

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

June 23, 2009  
**6:00 p.m. Closed Session**  
**6:30 p.m. Regular Meeting**

Banning Civic Center  
Council Chambers  
99 E. Ramsey St.

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

*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 council members present and voting.*

**I. CLOSED SESSION**

1. Pursuant to Government Code Section 54957.6 Conference with Labor Negotiators Employee organization: IBEW - Utility Unit and IBEW General Unit, CBAM and BPOA. Agency Designated Representatives: Brian Nakamura, David Aleshire, Bonnie Johnson and Hoyl Belt

**II. CALL TO ORDER**

- Invocation
- Pledge of Allegiance
- Roll Call – Council Members Franklin, Hanna, Machisic, Robinson, Mayor Botts

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

Report by City Attorney

Report by City Manager

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

**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 or future study, research, completion and/or future Council Action.) (See last page. PLEASE STATE YOUR NAME AND ADDRESS FOR THE RECORD.)*

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

**ANNOUNCEMENTS/COUNCIL REPORTS:** *(Upcoming Events/Other Items and Report if any)*

**IV. REPORTS OF OFFICERS**

1. Sewage Sludge Initiative: Procedures and Options Upon Certification of Initiative Signatures and/or Processing of Liberty Energy Application. . . . . 1

**Recommendation: The City Clerk has received the Certification of Signatures from the Registrar of Voters and declared the petition sufficient with certification made on May 28, 2009 (Attachment “A”). City Council received certification and Per Elections Code 9214, the City Council shall do one of the following:**

- a) Adopt the ordinance, without alteration, at the regular meeting at which the certification of the petition is presented, or within 10 days after it is presented.
- b) Immediately order a special election, to be held pursuant to subdivision (a) of Section 1405, at which the ordinance, without alteration, shall be submitted to a vote of the voters of the city.
- c) Order a report pursuant to Section 9212 at the regular meeting at which the certification of the petition is presented. When the report is presented to the legislative body, the legislative body shall either adopt the ordinance within 10 days or order an election pursuant to subdivision (b).

**V. 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 10**

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

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

1.	Approval of Minutes – Regular Meeting – 6/09/09. . . . .	44
2.	Resolution No. 2009-43, Providing for Certain Nuisance Abatement Charges to be Added to the Tax Rolls of Riverside County, California . . . . .	65
3.	Resolution No. 2009-47, Approving a Loan and Repayment Between the City and the Redevelopment Agency to Facilitate the Funding of Redevelopment Capital Projects. . . . .	82
4.	Resolution No. 2009-50, Awarding a Contract to Packham & Toomey of Hemet, California in the Amount of \$42,660.00 for the Emergency Upgrade of the City Yard Fueling Station . . . . .	86
5.	Resolution No. 2009-51, Approving the Maximum Compensation and Benefits in Certain City Department Director Employment Contracts, Pursuant to Section 2.08.090 (C) of the Banning Municipal Code. . . . .	91
6.	Approval of Employment Agreement Between the City of Banning and Zaiton Abu-Baker for the position of Community Development Director . . . . .	95
7.	Adopt the 2009-2010 Cooperative and Repayment Agreement between the City of Banning and the Banning Redevelopment Agency for the Payment of Administrative Expenses . . . . .	107
8.	Approval of Accounts Payable and Payroll Warrants for the Month of May 2009 . . . . .	114
9.	Request for Donation - San Gorgonio Pass Hispanic Chamber of Commerce and Trade Association 7 <sup>th</sup> Annual Christmas Toy Distribution Project . . . . .	116
10.	Resolution No. 2009-52, Temporarily Deferring the Collection of the City's Commercial and Industrial Development Impact fees Until the Issuance of a Certificate of Occupancy. . . . .	119

- Open for Public Comments
- Make Motion

## VI. 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.	Resolution No. 2009-44, Approving the Service Charges Rate Adjustment for the Collection, Transportation and Disposal of Solid Waste . . . . .	124
	<b>Recommendation: That the City Council adopt Resolution No. 2009-44, Approving the Service Charges Rate Adjustment for the Collection, Transportation and Disposal of Solid Waste as set forth in the City of Banning's Franchise Agreement with Waste Management of the Inland Empire.</b>	
2.	Resolution No. 2009-46, Authorizing the Acceptance of the 2009 U.S. Department of Justice Edward Byrne Memorial Justice Assistance Grant in the Amount of \$23,287 to be Used for Police Department Overtime . . . . .	135

Recommendation: That the City Council conduct a Public Hearing and accept grant funds provided by the Office of Justice Programs in the amount of \$23,287 to cover overtime costs for police officers participating in Banning Police Activities League (BPAL) activities and training exercises for the department's Emergency Tactical Unit (ETU).

3. Proposed Ordinance No. 1388, Adding Title 18 to the Municipal Code Pertaining to Grading Erosion and Sediment Control . . . . . 138  
Recommendation: That the City Council adopt Ordinance No. 1388.

*Mayor asks the City Clerk to read the title of Ordinance No. 1388:*

*"An Ordinance of the City Council of the City of Banning, California, Adding title 18 to the Banning Municipal code Pertaining to Grading, Erosion, and Sediment Control, and Authorizing the City Engineer to Prepare a Grading Manual Setting Forth the Administrative Procedures and Technical Requirements Necessary to Implement this Ordinance."*

**Motion: I move to waive further reading of Ordinance No. 1388.**  
(Requires a majority vote of Council)

**Motion: I move that Ordinance No. 1388 pass it first reading.**  
(A minimum of three votes required)

## **VII. RECESS CITY COUNCIL MEETING TO A JOINT MEETING OF THE CITY COUNCIL AND THE BANNING UTILITY AUTHORITY**

### **Call to Order Joint Meeting**

#### **A. REPORTS OF OFFICERS**

A-1. Bonnie Johnson, Finance Director  
1) Recommendation to Adopt Three Resolutions (1) Adopting the City's Annual Budget for the Fiscal Period 2009-10, (2) Adopting the Fiscal Year 2009-10 Gann Limit Calculation and (3) Adopting the Utility Authority's Annual Budget for the Fiscal Period 2009-10. Staff Report . . . . . 187  
Recommendations:  
a) That the City Council adopt Resolution No. 2008-48, Approving the Annual Budget for the Fiscal Period July 1, 2009 to June 30, 2010.  
b) That the City Council adopt Resolution No. 2008-49, Approving the Fiscal Year 2009-10 Gann Limit Calculation.  
c) The Banning Utility Authority Board adopt Resolution No. 2009-02UA, Approving the Annual Budget for the Fiscal Period July 1, 2009 to June 30, 2010.

Adjourn Joint Meeting of City Council and the Banning Utility Authority

## **RECONVENE REGULAR MEETING OF THE CITY COUNCIL**

### **VIII. ITEMS FOR FUTURE AGENDAS**

#### New Items –

#### Pending Items –

1. Service Club Signage on Ramsey Street, Gateway project (ETA 7/14/09)
2. Courthouse Development, Land Assembly for Future Development
3. Local Economic Stimulus Program (ETA 7/14/09)
4. Golf Cart Lane Policy for City of Banning (ETA 7/14/09)
5. Update on Sunset Grade Separation (ETA 7/28/09)
6. Schedule Meetings with Our State and County Elected Officials
7. Set New Date for Joint Meeting with Banning School Board
8. Policy for Naming of Street and also Parks – Policy and Procedures

### **IX. CLOSED SESSION**

1. The City Council will meet in Closed Session to consider personnel matters pursuant to Government Code Section 54957.
  - A. Opportunity for Public to Address Closed Session Items.
  - B. Convene Closed Session.

### **X. ADJOURNMENT**

*Pursuant to amended Government Code Section 54957.5(b) staff reports and other public records related to open session agenda items are available at City Hall, 99 E. Ramsey St., at the office of the City Clerk during regular business hours, Monday through Friday, 8 a.m. to 5 p.m.*

**NOTICE:** Any member of the public may address this meeting of the Mayor and Council on any item appearing on the agenda by approaching the microphone in the Council Chambers and asking to be recognized, either before the item about which the member desires to speak is called, or at any time during consideration of the item. A five-minute limitation shall apply to each member of the public, unless such time is extended by the Mayor 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 Title II].

**CITY COUNCIL AGENDA  
REPORTS OF OFFICERS**

**Date:** **June 23, 2009**

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

**FROM:** **Marie A. Calderon, City Clerk**

**SUBJECT:** **Sewage Sludge Initiative: Procedures and Options Upon Certification  
of Initiative Signatures and/or Processing of Liberty Energy  
Application**

**RECOMMENDATION:**

The City Clerk has received the Certification of Signatures from the Registrar of Voters and declared the petition sufficient with certification made on May 28, 2009 (Attachment "A"). City Council received certification and Per Elections Code 9214, the City Council shall do one of the following:

- a) Adopt the ordinance, without alteration, at the regular meeting at which the certification of the petition is presented, or within 10 days after it is presented.
- b) Immediately order a special election, to be held pursuant to subdivision (a) of Section 1405, at which the ordinance, without alteration, shall be submitted to a vote of the voters of the city.
- c) Order a report pursuant to Section 9212 at the regular meeting at which the certification of the petition is presented. When the report is presented to the legislative body, the legislative body shall either adopt the ordinance within 10 days or order an election pursuant to subdivision (b).

**BACKGROUND & ANALYSIS:**

The City Clerk received on May 4, 2009, petitions for a Special Election to create a new City ordinance within the City of Banning, California to prohibit within the City of Banning the burning, thermal conversion, or partial thermal conversion of any class of sewage sludge or bio-solid to ash. The number of registered voters of the City last reported by the Registrar of Voters to the Secretary of State was 13,189 and 15% was needed to hold a special election. The amount of signatures needed was 1,978. The number of petitions received was 480 with an approximate number of 4,303 signatures. The City Clerk took a prima facie count and determined that they submitted a sufficient amount of signatures. Petitions were then submitted to the Registrar of Voters, County of Riverside for verification of signatures by means of random sample verification process.

The City Attorney has prepared an extensive analysis of the options available to the City Council, including legal challenges to the measure, as well as potential legal issues related to claims Liberty Energy may make concerning the City's actions (Attachment "B").

**FISCAL IMPACT:**

An election consolidated with the County election will cost the City approximately \$15,000 to \$20,000, according to the County Registrar of Voters, approximately half of the cost of a stand alone election.

**RECOMMENDED BY:**

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Marie A. Calderon, City Clerk

**APPROVED BY:**

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David J. Aleshire, City Attorney

**REVIEWED BY:**



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Brian Nakamura, City Manager

BARBARA DUNMORE  
Registrar of Voters



REGISTRAR OF  
VOTERS  
County of Riverside

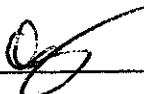
2724 Gateway Drive  
Riverside, CA 92507-0918  
(951) 486-7200 • Fax (951) 486-7272

[www.voteinfo.net](http://www.voteinfo.net)

### Petition Return Receipt

This acknowledges receipt in this office, on 5/29/09, of the petition for an Initiative Measure to Prevent the Burning of Sewage Sludge in Banning.  
Said petition was returned to Marie Calderon, City Clerk.

BARBARA DUNMORE  
Registrar of Voters

By: M Val 

ATTACHMENT "A"



REGISTRAR OF VOTERS  
County of Riverside

**CERTIFICATE OF REGISTRAR OF VOTERS**

State of California      )  
                            )  
                            ) ss.  
County of Riverside    )

I, BARBARA DUNMORE, Registrar of Voters of the County of Riverside, State of California, do hereby certify that on May 5, 2009 the Initiative Measure to Prevent the Burning of Sewage Sludge in Banning was delivered to my office for the purpose of verifying that the signatures thereon were registered within the defined area.

I further certify that the signatures on said petition were counted and examined by means of a random sample verification process, and that the results of said examination are as follows:

-	That the total number of signatures submitted for said petition was....	4,293
-	The total number of signatures checked was.....	500
-	The total number of sufficient signatures on said petition is.....	447
-	The total number of insufficient signatures on said petition is.....	53

I further certify that out of the 4,293 signatures submitted, 3,772 signatures were projected to be valid based on the random sample of signatures.

I further certify that the number of valid signatures required to qualify said petition is 1,978 and that, because the number of projected valid signatures on said petition was 3,772 the petition is hereby declared sufficient.

Dated: May 28, 2009

**BARBARA DUNMORE**  
Registrar of Voters

By:

Marsha Shug  
Deputy

## **ATTACHMENT “B”**



## MEMORANDUM

**TO:** HONORABLE MAYOR AND MEMBERS OF THE BANNING CITY COUNCIL  
BRIAN NAKAMURA, CITY MANAGER

**FROM:** DAVID J. ALESHIRE, CITY ATTORNEY

**DATE:** JUNE 23, 2009

**FILE:** 01102-0002

**RE:** SEWAGE SLUDGE INITIATIVE: PROCEDURES AND OPTIONS UPON CERTIFICATION  
OF INITIATIVE SIGNATURES AND LIABILITY CONCERNING PROCESSING OF  
LIBERTY ENERGY APPLICATION

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### I. INTRODUCTION & SUMMARY OF CONCLUSIONS

On May 4, 2009, an “Initiative Ordinance to prohibit burning of sewage sludge or biosolids (as those terms are defined) within the City of Banning, and providing misdemeanor penalty for violation” (“Measure”) was submitted to the City Clerk with 4,303 signatures. The Riverside County Registrar of Voters (“County Registrar”) has now verified that there are sufficient signatures to place the initiative on the ballot.

The City Clerk can certify the petition at the next regular Council meeting after her official verification of the signatures. Briefly, the Council’s options would be: (1) adopt the ordinance; (2) submit the ordinance to the voters at a special election; or (3) order a report prepared within 30 days detailing several items pertaining to the initiative, e.g., its fiscal impact, its impact on the uses of vacant parcels of land, and so forth. After presentation of the report, the Council must then decide whether it wants to proceed with adopting the initiative or ordering a special election.<sup>1</sup>

The City Attorney’s office has prepared this memorandum addressing legal issues associated with the “Measure” and outlining the decisions before the Council.

1. On May 28, 2009, County Registrar determined through random sampling that 3772 of the 4303 signatures were valid considerably exceeding the 1978 signatures needed to qualify the Measure for an election.

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<sup>1</sup> CAL. ELEC. CODE § 9214.

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2. The City Clerk will certify the results of the Measure on June 23, 2009 to the City Council at which time the Council will be given three options<sup>2</sup>:
  - a. Adopt the ordinance without alteration within 10 days of the certification which will give it the same effect as if adopted by the voters.
  - b. Submit the ordinance to the voters at a special election to be consolidated with a County election on November 3, 2009. Because there is another election being held in the same jurisdiction within 180 days of when this election would be held, the City is required to hold the election on November 3, 2009, rather than having a stand-alone election. (Cal. Elec. Code § 1405(a)).
  - c. Order a report from any City agency or official detailing items pertaining to the initiative, e.g., its fiscal impact, legal issues, its impact on the uses of vacant parcels of land, etc. After presentation of the report, which must occur within 30 days, the Council will then have 10 days to either adopt the ordinance or order a special election. In such case, the matter would likely be back on the July 14, 2009 Council agenda.
3. An election consolidated with the County election will cost the City approximately \$15,000 to \$20,000, according to the County Registrar, approximately half the cost of a stand alone election.
4. Pre-election challenges are generally disfavored by the courts where opponents are challenging the substantive validity of an initiative measure.
5. The proponents appear to have complied with all procedural requirements when submitting the initiative petition and our review of other grounds for pre-election challenge, such as constitutional, conflict with law, or other grounds, shows that such grounds lack merit except for a challenge to the provision of the Measure purporting to revoke validly issued permits which could be a taking or impairment contract, but the Measure could be saved by severing this clause from the remainder.
6. We have reviewed the claim that the adoption of the Measure would be an unconstitutional impairment of contract concerning the proposed Liberty Energy Project (“Project”) but we conclude that (i) the letters of intent were not a contract, (ii) Liberty Energy (“Liberty”) lacked any vested right, and (iii) the City

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<sup>2</sup> *Id.* at § 9214.

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cannot contract away police power without compliance with the entitlement process.

7. Liberty is entitled to "due process" and there has been significant public discussion concerning the Project, but the record seems to support that the suspensions in the processing of the Project have been voluntary and Liberty has no current right to a hearing which would trump the adoption of the Measure.

This memorandum focuses on legal issues surrounding the post-certification of the Measure. The purpose of this legal discussion is to advise the Council so it might consider what steps the City should take now pursuant to California Elections Code Section 9214. We have also included a sample elections timeline for your convenience (Exhibit A).

## **II. BACKGROUND**

### **A. Project History**

Liberty Energy ("Liberty") has proposed to construct and operate a 15 MW renewable power generation facility that will provide electricity to the residents and businesses ("Project") of the City. The City signed two letters of intent with Liberty Energy. The first was a general letter ("First Letter") approved by Council in April 2007. It detailed the City's potential lease of land to Liberty Energy and intent to buy energy, should the Project get built. The second letter of intent ("Second Letter"), which was approved by Council in July 2007, contained specific lease terms for the lease of the land while the first letter focused on power and utility issues, the second focused on real estate land lease issues. The plan was to put the letter of intent terms into formalized agreements. We are not aware if any draft agreement was ever circulated by the parties.

We understand there is an allegation that Liberty may have spent in excess of \$1M in predevelopment costs but have seen no verification of such alleged costs. Liberty Energy prepared and circulated a Draft Environmental Impact Report, which was released for public review on July 23, 2007. Subsequently, Liberty Energy submitted the application for the Project on August 6, 2007. However, in a press release dated September 30, 2008, Liberty Energy suspended the Project as of October 1, 2008 "due to extreme stress in the capital markets." (Exhibit B)

On October 3, 2008, a Notice of Intent to Circulate Petition was sent to the City Clerk by proponents who planned to circulate a petition for the purpose of prohibiting the burning of sewage sludge within the City of Banning, thereby effectively prohibiting Liberty's Project. It is important to note that Liberty did not obtain any type of building permits, or any other permits, from the City during this process.

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On March 20, 2009, Liberty Energy sent a letter to the City stating its intent to continue (via the permitting and entitlement process) "to seek and obtain the appropriate approvals from the City of Banning" to construct and operate the Project. The City Attorney responded to this letter with a letter dated May 4, 2009 (Exhibit C) to which Liberty responded with a letter dated May 15, 2009 (Exhibit D).<sup>3</sup>

On May 28, 2009, the Initiative qualified to be placed on the ballot at a special election. The Council will now decide whether to adopt the Measure or allow the voters to decide the outcome.

**B. Terms of Letters of Intent**

As stated, the City and Liberty signed two letters of intent – one on February 5, 2007 and one on July 10, 2007.

**1. First Letter – February 5, 2007**

On February 5, 2007, Liberty Energy wrote the First Letter to the City of Banning and it stated as follows:

"Liberty...agrees to use its best efforts to permit, contractually secure fuel, finance, construct and operate a 15 MW biosolids and biomass fired power generating station with black start capability more fully described....The City of Banning hereby agrees to purchase power produced by the generating station, provide land for the power generating facility, provide potable and reclaim water and accept wastewater discharge. **The parties agree to immediately and jointly prepare and enter into a definitive agreement or agreements** containing such terms and conditions as are reasonably necessary to carry out the construction and operation of the power generation station, including, but not limited to the following points:" (emphasis added). At this point in the First Letter, it set forth certain informal deal points, including power pricing and terms, electrical intertie provisions, site provisions, utilities, and a miscellaneous section.

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<sup>3</sup> Liberty Energy is now claiming that the City made two requests that it delay the Project: One request in August 2006 by then City Manager Randy Anstine and a second request by Councilmember Barbara Hanna. Liberty Energy states that both requests were related to the November elections, i.e., that Anstine and Councilmember Hanna asked Liberty Energy to delay the Project until after the election. Liberty Energy says that, while it complied with the first request and temporarily suspended the Project, it did not comply with Councilmember Hanna's request. (Letter to David J. Aleshire from Liberty Energy (May 15, 2009)).

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We looked through the Liberty Energy files and were unable to find any "definitive agreement or agreements" as referred to in the above clause.

The First Letter was signed by City Manager Randy Anstine on April 10, 2007 and approved by Council Resolution 2007-24 on March 27, 2007.

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2. Second Letter – July 10, 2007

On July 10, 2007, Liberty wrote the Second Letter to the City. It stated as follows:

“The purpose of this Letter of Intent is to memorialize an Agreement between the City of Banning, California and Liberty....

This Letter of Intent is drafted for the purpose of creating an Agreement for Liberty...to lease land owned by the City of Banning for purposes of constructing and operating a Power Generation Facility.”

The Second Letter set forth deal points pertaining to site, usage of land and improvements, term of lease, ownership of leasehold improvements, lease amount, condition of lease, additional documentation and approval by City Council.

The Condition of Lease stated: “**The formal land lease between the City of Banning and Liberty...shall not commence unless and until such time as the City of Banning issues a building permit for the site....**” (emphasis added). It is clear from this provision that no formal land lease could commence unless the Project had first been approved by the City Council, which again emphasizes the less formal nature of this agreement.

The “Additional Documentation” section states: “The purpose of this Letter of Intent is to formalize specific deal points as agreed to by the City of Banning and Liberty....At such time as by the City Council for the City of Banning and Liberty...approves this Letter of Intent, **both parties shall begin working on a formal Land Lease Contract.**” We were unable to find such a contract in the Liberty Energy files at the City, and three months later Liberty Energy suspended its Project, so it appears these formalized deal points were as far as the lease agreement went between the parties.

After checking with the City Clerk, we were unable to locate a signed copy of the Second Letter. However, it was approved by Council Resolution 2007-81 on July 10, 2007.

**C. Initiative Measure**

On May 4, 2009, the Measure proponents submitted 4,303 signatures in favor of the Measure to the City Clerk. On May 5, 2009, the City Clerk submitted the signatures to the County of Riverside in order that the County Registrar could determine their validity.

The County used a random sampling method pursuant to California Elections Code Section 9115 to count the signatures and determined that 3,772 of the signatures were projected

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to be valid. Because the proponents requested a special election on this matter (to be held pursuant to California Elections Code Section 9214), they needed 15 percent of the voters of the City, or 1,978 valid signatures, in order to qualify for a special election. Accordingly, the proponents have obtained the requisite number of signatures needed to: (i) place the Measure on the ballot; and (ii) have the Measure submitted immediately to a vote of the people at a special election.

The City Clerk will certify the results to the Council at the next regular meeting, which is on June 23, 2009.<sup>4</sup> At that time, the Council will make a decision as to whether to adopt the Measure, place it on the ballot for special election on November 3, 2009, or order a report to gather further information, pursuant to the Council's statutorily mandated duties set forth in California Elections Code Section 9214.

### LEGAL ANALYSIS

#### **III. ELECTIONS CODE PROCEDURES**

The Council has three options under the California Elections Code: (1) adopt the ordinance; (2) order a special election (to be held on November 3, 2009); or (3) order a report detailing the effects of the Measure. If Council orders a report, after the report is due (in 30 days or less), the Council will then have to adopt the ordinance or order a special election.

Pursuant to California Elections Code Section 9214, the proponents called for a special election in their Measure. Thus, the statute states: "If the initiative petition is signed by not less than 15 percent of the voters of the city...and contains a request that the ordinance be submitted immediately to a vote of the people at a special election," the Council must do one of the following:

1. Adopt the ordinance, without alteration, at the regular meeting where the certification of the signatures is presented, or within 10 days of certification;
2. Immediately order a special election, to be held pursuant to California Elections Code Section 1405(a) at which the ordinance will be submitted to the voters; or
3. The Council may refer the proposed Measure to any City agency or official for a report on the fiscal and other impacts of the Measure.

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<sup>4</sup> *Id.* at § 9115(f).

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Section 1405(a) states that the special election shall be held not less than 88 nor more than 103 days after the date of the order of the election. Normally, that would require the City to have a stand-alone election sometime in September. However, wherever it is legally possible, such as when the measure has qualified 180 days prior to another regular or special election occurring within the jurisdiction, the election must be consolidated with the regular or special election being held in that jurisdiction. In this case, the County is holding an election on November 3, 2009, which means that if the City calls a special election, it can be held on November 3, 2009. According to the County Registrar, the City's share of that special election will cost approximately \$15,000-\$20,000 which will be approximately half the cost of the stand alone election.

The Measure Report, which is described in California Elections Code Section 9212, must be presented to the Council within the time prescribed, but no later than 30 days after the City Clerk certifies the petition signatures.<sup>5</sup> After the report is presented, the Council must either adopt the ordinance within 10 days or order a special election, as described above.<sup>6</sup>

The only reason the Council should not act on June 9 would be if the Council was interested in having the Measure analyzed under Option #3 ("Measure Report"). In such case staff would take up to 30 days to prepare this report and the Council would have up to 10 more days to act, which could possibly be as late as the Council's regular meeting of July 14, 2009. The Measure Report could include the following:

1. The Measure's fiscal impact.
2. The Measure's effect on the internal consistency of the city's general and specific plans, including the housing element, the consistency between planning and zoning, and the limitations on City actions under certain sections of the Government Code relating to planning and zoning and zoning regulations.<sup>7</sup>
3. The Measure's effect on the use of land, the impact on the availability and location of housing, and the ability of the City to meet its regional housing needs.
4. The Measure's impact on funding for infrastructure of all types, including, but not limited to, transportation, schools, parks and open space. The report may also discuss whether the measure would be likely to result in increased infrastructure

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<sup>5</sup> CAL. ELEC. CODE § 9212 (b). In this case, 30 days from June 9, 2009 would be Thursday, July 9, 2009.

<sup>6</sup> *Id.* at § 9214 (c).

<sup>7</sup> CAL. GOV. CODE §§ 65008, 65913 *et seq.* & 65915 *et seq.*

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costs or savings, including the costs of infrastructure maintenance, to current residents and businesses.

5. The Measure's impact on the community's ability to attract and retain business and employment.
6. The Measure's impact on the uses of vacant parcels of land.
7. The Measure's impact on agricultural lands, open space, traffic congestion, existing business districts, and developed areas designated for revitalization.
8. Any other matters the Council requests to be in the report.

Having described the process outlined by the Elections Code, we now will examine two other subjects from which legal issues arise: (1) can the Measure be challenged legally before an election is held, and (2) what legal liability might the City face from Liberty Energy should the Measure be adopted?

#### **IV. PRE-ELECTION CHALLENGES**

Courts generally do not favor pre-election challenges to the substance of the measure, but are willing to look at factors like procedural defects, whether the measure is non-legislative in nature or is otherwise beyond the power of the voters to adopt, and whether the measure violates the single-subject rule. Our research indicates that a pre-election challenge is unlikely to succeed on these grounds.

In general, courts disfavor pre-election invalidation of an initiative or referendum measure, particularly where the opponents are challenging the substantive validity of the measure. As stated in *Legislature v. Deukmejian*, 34 Cal. 3d 658, 665-666 (1983): "As we have frequently observed, it is usually more appropriate to review constitutional and other [substantive] challenges to ballot propositions or initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise, in the absence of some clear showing of invalidity...." (Citations omitted).

An exercise of the voters' power is subject to the same substantive limitations that would otherwise apply to a city council's actions: the voters can do no more by initiative than can the local legislative body by ordinance.<sup>8</sup> For example, California courts have held that an initiative or referendum cannot: (i) violate the California or United States Constitutions; (ii) conflict with

<sup>8</sup> See, e.g., *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach*, 86 Cal.App.4<sup>th</sup> 534, 549 (2001).

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certain general or statutory laws; (iii) enact or reject non-legislative matters; (iv) interfere with powers exclusively delegated to local legislative bodies; (v) constitute an abuse of the city's or county's police power; or (vi) impair an essential governmental function.

Accordingly, there are four main areas to look at when considering pre-election challenges: (i) procedural defects; (ii) whether the Measure is non-legislative in nature (iii) whether the Measure violates the single-subject rule; or (iv) whether the Measure might be an unconstitutional based on impairment of contract or other grounds.

#### **A. Procedural Defects**

The California Supreme Court has indicated that a failure to challenge a procedural defect before the election may result in waiving the right to challenge that defect if the measure is adopted.<sup>9</sup> Procedural defects include administrative items such as: (i) the proponents circulating the petition without including a notice of intention<sup>10</sup>; (ii) the proponents failing to include the complete text of the initiative measure in their petition sections<sup>11</sup>; and (iii) the initiative containing clearly misleading information.<sup>12</sup>

Here, the City Clerk accepted the petition for filing and there did not appear to be any procedural defects in the text of the Measure or any of the accompanying documents, or any issues with either the circulation process or the filing process.<sup>13</sup> Accordingly, we do not see significant grounds for legal challenge based on procedural issues.

#### **B. Consistency with Statutory Law and Proper Legislative Purpose.**

An initiative may be used only to effect legislative acts.<sup>14</sup> The adoption and amendment of zoning ordinances, for example, are legislative acts,<sup>15</sup> as are general plan amendments.<sup>16</sup> In

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<sup>9</sup> *Costa v. Superior Court*, 37 Cal.4<sup>th</sup> 986 (2006).

<sup>10</sup> *Myers v. Patterson*, 196 Cal.App.3d 130 (1987).

<sup>11</sup> *Mervyn's v. Reyes*, 69 Cal.App.4<sup>th</sup> 93 (1998).

<sup>12</sup> *San Francisco Forty-Niners v. Nishioka*, 75 Cal.App.4<sup>th</sup> 637 (2000).

<sup>13</sup> Even if there were a procedural defect, it may not be fatal due to the doctrine of "substantial compliance." See, *Ibarra v. City of Carson*, 214 Cal.App.3d 90 (1989) (holding that substantial compliance may or may not be fatal depending on the nature and purpose of the statutory requirement violated); and *Assembly v. Deukmejian*, 30 Cal.3d 638 (1982) (holding that defects that are merely technical defects of form will not affect the validity of an initiative measure if there is substantial compliance with all procedures.)

<sup>14</sup> *DeVita v. County of Napa*, 9 Cal.4<sup>th</sup> 763 (1995).

<sup>15</sup> *Arnel Development Co. v. City of Costa Mesa*, 28 Cal. 3d 511, 169 Cal. Rptr. 904 (1980).

<sup>16</sup> *Marblehead v. City of San Clemente*, 226 Cal.App.3d 1504 (1991).

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addition, courts have found that the location of municipal buildings are a legislative matter subject to the initiative and referendum power. For example, in *Citizens Against a New Jail v. Board of Supervisors*, 63 Cal.App.3d 559 (1976), the Court issued a writ of mandate to force the legislative body to act after it refused to adopt an initiative or call an election in regard to a voter-sponsored ordinance that would have required the renovation of an old jail, rather than the construction of a new one.

The Measure completely bans any type of sludge plant from locating in the City. Similarly, in *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach*, 86 Cal.App.4<sup>th</sup> 534 (2001), the voters, via initiative, reinstated a ban on oil drilling within the City.<sup>17</sup> The court upheld this as a valid exercise of the City's police power via initiative. Here, a ban on the placement of sludge plants in the City would be analogous. The Measure states: "It shall be unlawful to burn, incinerate or utilize any process which will convert any untreated or treated sewage sludge or bio-solids of any classification, partially or totally, into ash, within the City of Banning." The Measure bans the prior stated "treatment processes" and other "activities," which is similar to *Stop Oil*, which banned the activity of oil drilling.

Accordingly, just as banning oil drilling was not challenged as an invalid legislative purpose for an initiative subject in *Stop Oil*, it is likely that banning treatment processes pertaining to sewage sludge or bio-solid burning treatment processes is a proper legislative purpose for an initiative and, thus, this is not a valid ground to challenge the Measure.

Finally, an argument could be made against the Measure if it were not consistent with the general plan, or if it would make the general plan itself generally inconsistent. Thus far, we have not been able to find any evidence that enacting this ordinance would cause inconsistency with the City's General Plan.

#### **C. Measure Violates the Single-Subject Rule.**

Article 2, Section 8(d) of the California Constitution states: "An initiative measure embracing more than one subject may not be submitted to the electors or have any effect." Thus, an initiative may only address one single subject to be valid.

Here, the Measure: (i) bans the burning, incineration or any other process that will convert sewage sludge or bio-solids into ash within the City; and (ii) sets forth a penalty that makes violation of the ordinance a misdemeanor, fines the violator, and forces a forfeiture of all use permits granted by the City for that site.

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<sup>17</sup> *Stop Oil*, 86 Cal. .App.4<sup>th</sup> 534 (2001).

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There must be a clear showing of invalidity for a pre-election challenge on this issue.<sup>18</sup> An initiative measure may contain numerous provisions if all sections are "reasonably germane to each other and to the general purpose or objective of the initiative."<sup>19</sup>

Here, the Measure does two things that are related: (i) bans sewage sludge plants; and (ii) establishes a penalty for violation. Accordingly, we see no violation of the single-subject rule.

**D. Measure Violates Constitutional Protections Against Impairment of Contract or Taking of Property**

There are potentially arguments against the Measure as an impairment of contract since the City has signed Letters of Intent to purchase energy and lease land to Liberty Energy. The US and State Constitutions prevent regulatory measures which impair contracts (US Const., art. I, sec. 10; Cal. Const., art I, sec. 9). As discussed in more detail below in Section V, (i) we do not believe that the Letters of Intent constituted a binding contract, (ii) Liberty Energy never obtained any vested rights, and (iii) we do not believe that the City could have contracted away its police power as "a government may not contract away its right to exercise the police power in the future."<sup>20</sup> In the land use area, State law permits long-term contracts with developers in the form of Development Agreements (Government Code § 65864 *et. seq.*), but no Development Agreement was finalized here.

A more serious argument against the Measure arises from the following provisions: "Ordinance shall also result in the forfeiture of all City permits (i.e. use permits) that have been issued to said person or entity, for the site that has been utilized for the activities proscribed in this ordinance." This clause, which allows for the automatic revocation of validly issued and potentially vested permits could trigger both impairment of contract and takings issues pursuant to the US and State Constitutions.

A permit creates a property right. After a property owner has obtained all permits necessary for the proposed structure and performed substantial work and incurred substantial liabilities in good faith reliance upon those approvals, the property owner acquires a vested right to complete construction in accordance with the terms of the permit.<sup>21</sup> If the permit is validly

<sup>18</sup> *Brosnahan v. Eu*, 31 Cal.3d 1 (1982).

<sup>19</sup> *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 22 Cal. 3d. 208 (1978).

<sup>20</sup> *Delucchi v. County of Santa Clara*, 179 Cal.App.3d 814, 823 (6<sup>th</sup> Dist. 1986) (upholding a change in zoning terms between a landowner and the county, in spite of a contract to the contrary, because the contract did not contemplate the county not being able to exercise its police power.)

<sup>21</sup> *Consaul v. City of San Diego*, 6 Cal. App. 4th 1781 (1992); *Avco Community Developers, Inc.*, 17

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issued and the owner of such permit has a vested interest in it, the forfeit of the permit via the Measure, as written, would be an impairment of contract and an improper use of the City's police power. When a developer has a vested right to develop, that developer is largely immune from subsequent governmental actions that would preclude that development. (*See, generally, Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal.3d 785 (1976)). Accordingly, the City would not be able to interfere with such a permit in the way that the Measure suggests or use its police power to remove a permit without violating constitutional rights.

The 5th Amendment to the U.S. Constitution provides "Nor shall private property be taken for public use without just compensation" (Takings Clause, *also see* art 1, sec 19 California Constitution). The Takings Clause applies to the states through the 14th Amendment, moreover California courts generally construe the federal and California takings clause congruently.<sup>22</sup> The Takings Clause applies to governmental enactment which though not direct appropriations, are equivalent thereto and these are called regulatory takings. In *Penn Central*, a New York Commission refused to approve plans to build an office building over Grand Central Station due to its "landmark" status and the regulation was upheld although the Court recognized that a "taking" could result from regulations having significant economic impact, interfering with investment based expectations, and also depending on the nature of the regulation.

The automatic revocation of a validly issued permit without "due process" or "just compensation" is a potential violation of the Constitution. As one court said, "Interference with the right to continue an established business is far more serious than the interference a property owner experiences when denied a conditional use permit in the first instance."<sup>23</sup> However, a regulation requiring landlords to pay interest of 5% on security deposits is not a taking.<sup>24</sup> The language in the Measure revoking validly issued permits raises a major Constitutional concern. However, this becomes an issue with respect to the Liberty Project only if Liberty actually has a validly issued permit, and this issue is discussed below in the discussion on the Liberty Project.

Additionally, the Measure can also be saved through the severance of any constitutionally invalid provision from the remainder. The Measure does contain a "severance clause." The

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<sup>22</sup> *South Coast Regional Commission*, 17 Cal. 3d 785, 791 (1976), *cert. denied*, 429 U.S. 1083, 97 S. Ct. 1089, 51 L. Ed. 2d 529 (1977); *Billings v. California Coastal Commission*, 103 Cal. App. 3d 729, 735 (1980). *Cf. City of West Hollywood v. Beverly Towers*, 52 Cal. 3d 1184 (1991) (although no vested rights were held by developer, city was not allowed to impose new restrictions after all discretionary approvals for condominium conversion had been granted).

<sup>23</sup> *Penn Central v. New York City* (1978) 438 US 104, 122 (Penn Central); *San Remo Hotel v. City and County of San Francisco* (2002) 27 C 4th 643, 644

<sup>24</sup> *Goat Hill Tavern v. City of Costa Mesa*, 6 Cal. App. 4th 1519 (1992)

<sup>24</sup> *Small Property Owners of San Francisco v. City and County of San Francisco* (2006)

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clause states: "Should any part of this ordinance be found unconstitutional, the other provisions of this ordinance shall remain in full force and effect." Additionally, theoretically, if a portion of the Ordinance, such as the permit revocation clause, were found to be unconstitutional, a court could "sever" it and the rest of the Measure could be still be valid.

Finally, we believe that if an unconstitutional permit revocation issue exists in regard to the Liberty Energy Project, that discussion is best left for after an election, rather than a pre-election challenge. As discussed below, at this point, Liberty Energy does not have a permit. Any challenge concerning the impact of the Measure on existing permits, and whether to apply the severance language, is best dealt with based on the facts which exist after any election. Additionally, if the Council were to adopt the Measure on June 9, 2009, the permit revocation argument is arguably moot as no permits would have ever been issued by the City for this type of plant.

## **V. LIBERTY ENERGY ISSUES**

**A. We have reviewed the claim that the adoption of the Measure would be an unconstitutional impairment of contract but we conclude that (i) the letters of intent were not a contract, (ii) Liberty Energy lacked any vested right, and (iii) the City cannot contract away police power without compliance with the entitlement process.**

As discussed above, the City signed two letters of intent with Liberty Energy: The First Letter (February 5, 2007) and the Second Letter (July 10, 2007). The First Letter, which detailed the City's potential lease of land and intent to purchase energy if the Project was built, stated, in pertinent part, as follows:

"The City of Banning hereby agrees to purchase power produced by the generating station, provide land for the power generating facility, provide potable and reclaim water and accept wastewater discharge. The parties agree to immediately and jointly prepare and enter into a definitive agreement or agreements containing such terms and conditions as are reasonably necessary to carry out the construction and operation of the power generation station,..."

The First Letter went on to state numerous deal points to be placed into the future agreements. However, we are unaware of any agreements having been circulated or entered into between the parties.

The Second Letter focused on real estate land lease issues. It stated: "The formal land lease between the City of Banning and Liberty...shall not commence unless and until such time

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as the City of Banning issues a building permit for the site...." No building permit has ever been issued for Liberty Energy, which means no formal lease agreement has ever commenced.

Further, the Second Letter stated: "The purpose of this Letter of Intent is to formalize specific deal points as agreed to by the City of Banning and Liberty....At such time as by the City Council for the City of Banning and Liberty...approves this Letter of Intent, both parties shall begin working on a formal Land Lease Contract."

Although the Second Letter of Intent appears to have been approved by Council and Liberty Energy, we were unable to find any "formal Land Lease Contract" as contemplated by the Second Letter. Because three months after the Second Letter, Liberty Energy suspended its Project, it is quite possible that no further progress was made on the agreements.

California Civil Code Section 1550 states that the following elements are required for a contract: (i) parties capable of contracting; (ii) their consent; (iii) a lawful object; and (iv) a sufficient cause or consideration. Here, Liberty Energy and the City were capable of contracting for both the lease of the land and the sale of energy. Further, there was intent and consent on the part of both of the parties to eventually formalize a lease agreement. However, the letters do not contain consideration on either side, as required by the statute, although the parties did promise to use their best efforts to work out an agreement should the Project be approved. At this point, all the parties have executed, of which we are aware, are two letters of intent that describe future deal points to be placed into formalized agreements. In other words, there is simply an agreement to agree – an intent to work out a lease agreement. Accordingly, the letters do not rise to the level of a contract as they do not contain the required statutory elements.

As previously stated in Section IV. D, property rights which can be taken arise not just from contracts but from "vested rights." When a developer has a vested right to develop, that developer is largely immune from subsequent governmental actions that would substantially interfere with or preclude that development. (*See, generally, Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal.3d 785 (1976)). The *Avco* case is the leading discussion in California on vested rights.

In *Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal.3d 785 (1976), Avco owned a tract of land within a coastal zone. The County of Orange, at the request of Avco, zoned this property "Planned Community District Regulations" and a housing development was planned. The County approved a final map, subdividing Avco's land into smaller parcels, and approved a rough grading permit, although the permit did not refer to any specific building site.

Avco undertook a number of studies for the development of the tract and proceeded to subdivide and grade the property. Pursuant to approvals issued for such purposes by the county,

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Avco had completed or was in the process of constructing storm drains, culverts, street improvements, utilities, and similar facilities for the tract. Under the County's building code, a permit could not be obtained until grading had been completed. However, Avco had not completed the rough grading and it neither submitted building plans for the tract nor obtained a permit to construct any structures. It was estimated that the company had spent over \$2 million and incurred liabilities of nearly \$800,000 for the development of the tract. Subsequently, the California Coastal Zone Conservation Act of 1972 was enacted, which prevented property, such as Avco's that was located within the coastal zone from developing without a permit from the Commission. Avco argued that it had a vested right to develop because of the substantial amount of work it had done. The court disagreed because, although Avco had done a great deal of preparation on the property, Avco did not have a building permit (which, pursuant to the statute, at that time, would have exempted it from the Act). Thus, the Court held that Avco was not able to build without a permit from the Commission because it did not have a vested right. Moreover, Avco would have had to incur substantial expense in good faith reliance on the permit (generally by pouring foundations).

In a separate opinion, the *Stop Oil* Court further described the elements of the vested rights doctrine, stating that the doctrine "is ...a principle of equitable estoppel which may be applied against the government where justice and fairness require it. An equitable estoppel requiring the government to exempt a land use from a subsequently imposed regulation must include (1) a promise such as that imposed by a building permit that the proposed use will not be prohibited by a class of restrictions that includes the regulation in question and (2) reasonable reliance on the promise by the [developer] to the [developer's] detriment." (*Stop Oil*, 86 Cal. App at 551-52).

The *Stop Oil* Court further stated that "no right to develop vests until all final discretionary permits have been authorized and significant 'hard costs' have been expended in reliance on those permits – that is, until substantial construction has occurred in reliance on a building permit." (*Id.* at 552). Again, the Court has made it clear that a building permit is a necessary part of the vested rights doctrine.

The general land use entitlement process includes the following steps (i) preparing a project plan (ii) conducting scoping meetings on the project; (iii) preparing a draft environmental document; (iv) circulating the environmental document to review agencies and obtaining comments, (v) responding to comments, (vi) holding public hearings on the environmental documents and project before the Planning Commission and City Council, (vii) approving the project, (viii) applicant submitting building plans, (ix) issuance of permits, and (x) performing grading and substantial construction.

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Liberty Energy submitted its application to the City in August of 2007. Liberty Energy's project was subject to the California Environmental Quality Act (CEQA),<sup>25</sup> and, accordingly, Liberty did a Draft Environmental Impact Report, which it released for public review on July 23, 2007. However, in October 2008, Liberty Energy asked the City to suspend the Project "due to extreme stress in the capital markets."<sup>26</sup> According to a May 15, 2009 letter from Liberty Energy, the company is still in the CEQA process, which it must finish prior to applying for any building permit. As Liberty Energy stated in its letter: "...our project and engineering team are in the process of reviewing each operational detail of the facility to determine if there are any changes that need to be made to the project as we continue through the EIR process. [Liberty Energy] anticipate[s] providing any and all modifications to our project to City of Banning Staff no later than July 6, 2009."

Here, at most Liberty was at stage (iv) of the above-described process. Although there was a Draft Environmental Impact Report, and potentially other planning costs to Liberty Energy, there was no substantial construction in reliance on a building permit. In fact, there appears to be a question as to whether Liberty Energy's application had even been deemed complete by the City, and the company had announced a six-month voluntary suspension on the Project and confirmed it with the City's Planning Director.

Accordingly, any argument by Liberty Energy that it has a vested right to develop, i.e., that the Measure will not apply to the Project, must fail on these facts.

Further, Liberty Energy still has to contend with larger environmental issues that could act as a barrier to the Project and, thus, prevent any vesting of rights in the foreseeable future. For example, in a 2007 Superior Court case, *Natural Resources Defense Council v. South Coast Air Quality Management District*, the court held that SCAQMD violated CEQA with certain rules it had promulgated and, as a result, SCAQMD has been unable to issue over one thousand pending permits that rely on the district's internal offset bank to offset emissions. The district also had to set aside several thousand permits issued in reliance on that offset bank. Sewage

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<sup>25</sup> California Public Resources Code §§21000-21177. Section 21065 defines "Project," which "means an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following:

...  
(c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies."

<sup>26</sup> September 28, 2008; Press Release from Liberty Energy to City of Banning (March 20, 2009) (requesting that the Project be taken of suspension); Letter to Michael Bracken from Matthew Bassi (November 25, 2009) (following up phone call between City and Liberty Energy where Liberty Energy and City agreed that Project suspension date was October 1, 2009).

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treatment plants are among those projects that could be affected if the court case stands (there is currently legislation<sup>27</sup> to allow the district to begin to reissue permits and to abrogate the court case). The dynamic litigation on CEQA issues alone means that Liberty Energy likely has a long way to go before it is eligible for vesting.

Finally, even if the letters of intent were deemed a contract, another continuation would arise due to law limited a City's power to contact its land use authority. The City of Banning is a General Law City, which means that it may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general law. (Cal. Const. art. XI, § 7). Although a legislative body may enter into contracts, a government may not generally contract away its right to exercise its police power in the future (excepting development agreements, as explained more fully below). (*Delucchi v. County of Santa Clara*, 179 Cal.App.3d 814, 823 (6<sup>th</sup> Dist. 1986).

In *Delucchi v. Santa Clara County*, the county and the landowner entered into a contract agreeing that the land would be restricted to agricultural and compatible uses. However, once an applicable state law passed, the county enacted new zoning regulations and required the landowner to conform. The Court of Appeal found in favor of the county and held that even if the contract were valid, it would be *invalid* as an attempt by the county to surrender its future right to exercise its police power. The court stated:

“[These types of contracts] are invalid and unenforceable as contrary to public policy. The police power being in its nature a continuous one, must ever be reposed somewhere, and cannot be barred or suspended by contract or irrepealable law....It is to be presumed that parties contract in contemplation of the inherent right of the state to exercise unhampered the police power that the sovereign always reserves to itself for the protection of peace, safety, health and morals. Its effect cannot be nullified in advance by making contracts inconsistent with its enforcement.... Thus, taking heed of the long-established rule that a contract must, if possible, be interpreted so as to make it ‘lawful, operative, definite, reasonable, and capable of being carried into effect’ (Civ. Code, § 1643), we point out that were we to uphold the interpretation urged by plaintiffs, i.e., that the contract effectuated a wholesale freeze of zoning...we would be compelled to find the agreement herein invalid.” (*Id.* at 823) (citations omitted).

In fact, state law provides a specific process to create binding land use contracts enforceable against future changes in laws, and this is through a development agreement. Development agreements are the way established by statute that a developer and a city can form a contract ensuring that the policies, rules and regulations in effect at the time of project approval will continue to apply to the project irrespective of future changes in law.<sup>28</sup> According to

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<sup>27</sup> Senate Bill 696 (Wright).

<sup>28</sup> See, generally, *City of W. Hollywood v. Beverly Towers, Inc.*, 52 Cal.3d 1184 (1991).

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California Government Code Section 65865.2, which sets forth the terms for a development agreement, such an agreement must have the following elements:

“A development agreement shall specify the duration of the agreement, the permitted uses of the property, the density or intensity of use, the maximum height and size of proposed buildings, and provisions for reservation or dedication of land for public purposes. The development agreement may include conditions, terms, restrictions, and requirements for subsequent discretionary actions, provided that such conditions, terms, restrictions, and requirements for subsequent discretionary actions shall not prevent development of the land for the uses and to the density or intensity of development set forth in the agreement. The agreement may provide that construction shall be commenced within a specified time and that the project or any phase thereof be completed within a specified time. The agreement may also include terms and conditions relating to applicant financing of necessary public facilities and subsequent reimbursement over time.”

Liberty Energy did not have a development agreement with the City which might have protected it from the possible application of the Measure. Of course there was no development agreement because Liberty never completed the CEQA or land entitlement process as discussed above.

For all the foregoing reasons we conclude that Liberty has no contract or vested right which would protect it from the effects of the Measure, if the Measure is enacted.

**B. Liberty is entitled to “due process” and there has been significant public discussion concerning the Project, but the record seems to support that the suspensions in the processing of the Project have been voluntary and Liberty has no current right to a hearing which would trump the adoption of the Measure.**

An applicant for a discretionary approval is entitled to a fair hearing in the consideration of its project or an administrative appeal of any decision regarding such project. (*Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4<sup>th</sup> 1152, 1170.) A fair hearing requires that the decision makers be impartial: “Biased decision makers are impermissible and even the probability of unfairness is to be avoided.” (*Id.*) The most typical factor in establishing bias is where a decision maker has a financial interest in the outcome of a decision. The other factor is where

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there is significant personal embroilment by a decision maker in the controversy to be decided. (*Id.*)

To prevail on a claim of bias violating fair hearing requirements, Liberty Energy would have to establish "an unacceptable probability of actual bias" on the part of the decision makers. (*Breakzone v. City of Torrance* (2000) 81 Cal.App.4<sup>th</sup> 1205, 1236.) Bias is never implied and must be established by clear, objective evidence. (*Id.* at 1237.) Indeed, a presumption of honesty and integrity applies in those serving as administrative decision makers. (*Id.* at 1235.) Also, "neither prior knowledge of the factual background which bears on a decision nor pre-hearing expressions of opinions on the result disqualifies an administrative body from acting on a matter before it." (*Clark*, 48 Cal. App.4<sup>th</sup> at 1170; *see also, Menning v. City Council* (1978) 86 Cal.App.3d 341, 350.)

In *Clark v. City of Hermosa Beach*, the court found that a councilmember displayed sufficient bias to establish that the applicants were denied a fair hearing. However, the court did note: "Of course, a public official may express opinions on subjects of community concern (e.g., the height of new construction) without tainting his vote on such matters should they come before him. . . . (*Id.* at 1172-73 (emphasis added).)

Mr. Bracken's letter of May 15, 2009, states that Liberty was asked to suspend the Project by both the former City Manager and Councilmember Hanna. We have not tried to verify these statements. The public record will clearly show that the Liberty Energy Project has been controversial in the community for a considerable period, that it was a major issue in the most recent municipal elections(November 2008), and that speakers continue to come forward at Council meetings and speak adjacent the Project. Of course, this very initiative process further illustrates the point. Yet, if this should arise as a potential issue, Liberty Energy will need more than just public controversy and allegations to prove a claim of bias. The mere fact that a matter is controversial does not establish a deprivation of due process.

To the question of whether Liberty has somehow been deprived of due process, two other issues are much more important than the undeniable public controversy and opposition to the Project. The first is that no matter what might have influenced Liberty, the delay in processing the Project seems entirely voluntary, and the second is that Liberty cannot be deprived of due process when the Project is not in a state to come to hearing. Therefore, this claim is not ripe.

First, Liberty's unilateral press release of September 30, 2008 announces a suspension of the Project due to "extreme stress in the capital markets." Specifically, the precipitating event is referred to as Congress' failure to adopt the Bush Bailout Proposal. Congress soon thereafter did adopt the Bailout, but Liberty did not then request to proceed with the Project, nor did it do so after the November election. In fact, in a conversation after the election between Mr. Bracken and the City's Planning Director, Mr. Matt Bassi, Mr. Bracken confirmed Liberty's desire for the

Honorable Mayor and Members of the  
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Brian Nakamura, City Manager  
June 23, 2009  
Page 21

suspension to continue for six (6) months through March 31, 2009. This was confirmed by a letter from Mr. Bassi dated November 25, 2008. So despite the later effort to pass the reasons for the suspension off on specific City officials, Liberty may have had a variety of its own reasons including financial and possibly the general political environment (given the pending election). The City as a legal entity is not responsible for the general political environment and Liberty never attempted to accelerate the Project to escape the effect of any impending initiative.

Second and apart from the above, not only does Liberty not have a building permit which might get them a vested right, their Project is not even at the public hearing stage, as of June 23, 2009, nor is it likely that it could be by November 3, in the event an election is held.

The Project could not be approved before completion of a process under CEQA. Although Liberty got as far as preparing the Draft EIR and soliciting comments, there were many additional stages to the process which would have been required, as discussed above. This included preparing responses to comments, holding public hearings before the Planning Commission and City Council and then preparing the Final EIR with a Mitigation Monitoring Program, and with responses to comments, in a legally sufficient manner. Experienced professionals in this practice would generally opine that completing such a process from the receipt of comments could easily be six (6) months or even longer with a highly controversial project.

Based on the foregoing, Liberty clearly has no current right to a hearing, and would have been unlikely to reach a hearing before November 3, 2009. As no hearing has been held, or even set, any claim that Liberty has been deprived of due process is speculative and not ripe.

## **VI. CONCLUSION**

The Measure has qualified for placement on the ballot, valid pre-election challenges do not exist, and to the extent they do concerning the clause revoking permits, the Measure can be saved by the severance clause. Accordingly, the Council will be presented with the following decision at the meeting on June 23, 2009: (i) adopt the ordinance, without alteration; (ii) order a special election to be held on November 3, 2009; or (iii) order a California Elections Code Section 9212 report detailing the impact of the Measure, and after receiving the Report, then choosing between options (i) and (ii).

If you have any questions regarding this or any other matter, please do not hesitate to contact us.

[END OF MEMORANDUM]

Honorable Mayor and Members of the  
Banning City Council  
Brian Nakamura, City Manager  
June 23, 2009  
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Exhibits:

- A. Election Schedule
- B. Press Release of September 28, 2008
- C. Aleshire letter of May 4, 2009
- D. Bracken letter of May 15, 2009
- E. Letter of Intent dated February 5, 2007
- F. Letter of Intent dated July 10, 2007

EXHIBIT "A"

**SAMPLE ELECTION TIMELINE**

Below is a sample elections timeline (depending on Council's actions):

<b><u>DATE</u></b>	<b><u>ACTION</u></b>
Monday, May 4, 2009	Proponents turn in petitions to the City Clerk. City Clerk accepts for filing.
Tuesday, May 5, 2009	City Clerk sends signatures to County Registrar of Voters for verification.
Thursday, May 28, 2009	County returns "Certificate of Registrar of Voters" verifying that 3,772 signatures were projected to be valid. This gives the proponents the 15 percent voter signature threshold (1,978) they needed in order to place the Initiative on the ballot for a special election.
Tuesday, June 16, 2009	Final deadline for City Clerk to verify signatures.
Tuesday, June 23, 2009	Next regular meeting at which City Clerk must certify valid signatures to City Council. Council must either: (a) adopt the ordinance; (b) place the ordinance on a ballot; or (c) order a report. If the Council orders an election, it must adopt a resolution requesting consolidation with the county at the same time.
Friday, July 3, 2009	Last day for Council to adopt the ordinance, without alteration, if it has not ordered a California Elections Code 9212 report.
Thursday, July 9, 2009	If Council orders a report, it must be presented no later than within 30 days of the City Clerk's certification of the signatures. July 9 would be the deadline for the report's presentation.
Tuesday, July 14, 2009	If Council has ordered a report and heard the results, it must within 10 days: (a) adopt the ordinance; or (b) place the ordinance on a ballot. This date would be the next regular meeting within that 10-day period. If the Council orders an election, it must adopt a resolution requesting consolidation with the county at the same time.

Honorable Mayor and Members of the  
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 Brian Nakamura, City Manager  
 June 23, 2009  
 Page 2

<u>DATE</u>	<u>ACTION</u>
Friday, August 7, 2009	<ul style="list-style-type: none"> <li>• Last day to request consolidation. The City Council must file a resolution with the Registrar of Voters no later than this date. The Registrar will forward the resolution to the Board of Supervisors.</li> <li>• Last day for a copy of the ordinance/measure to be submitted to the Registrar of Voters if a measure is to be included on the ballot.</li> </ul>
Monday, August 17, 2009	<ul style="list-style-type: none"> <li>• Impartial Analysis of Measure (date suggested by County). The governing body may direct the City Clerk to transmit a copy of the measure to the City Attorney to prepare and submit an analysis of the measure showing the effect it will have on the existing law, etc.</li> <li>• Last Day to File Arguments (date suggested by County). Last day to file arguments with the City Clerk regarding any measure to be on the ballot.</li> </ul>
Tuesday, August 18, 2009-Thursday, August 27, 2009.	<ul style="list-style-type: none"> <li>• Public Examination Period (10 days) (based on County's suggested dates).</li> </ul>
Thursday, August 27, 2009	Last Day to File Rebuttal Arguments (based on County's suggested dates). Last day for authors of primary arguments to file rebuttals to arguments with the City Clerk.
Friday, August 28, 2009-Sunday, September 6, 2009.	Public Examination Period (10 days) (based on County's suggested dates).
Tuesday, November 3, 2009	Pursuant to California Elections Code Section 1405(a), the City's special election must be consolidated with the County's November 3 election.



# Liberty XXIII Biofuels Power LLC

(Banning, CA)

For Release (September 30, 2008)

## LIBERTY ENERGY ANNOUNCES SUSPENSION OF BANNING, CALIFORNIA PROJECT PENDING STABILIZATION OF FINANCIAL/CREDIT MARKETS

Liberty XXIII Biofuels Power, LLC announces an immediate suspension of their Banning, California renewable energy generation facility pending the stabilization of the financial and credit markets according to Michael Bracken, company President.

By way of background, Liberty Energy is proposing to construct and operate a 15 MW renewable power generation facility in Banning, CA that will operate using a mix of biosolids (sewage sludge) and biomass (green waste). The facility has a development budget of approximately \$200 million and would generate some 50-75 permanent jobs while producing affordable renewable power for the City of Banning, California.

Over the past three weeks, our nation has watched a systematic meltdown of our financial and credit markets. The lack of liquidity in our financial markets means that it would be irresponsible of me (on behalf of our investors and board of directors) to continue through the development entitlement and permitting process unless and until we see a level of stabilization that would guarantee that our project would be funded without further interruption.

When asked if Monday's (September 29, 2008) vote by Congress to reject a \$700 billion "bailout" of the financial system weighed in the decision making process, Bracken responded, "The rejection of the bailout by Congress was the proverbial straw that broke the camels back. Our markets shed approximately \$1 trillion of market value in just six hours yesterday. This combined with the general lack of credit available in the marketplace causes me to pause to insure that once we begin construction that we can complete our project and do what we have promised and that is to generate approximately 70% of Banning's electrical needs through renewable power."

Liberty Energy employees, consultants and contract service staff were informed of the decision on Monday afternoon (9/29/08) of the decision by Bracken. "It is very disappointing to inform our dedicated team of professionals of our decision especially in light of the challenges facing our economy as a whole." Bracken continued, "Unfortunately the decision I have made is being made by literally thousands across the country to cut back in capital and investment expenditures. I truly hope that Congress will begin a meaningful dialog with Treasury Secretary Paulson to resolve this credit crisis before our nation falls into a more devastating economic situation."

Liberty Energy's Hamilton, Ontario Canada project will be unaffected by the decision to suspend the Banning, CA project. "That project has received all entitlements and permits and previously received financing commitments."

Further Information: Michael Bracken, Liberty Energy (760) 272-9136

Liberty Energy Resources, Inc. ([www.libertyenergyresources.com](http://www.libertyenergyresources.com)), based in Bakersfield, CA, is developing a series of renewable power generation facilities in both the United States and Canada and is the parent company of Liberty XXIII Biofuels Power, LLC.

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1795 West Ramsey Street Banning, CA 92220  
Phone (760) 346-8820 \* Fax (760) 346-8887  
[www.liberty23.com](http://www.liberty23.com)



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Los Angeles Office  
South Bay Centre  
1515 West 190th Street  
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Gardena, California 90248  
Phone 310.532.6660  
Fax 310.532.7395

May 4, 2009

VIA E-MAIL [mbracken@yahoo.com](mailto:mbracken@yahoo.com)

Mr. Michael Bracken  
Development Management Group, Inc.  
73-845 Highway 111, Suite 202  
Palm Desert, CA 92260

Re: Status of Liberty Energy Biofuels Project  
(CUP 07-806; GPA 07-2501, ZC 08-3502; DA 07-1501)

Dear Mr. Bracken:

On September 30, 2008, on behalf of Liberty Energy, Inc. ("Developer"), you informed the City of Banning ("City") you were suspending processing of the proposed \$200M 15 MW renewable power generation facility known as the "Liberty Project" due to market conditions, with the triggering event being Congress' decision not to approve the \$700 Billion Bailout Package proposed by the Administration and the effect on financing markets.

The City though its interim Community Development Director, Matt Bassi by a letter dated November 25, 2008, confirmed a conversation with you that the Project was suspended effective October 1, 2008 for six months until March 31, 2009. On March 12, 2009, you informed the City that you intended to continue through with permitting and entitlement of the Project, but you were not making any final decisions until after the City had completed its process to select a new Community Development Director.

This Project was originally filed with the City on August 6, 2007, and the application was deemed complete on July 3, 2008. The Project was proposed on two parcels of land consisting of almost 20 acres south of the Banning Airport between Westward Avenue and Smith Creek. The Notice of Preparation was issued on August 27, 2007. A 30-day scoping period ended on September 26, 2007. Public scoping meetings were held on September 17, 2007. Notice of the Availability of the Draft EIR was given on June 5, 2008. The deadline for comments was July 21, 2008. Public informational meetings were held on August 7, 2008 and September 4, 2008, before the developer gave notice of the suspension of the Project. Responses to comments were not prepared nor were any public hearings conducted by the approving bodies.

There are certain legal requirements for the processing of projects. The Permit Streamlining Act ("PSA") and the California Environmental Quality Act ("CEQA") require that the EIR for the Project be certified within one year of the time the application was deemed complete. That deadline would be July 3, 2009. The deadline can be extended once for up to 90



Mr. Michael Bracken  
May 4, 2009  
Page 2

days upon consent of the City and the applicant. (14 Cal. Code Reg. 15108; City's Local CEQA Guidelines, § IX.P., Resolution No. 2008-99.) The City construes the November 25, 2008 letter from interim Community Development Director Bassi to the Developer as confirmation of the maximum 90-day extension. The current deadline for certification of the EIR would apparently be October 1, 2009.

However, in your March 20, 2009 letter, you indicated that the Developer would resubmit various documents requested by the City as part of the Draft EIR process "no later than 90 days after a new Community Development Director begins his/her new assignment with the City." Time periods for processing projects can be extended for other reasons. The PSA and CEQA provide that "an unreasonable delay by an applicant in meeting requests by the lead agency necessary for the preparation of . . . an EIR shall suspend the running of the time period . . . for the period of the unreasonable delay. Alternatively, an agency may disapprove a project application where there is unreasonable delay in meeting requests." (14 Cal. Code Reg. 15109.) The City's Local CEQA Guidelines further allow for such suspension when there are "changes to the Project." (City's Local CEQA Guidelines, § IX.P., Resolution No. 2008-99.)

Accordingly, at this time we are unaware of your intentions with respect to the processing of this Project or your intentions with respect to the Permit Streamlining Act. The City's process to hire a new Planning Director is irrelevant to the processing of your Project. The City has never requested a delay of this Project or obstructed your efforts.

As you are aware, this Project has already generated considerable public controversy and was an issue in the November 2008 municipal election. The controversy concerning the Project has continued to fill City Council chambers on various occasions, most recently at the Council meeting on April 14, 2009. One of the primary questions has been a question of the schedule which this Project might follow, and when the Project would come forward for public hearing.

Finally, it is the understanding of certain staff members that the site proposed for the Project has now been found to be unsuitable by the Developer and that the Developer intends to relocate the Project to a nearby location. If this is correct, it may significantly affect the analysis presented in the Draft EIR, and require revision of the document and recirculation of the Draft. Given the high interest in this Project, it behooves the Developer and the City to give clear information concerning the Developer's intentions and the schedule intended by the Developer.

Accordingly, given our lack of understanding of your current intentions, we would like you to address the following questions:

- 1) Is it true that you intend to propose a different location for the Project than presently contemplated in the Draft EIR?



Mr. Michael Bracken  
May 4, 2009  
Page 3

- 2) If so, have you established the other site and do you have site-control?
- 3) How will this affect the intended schedule for processing the Project and the Draft EIR, and what currently is your best estimate as to when recirculation can occur and when the Project will proceed?

The City will construe any unreasonable delay in receiving the above information as a suspension of the time period for certifying the EIR under the PSA and CEQA. The City further reserves its right pursuant to 14 Cal. Code Reg. 15109 to disapprove the Project if the delay becomes significantly unreasonable.

As previously stated, the City believes that the public is entitled to be kept reasonably informed concerning this Project. The City Council appreciates that the Developer has a right to bring a Project such as this forward for public consideration. At the same time, the City has the right, after assuring that all appropriate analysis is undertaken in accordance with the General Plan and zoning of the City of Banning, and after all environmental analysis has been performed, to act in the best interests of the citizens of Banning after affording full due process to all parties.

With the foregoing in mind, the City Attorney on behalf of the City would appreciate your answering the above questions to clarify the serious questions now being raised concerning the current status of the Project.

Your cooperation is appreciated.

Very truly yours,

ALESHIRE & WYNDER, LLP

A handwritten signature in black ink, appearing to read "David J. Aleshire".

David J. Aleshire  
City Attorney, City of Banning

DJA:sgc

cc: Honorably Mayor Botts and Members of the Banning City Council  
Mr. Brian Nakamura, City Manager  
Mr. Marie Calderon, City Clerk



# Liberty XXIII Biofuels Power LLC

City of Banning  
RECEIVED

MAY 18 2009

City Manager's Office

May 15, 2009

David J. Aleshire, City Attorney  
City of Banning, CA  
99 East Ramsey Street  
Banning, CA 92220

**RE: RESPONSE TO COORESPONDENCE DATED MAY 4, 2009  
REGARDING LIBERTY ENERGY**

Dear Mr. Aleshire:

This letter is written in response to your correspondence dated May 4, 2009 regarding the status of Liberty Energy's proposed project in Banning, CA. Before specifically addressing your questions, please allow me to clarify two statements you made in your letter.

In paragraph three (3) on page two, you state "The City's process to hire a new Planning Director is irrelevant to the processing of your Project". While we are aware that a specific vacancy on a staff does not directly impact an applicant's legal right to project processing, there is a practical matter regarding whether a jurisdiction has the expertise available to handle said process. In the case of the City of Banning, both the Director of Public Utilities and Director of Community Development are currently vacant, therefore we believe these vacancies have a practical effect upon the ability for the City to appropriately process our project.

The next statement in the same paragraph states, "The City has never requested a delay of this Project or obstructed your efforts." While it is not my intent to question your statement, the truth is that City officials on two (2) occasions have asked us to delay our project. The first request was made in August, 2006 by then City Manager Randy Anstine, whom asked us to delay formal submittal of any documents related to our project until after the November, 2006 elections (we complied). A second request was made in July, 2008 by Councilmember Barbara Hanna who asked us to delay any further action on our project until after "her" re-election bid in November, 2008. We chose respectfully continue the processing of our project as to not unduly delay it any further.

---

73-845 Highway 111, Suite 202 \* Palm Desert, CA 92260  
Phone (760) 346-8820 \* Fax (760) 346-8887  
[www.liberty23.com](http://www.liberty23.com)

EXHIBIT D

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None of what is written above in this letter changes the spirit of your request, but is provided for sake of accuracy. Regarding your questions:

1. Liberty Energy has NOT changed the site for which we are proposing to build a 15MW renewable energy generation facility.
2. As we have not adjusted our site, no other site control is needed, as we contend that the Letter of Intent between the City (RDA) is site control.
3. While we do not intend to change sites, our project development and engineering team are in the process of reviewing each operational detail of the facility to determine if there are any changes that need to be made to the project as we continue through the EIR process. I anticipate providing any and all modifications to our project to City of Banning staff no later than July 6, 2009.

David, if you would like to meet to further discuss the project, technology and process, please give me a call at (760) 346-8820 or email me at [mkbracken@yahoo.com](mailto:mkbracken@yahoo.com).

Sincerely,



Michael J. Bracken, President  
Liberty XXIII Biofuels Power, LLC

Cc: Mayor Robert Botts  
Brian Nakamura, City Manager



## LIBERTY ENERGY

---

February 5, 2007

Jim Earhart  
Director, Electric Utility Services  
City of Banning  
Banning, California

RE: Liberty XXIII Power Generating Station Letter of Intent

Dear Jim:

Liberty Energy and the City of Banning have concluded initial studies related to Liberty Energy's construction and operation of a 15 MW power generating station on City owned land at the eastern terminus of Westward Avenue interconnected to the City's nearby 34 KV distribution line with the City off taking power generated. The studies have indicated it is feasible to construct and operate a power generating station.

Liberty Energy Resources, Inc. and/or Liberty XXIII Biofuels Power, LLC (Liberty Energy) hereby agrees to use its best efforts to permit, contractually secure fuel, finance, construct and operate a 15 MW biosolids and biomass fired power generating station with black start capability more fully described in the attached Project Description. The City of Banning hereby agrees to purchase power produced by the generating station, provide land for the power generating facility, provide potable and reclaim water and accept wastewater discharge. The parties agree to immediately and jointly prepare and enter into a definitive agreement or agreements containing such terms and conditions as are reasonably necessary to carry out the construction and operation of the power generating station including but not limited to the following points:

Power Pricing & Terms

- \$0.073/KWh, 20 year term fixed price
- Unit 1 initial operation by year 2011
- Unit 2 initial operation by year 2013
- Unit 3 initial operation by year 2015
- Units 2 and/or 3 may be developed after years 2013 and 2015 respectively and power sold to any 3<sup>rd</sup> party however the City will have the first right refusal and will provide interconnect services.
- The power off take agreement will contain terms and conditions generally acceptable to project finance lenders experienced in power generation projects.

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1601 Skyway Drive, Suite 205 • Bakersfield, CA • 93308  
(661) 391-5840 • [wenolan@mccarthyfarms.com](mailto:wenolan@mccarthyfarms.com)  
[www.libertyenergycentre.ca](http://www.libertyenergycentre.ca)

EXHIBIT E

36

November 30<sup>th</sup>, 2006

Jim Earhart

2/3

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#### Electrical Intertie Provisions

- The ability to easily synchronize generators to the 34 KV line
- The 34 KV line can withstand a single generator full load trip
- The 34 KV line is supplied from two sources or equivalent reliability
- Metering at the 34 KV level (payment for VARS & MW's)
- City supply power generating station electrical services i.e., up to 900 KW per unit, 3 units, at internal City rates
- The generating station will have black start capability
- The city will provide necessary load management services following a commanded black start
- The generating station will have the capability to black start all three units
- The power generating station diesel generator will be dispatchable subject to air permit emission limitations
- Intertie Configuration
  - Tap connection to 34 KV line
  - Separate transforms each generator, delta ground on utility side, wye configuration generator side (4.16 KV)
  - Separate transformer for plant load
  - HV switch (no fuses) at or near pole, 34 KV breaker, Liberty bus
  - Three independent remote trips, the City pays for remote trip fiber optic circuits

#### Site Provisions

- Approximately 9.6 acres available from 10.3 acre parcel (APN 532-180-034)
- Approximately 7 acres available from adjacent parcel for biomass storage
- Liberty Energy to pay City fair market value land rent
- Lease terms – 50 years
- Liberty Energy improves Westward Avenue to 10.3 acre parcel, private drive standards only

#### Utilities

- The City to extend potable water, reclaim water and sanitary sewer to the 10.3 acre parcel
- The City will provide potable water at industrial rates
  - Sufficient for 20 employees plus fire flow and pressure
- The City will accept sanitary flow generated from 20 employees at its industrial user rates
- The City will provide reclaim water for plant process water on intermittent basis
  - Up to 500 gpm (0.72 mgd)
  - Plant process water needed for short duration only for start-up, Liberty Energy will be a net exporter of reclaim quality water to the City
- The City will accept and purchase reclaim quality water discharge flow
  - 100 gpm (0.173 mgd) expected average daily flow
  - Less than 600 ppm TDS

November 30<sup>th</sup>, 2006

Jim Earhart

3/3

Other

- City will receive a \$2 per ton host fee for all biosolids brought into the City
- Liberty Energy will accept City cake sewage sludge at no cost with a reasonable cap on tonnage

Liberty Energy is very excited about this project and looks forward to working with the City of Banning in the development and operation of Liberty XXIII power generating station.

Regards,



Wilson E. Nolan  
Chief Executive Officer  
Liberty Energy Resources, Inc.

Accepted:

  
(Signature)

Randy Anstine

(Name)

City Manager

(Title)

4/10/07

(Date)

---

*Liberty Energy*



# Liberty Energy Resources, Inc.

1601 Skyway Drive, Suite 205 Bakersfield, CA 93308  
Phone (661) 391-5840 Fax (661) 391-5844

Liberty Compost • Liberty Ranch • Liberty Logistics • Liberty Energy

July 10, 2007

Judith A. Von Klug, Economic Development Director  
City of Banning, California  
99 East Ramsey Street  
Banning, CA 92220

**RE: LETTER OF INTENT: LAND LEASE FOR LIBERTY XXIII POWER  
GENERATION STATION**

Dear Jae:

The purpose of this Letter of Intent is to memorialize an Agreement between the City of Banning, California and Liberty XXIII Biofuels Power LLC "Liberty XXIII".

This Letter of Intent is drafted for the purpose of creating an Agreement for Liberty XXIII to lease land owned by the City of Banning for purposes of constructing and operating a Power Generation Facility.

**Land Location (Site)**

The Site shall be defined as a portion of Riverside County Assessors Parcel Number 532-18-038, subparcel 16. The Site shall be crafted to be not less than five (5) acres and not greater than ten (10) acres. The ultimate Site crafted under this Letter of Intent shall be contiguous with Riverside County Assessors Parcel Number 532-180-034.

**Usage of Land (Site) and Improvements**

Liberty XXIII, while under lease, shall use the Site, for purposes of constructing and operating a power generation facility. In accordance with the laws and applicable codes of the City of Banning, Liberty XXIII shall have the right to make certain real property improvements to the site during the lease period.

**Term (Length) of Lease**

Liberty XXIII shall enter into a twenty-two (22) year lease with four (4) five (5) year options to extend after the original lease term has expired for a potential total of forty-two (42) years.

**EXHIBIT F**

#### Ownership of Leasehold Improvements

At such time as the land lease expires or is terminated, leasehold improvements shall be decommissioned by Liberty XXIII. The decommission process shall include either the removal of leasehold improvements or the offering of said improvements to the City of Banning at fair market value at the discretion of Liberty XXIII. If Liberty XXIII offers the leasehold improvements to the City of Banning and the option is declined, then Liberty XXIII shall be responsible for the removal of said improvements in a timely manner.

#### Lease Amount (Consideration)

The lease amount shall be set based on the following criteria:

1. At such time as a Letter of Intent is signed, the City of Banning shall procure a land appraisal from a licensed appraiser within the State of California.
2. The lease amount shall be based on 8% of the base year land value per annum.
3. The lease amount shall increase or decrease on an annual basis. The amount of the increase (or decrease) shall be tied to the Consumer Price Index (CPI). At no time shall the lease increase or (decrease) by more than the actual CPI or 2.5% (-2.5%) per annum.
4. At the end of the first twenty-two (22) year lease period, the property shall be reappraised and a new base year set at 8% of the new appraised value per annum. Annual adjustments from year 23 on shall be set by the same formula as listed above (the lesser of CPI or 2.5% per annum).

#### Condition of Lease

The formal land lease between the City of Banning and Liberty XXIII shall not commence unless and until such time as the City of Banning issues a building permit for the site as described above.

#### Additional Documentation

The purpose of this Letter of Intent is to formalize specific deal points as agreed to by the City of Banning and Liberty XXIII. At such time as both the City Council for the City of Banning and Liberty XXIII approves this Letter of Intent, both parties shall begin working on a formal Land Lease Contract.

On behalf of our entire Liberty XXIII development team, I am excited about this project and look forward to working with the City of Banning in the development and operation of Liberty XXIII power generating station.

#### Approval by City Council

All terms, conditions, and agreements are subject to approval and/or ratification by the Banning City Council.

Liberty Energy

City of Banning/Liberty XXIII  
Land Lease Letter of Intent  
July 10, 2007  
Page 3 of 3

It is understood that by execution of this letter, or that your indication of assent to the terms herein by signing this letter, will not form a binding contract or lease agreement between the parties. Both parties reserve the right to review, approve, or deny the final form of a lease agreement to be entered into between the parties.

Regards,

Wilson E. Nolan  
Chief Executive Officer  
Liberty XXIII Biofuels Power LLC.

Accepted:

(Signature)

(Name)

(Title)

(Date)

Liberty Energy

RESOLUTION NO. 2007-24

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BANNING APPROVING THE LETTER OF INTENT BETWEEN THE CITY OF BANNING AND LIBERTY ENERGY

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

WHEREAS, the City Council adopted a Renewable Portfolio Standard ("RPS") in March 2004 that established a renewable energy goal of 20% by 2017; and

WHEREAS, the City's electric load growth is estimated to be 19% by 2011 and an additional 15% by 2015; and

WHEREAS, Liberty Energy has proposed to build a renewable energy biomass generating facility in the City of Banning, and wishes to execute a Letter of Intent with the City of Banning (attached herewith as Exhibit "A") where the City would agree to purchase the renewable energy produced from the proposed generating facility; and

WHEREAS, the City desires to meet its RPS goals, plan and prepare for future electric load growth, and minimize the impact of the volatile energy market on the Banning Electric Utility customers;

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

1. Adopt Resolution No. 2007-24 approving the Letter of Intent between Liberty Energy and the City of Banning, and authorize the City Manager, or his designee, to execute said document.
2. Authorize the Mayor to execute Resolution No. 2007-24. Said authorization shall become void if not executed within 60 days of the effective date of this resolution.

PASSED, APPROVED, AND ADOPTED this 27<sup>th</sup> day of March 2007.



Brenda Salas, Mayor  
City of Banning

APPROVED AS TO FORM  
AND LEGAL CONTENT:



Burke, Williams & Sorensen, LLP  
City Attorney

CERTIFICATION

I, MARIE A. CALDERON, City Clerk of the City of Banning, California, do hereby certify that the foregoing Resolution No. 2007-24 was duly adopted by the City Council of the City of Banning, California at a regular meeting thereof held on the 27th day of March, 2007, by the following vote, to wit:

AYES: Councilmembers Botts, Franklin, Hanna, Machisic, Mayor Salas

NOES: None

ABSTAIN: None

ABSENT: None



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

MINUTES  
CITY COUNCIL  
BANNING, CALIFORNIA

06/09/09  
REGULAR MEETING

A regular meeting of the Banning City Council was called to order by Mayor Botts on June 9, 2009 at 6:36 p.m. at the Banning Civic Center Council Chambers, 99 E. Ramsey Street, Banning, California.

COUNCIL MEMBERS PRESENT: Councilmember Franklin  
Councilmember Hanna  
Councilmember Machisic  
Councilmember Robinson  
Mayor Botts

COUNCIL MEMBERS ABSENT: None

OTHERS PRESENT: Brian Nakamura, City Manager  
David J. Alshire, City Attorney  
Bonnie Johnson, Finance Director  
Duane Burk, Public Works Director  
Hoyl Belt, Human Resource Director  
Heidi Meraz, Recreation Director  
Leonard Purvis, Chief of Police  
Jeff Stowells, Battalion Chief  
Fred Mason, Power Contracts and Revenue Administrator  
Brian Guillot, Planning Engineer  
Perry Gerdes, Public Utilities Superintendent  
Chuck Thurman, Electrical Operations Manager  
Nichole Mihld, Purchasing Manager  
Marie A. Calderon, City Clerk

Mayor Pro Tem Hanna invited the audience to join her in the Pledge of Allegiance to the Flag. Mayor Botts gave the invocation.

PUBLIC COMMENTS/CORRESPONDENCE/PRESENTATIONS  
ANNOUNCEMENTS/APPOINTMENTS

Report by City Attorney – None at this time.

Report by City Manager – None at this time.

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

Karen Clavlot, 5449 Riviera Ave., President of the Banning Cultural Alliance reminded everyone that Friday night is Cool Summer Nights beginning at 5 p.m. This will be "Golf

"Night" and they will have an inflatable driving range by the PGA. The Farmer's Market special will be if you buy \$10 or more of produce or juice you will get an additional \$2.50 free. This will be hosted by San Gorgonio Pass Rotary Club and Sound Design will provide the music.

Lyndon Taylor, 1702 Fairway Oaks addressed the Council stating that the Liberty Energy issue goes on and on. He said that Liberty proposed to provide the City with electricity and you listened to them. They said that they would not pollute our environment and you listened to that too. They spread money around the City including donations to several of elections campaigns and you were grateful and that made you listen even more. You tried to keep the incinerator issue as quiet as possible but we found out about it. We told you that the exhaust gases from the incinerator would cause cancer and birth defects but you didn't listen to us. We told you that the incinerator would use 1.4 million gallons of our water but you didn't listen to that either. We told you that the presence of the incinerator would depress property values by 30% and you didn't listen to that either. We told you about the pollution of our environment but you didn't hear that one either. We told you that we represented a majority of the citizens of this community in opposing the incinerator but you didn't listen to us there either. So we gathered the names of over 4,300 people of Banning and developed an initiative to do what you have refused to do namely, protecting our city by stopping this incinerator madness. We found that less than 1% of the people we talked to in Banning were in favor of the Liberty project. If we had run the signature process longer, we would have gotten 10,000 signatures but thought finally that you might get the message. Once again, you must be reminded that you are elected by the people to do the people's business; not your own business. You are our representatives and you are supposed to listen to the people and be responsive to them and follow their directions. They provided clear directions but again, the Council has not listened. In a representative democracy it simply doesn't work this way. You are responsible to the citizens and yes, you work for the citizens and you are in a position on the Council because of the citizens and at their will and direction. You can now adopt this initiative through Council action. If you don't, they will hold the election in the fall should the Council choose to again ignore the voice of the people and will win by a significant majority yet another embarrassment for you. Rest assured our victory at the polls will be another demonstration of your lack of response, connection and interest of the will of the people and your disdain for the health, safety, financial viability and life-style of this community. This will ultimately be resolved in your defeat as Council Members and your loss of respect as citizens of our city.

Stacey Cue, Labor Relations Representative with the San Bernardino Public Employees Association representing the employees in the City of Banning mid-management and professional bargaining unit as CBAM. We are here to express our continuing commitment to assist the City in its current economic challenge. CBAM representatives have met with City administration eight times since February. We have been part of the discussions as to how best to resolve the daunting projected budget deficit for the upcoming fiscal year. We have also assisted their respective departments in seeking ways to reduce expenses while still maintaining a high level of service. Throughout our meetings City administration has been clear in the direction you have given them to achieve savings through furloughs. CBAM members are FSLA exempt employees and are not subject to the same overtime provisions as

the General, Utility and POA bargaining units. As managers and professionals we work as many overtime hours as necessary to get our jobs done. During the last 18 months that number has been every increasing for many of our members because they have absorbed the duties of five CBAM positions that were vacated and left unfilled. These include the Customer Service Manager, Fleet Maintenance Manager, IT Manager, Assistant Public Utilities Director and Senior Planner. Many of our managers are already performing duties far outside their classifications in order to keep operations running as smoothly as possible. In spite of their already overburden workloads CBAM members stand willing to help the City by reducing their salaries by 10% if the City ultimately institutes furloughs and City Hall closure in July. This is based on the condition that all employees in the City be burdened with an equivalent 10% reduction in salary, hours and/or benefits. Our understanding is that all bargaining units were initially asked to sacrifice in an amount that would result in a 10% loss of work hours and/or salary. We were told these amounts had to be achieved as hard dollars through some form of compensation, salary or benefits. Since that initial request by the City it is their understanding that one of the bargaining units is not being asked to reduce its salaries and/or benefits but is being allowed to apply other departmental personnel related costs to satisfy a portion of its 10% contribution. This is inherently unfair to the other 120 employees whose departments have significantly cut costs but are still being asked to take an additional 10% salary cut or furlough. During these desperate times it is important that all employees stand together and sacrifice equally to achieve true teamwork and solidarity. All we are asking is that you insure that all employees will be sacrificed equally and fairly. It takes all employees to make the City of Banning safe and keep it running efficiently. One group or bargaining unit is not better than another.

Marilyn Miller resident of Banning addressed the Council stating that she would like to offer the following business opportunity. She said that she has one dollar and she is willing to give anyone this one dollar who would let her dump a thousand pounds of sewage in their backyard. She doubts that she will receive many offers but that is exactly the deal that the City of Banning is proposing that we accept from Liberty Energy. For every thousand pounds of sewage they dump here we will get one dollar and after they dump it here they plan on burning it. It seems to her that this offer is a completely unattractive one and explains why the residents of every other city in California that was offered this arrangement turned it down. All of Banning should be considered the City Council's backyard and the City Council by this time realize that they should respond to that offer as the residents of every part of Banning has and reject it by approving the initiative measure. And yet the Council has said it wants more testimony on this subject. If I took a cigarette which weighs less than one ounce and lit it here, I would probably be arrested for the outrageous act. If I took a cigarette and lit it in any of our parks, she would be cited for this outrage. Do you expect testimony that burning one and a half billion pounds of human feces is less objectionable than lighting one cigarette? The concept of burning human feces has been rejected by every other California city that was approached by Liberty. Does the City Council hold its own city in such low regard that it considers Banning as the proper place for this rejected concept? The Council has all the testimony it needs. 4,303 residents of Banning have signed a petition indicating their desire not to have the plant built here. This tremendous expression of outrage at this plant is the only testimony that the Council need consider. Approving the initiative ballot

measure at this time will indicate that the City Council has listened to the residents that have elected you to represent us.

Edward Miller, one of the initiative writers, said that his home is in Banning and Banning is his home. He has spoken before about the many, many aspects of the Liberty Plant that will be disastrous to his home Banning. So many other residents of this City have also spoken about that. He needed to point out the very real dangers of hundreds of millions of lawsuits from surrounding cities when the sewage spill will occur from the proposed plant. Every sewage plant has had such spills so this will inevitably occur. The sewage waste will be stored in silos and there is potential for spillage during the truck loading and unloading, washing procedures and other unexpected events. The sketchy sewage sludge control plan simply includes a ditch built around the silos to collect such spilled materials and hopefully hold that during rain. The proposed plant is located in the northwest region of the Whitewater River Basin. The plant land has a drainage slope of 4% towards the Smith Creek which will accept all of this spilled sewage. The Smith Creek joins the San Gorgonio River and discharges into the Whitewater River and this drains into the Salt and Sea by the Coachella Valley Channel. The water sinks to the posed floor recharging the Coachella Valley groundwater and is used for domestic supply, agricultural supply, groundwater recharging, recreational usage, wildlife habitats and other uses. Any spillage that occurs from the proposed plant would therefore contaminate the water supply for the entire region. It should be obvious that the pollution from the plant occurring over such a vast area would involve the City of Banning interminable legal battles and is one more reason why the initiative to stop the plant from further consideration should be approved at this time. The overwhelming majority of people of Banning absolutely recognize the disaster the proposed plant would have on our air quality, water supply, health, property values and reputation. He doubts that anyone would want to live in the city known as a sewage dump of California. He ask that the Council listen to the people of the city you represent and approve the initiative now and be known as the City Council that sides with the wishes of the residents of the city in keeping our city safe.

Harriet Herman addressed the Council quoting a gentleman from the Environmental Protection Agency that said from reviewing his records inspectors typically work from 9 a.m. to 5 p.m., Monday through Friday so if the incinerator has anything particularly nasty to burn it will do so at night or weekends. When the complaints come into the inspector's office the next day he will call the incinerator operator and ask what is going on. He may also visit the plant but rarely finds any violations. The enforcement officials tend to view the incinerator operator as the client and the public as a nuisance. Another thing the EPA says that despite widespread violations it is rare for the enforcement agency to issue a formal notice of violation and the consequence of issuing one is usually nothing more than a promise by the operator not to do it again. The EPA assists to provide numerous avenues for the operator to delay, procrastinate, negotiate and appeal for years and years while he keeps on operating. She said that she grew up in a very small town on Long Island of 5,000 people and they had an open air incinerator and they all hated to drive up to Sunrise Highway where it burned and it smelled. Also they lost their nephew in the World Trade Center on 9/11 and he was a fireman so they know about loss. They lost their daughter who was a nurse so they know about loss. They know that their home on Long Island had wells that were never tested and

given certificates of occupancy and they almost lost their daughter to that. She urged the Council think seriously about dropping this plan. She thinks that her family and most of the families around here have given enough and we deserve to live in a safe, comfortable, sweet-smelling town like Banning.

Hall Herman resident of Banning said that he has never spoken before the Council before but the fact that the Council is still considering the possibility of not approving the initiative measure that he and so many other Banning people have approved requires that he speak. Not only is this proposed plant going to pollute Banning but also will completely endanger our water supply. Everyone knows that this is an arid climate and that we are in a severe drought. The proposed Liberty Energy Plant will require enormous amounts of water which we cannot afford. At the town hall meeting Liberty Energy stated proudly that they would return all of the water they used in the same purity that they received it. Unfortunately the water they receive will be from ground water wells and reclaimed water all usable and needed by the residents of Banning that Liberty Energy plans to simply dump into the wastewater plant. This is equivalent to saying that I will take water from my home faucet and dump it into the toilet and claim that I am returning it in usable condition. If you read the environmental impact report, the water requirements are specific. Daily use of 1.4 million gallons of fresh water from wells; 2 millions gallons of reclaimed water from the city of Banning and this is in the time of drought. Does anyone think that our water usage will not be curtailed and that our water bill will not be increased by this plant? When looked at carefully this plan is a danger to every aspect of our lives in Banning. The citizens of Banning are informed and they have spoken for all the reasons you have heard over and over. They do not want a sludge plant in their city. As City Council members and the people's representative it is your duty to support the will of the people. That is why you must approve this initiative and you must approve it now.

Don Smith said that he has three items that he wants to discuss. He said the Council all knows what he thinks about Liberty so he won't spend time telling the Council again what he thinks of Liberty. What he is going to say is that as our elected officials he trusts that you understand that the common sense of the community is often right and if the great majority of people believe that this is not in their best interest, it probably isn't and that he trust the Council will then vote accordingly. Several meetings ago he suggested and wanted to suggest again that as you make decisions that are going to cut services to the citizens in order to balance the budget that the citizens be kept in the loop and the best way to keep them in the loop and you are still not using is the website and you need to put your budget up on the website so that the entire city can follow what you are doing and understand why you are doing it. The third item he wanted to discuss is that he went to the street fair two weeks ago when they had all the dog walking and everybody seemed to have a lot of fun and he wanted to encourage everyone to try to come out to the next one and see what goes on and also see what has been done downtown and buy some produce from the booth that is raising money for Carol's Kitchen which is a great cause.

CORRESPONDENCE: There was none.

ANNOUNCEMENTS/COUNCIL REPORTS:

**Mayor Pro Tem Hanna –**

- Wednesday, June 10<sup>th</sup> at 5:30 p.m. the Highland Springs Resort is having their grand opening/ribbon cutting for a new white-cloth restaurant called The Grand Oak. The Highland Springs Resort is also having their Lavender Festival which is a wonderful event and will be held for the next two weekends – June 13<sup>th</sup> and June 20<sup>th</sup>. It has all things lavender including ice cream and lots of booths and music.

**Councilmember Machisic –**

- He attended the Regional Conservation Authority meeting and their land acquisition is now up to 44,000 acres. Their goal is to get to 150,000 acres combined with 350,000 acres from the Bureau of Land Management and in western Riverside County we would have open spaces equal to a half a million acres. They are in the process of developing a website to talk about the animals, flora and fauna that will be in this area and anticipate completing it within this year. The mitigation revenue has dropped 51% over this past year. Expenditure reduction overall is 69%. He told the Council at a previous meeting that they are trying to remove any contact where there hasn't been any action because the commitment for money is much larger than the revenue they are now having.
- He attended the WRCOG meeting and Dave Willmon spoke on behalf of the California League of Cities and he reported on the State budget and as of yesterday, which would have been Monday, the State has not taken any local money away at this point in time. If you read the papers they are talking about taking hundreds of thousands and the last time he talked to the Finance Director there is a potential for another million dollars that will be taken from our City and with the reductions that we've had the \$4 million plus another million would really hurt. He also indicated that Senator Hollingsworth and our own Assemblyman Paul Cook are leading the charge that no further money will be taken from cities. He indicated though that it was not unanimous comment by all the legislators. Also the State Treasurer has indicated that by July 29<sup>th</sup> there will be a cash flow crisis and they will not be able to pay any of the State bills and the problem is, as he indicated, that the arrangement for money has to be done by July 1st because it takes a month to get the arrangements and get the cash flowing. Also there is a law called AB 1881 which deals with water conservation in landscaping and we are mandated that we have to have a plan in place by January 2010 and rather than each agency developing their own, they have a committee within WRCOG that is going to develop a model ordinance and it will be coming back to the cities between July and December. A number of TUMF projects have been put on hold because of the economic conditions and because growth has slowed. He also mentioned a couple of weeks ago that developers are having difficulty paying the TUMF fee which is approximately \$9,000 per house and they have gone into a plan in Menifee where they will provide the developer with 24 months to pay the TUMF fees with 5% interest. Also there was a report on the Goods Movement through the Inland Empire and he has a booklet to circulate and a summary of the workshop for the Council. The WRCOG budget expenditures have been reduced 9% for 2009/10 and in addition last year they were reduced 8%.

**Councilmember Franklin –**

- She thanked those people who participated in keeping Banning beautiful workshop project that they did. It was the last project for the Banning High School Interact Club that they did for the school year to work in the community. They were about nine students that came out along with Super Subs, Demario Jackson and Bottomline. They worked all around downtown from Alessandro to Fourth Street from Williams to Livingston and they were able to fill up the back of a flatbed worth of trash, as well as, about 40 bags of trash. What they focused on was cleaning weeds and leaves from the alleyways. The kids really enjoyed doing it and their supervisors for the day were John Jansons and Art Vela. Both staff people volunteered their time to come out on a Saturday and they actually took the kids out and walked all the alleys. She commended those people who took a Saturday morning to cleanup. The kids said they did this because it was important to them to help keep the city they live in clean also.
- She and Chief Purvis attended the Girl Scout Open House at the Scout House and if you haven't had a chance to go inside they had a complete remodel inside and it is really, really nice. It is open for people to be able to rent the place and it is located in Repplier Park. They have six troops that are active and meet there on a regular basis.
- She attend the T-NOW Meeting and two things that will be coming up but they are not completely active right now and that is there is a new phone number and you will be able to call 511 and this is where you can call to find out what the traffic conditions are at any time. This is part of a nationwide program and should be coming to our area to be up and running by October 2009. Second, there is Commute Smart and they are working to update that now whereby you can go on-line to Commute Smart and you can plan out a trip whether you want to do it on your own by car, by bus, or by train. If you are taking public transit it will not only tell you how to get there, it will tell you the times and how much it costs. It is not quite ready yet but should be coming soon. You can go into RTA's website and they will tell you how you can get from anywhere in Riverside where RTA travels and its gives you all that information.
- Reminder June 27<sup>th</sup> is the Ready to Ride event at Repplier Park from 10 a.m. to 2 p.m. and it is to help our young people be better safety aware for riding their bikes and skate boards and it is free to the public.

#### CONSENT ITEMS

##### 1. Approval of Minutes – Regular Meeting – 5/26/09

Recommendation: That the minutes of the regular meeting of May 26, 2009 be approved.

##### 2. Resolution No. 2009-45, Undergrounding of Utilities in the Downtown Area

Recommendation: That the City Council adopt Resolution No. 2009-45.

##### 3. Report of Investments for March 2009

Recommendation: That the City Council receive and place these required monthly Reports of Investments on file.

##### 4. Report of Investments for April 2009

Recommendation: That the City Council receive and place these required monthly Reports of Investments on file.

5. Approval of 1<sup>st</sup> Amendment to the Joint Powers Agreement of the Western Riverside Council of Governments to Add Water District to the WRCOG Governing Board.

Recommendation: That the City Council approve the Joint Powers Agreement amendment to add water districts to the Western Riverside Council of Governments (WRCOG) Governing Board.

6. Approval of Disaster and Emergency Mutual Aid Agreement between the Morongo Band of Mission Indians and City of Banning.

Recommendation: That the City Council approve the Disaster and Emergency Mutual Aid Agreement ("MAA") between the Morongo Band of Mission Indians and City of Banning.

7. Stagecoach Days City of Banning In-Kind Service Costs Waiver of \$15,500 for 2008/09.

Recommendation: That the City Council approve a fee waiver of \$15,500 to Stagecoach Days for Fiscal year 2008-09.

8. Banning Cultural alliance In-Kind Costs Waiver of \$11,500 for 2008/09 Cool Summer Nights Events and Consideration of Request for City Hall Parking Restrictions

Recommendation: That the City Council approve a public safety fee waiver of \$11,700 for Fiscal Year 2008/09 Cool Summer Nights, an event sponsored by the Banning Cultural Alliance and consider the Alliance's request to close City Hall parking lot at 12 noon for event preparation.

**Motion Franklin/Hanna to approved Consent Items 1 through 8. Mayor Botts open the item for public comments. There were none. Motion carried, all in favor.**

#### REPORTS OF OFFICERS

1. Municipal Code Section 3.24.140 Local Preferences in Regards to Purchase of Goods and Professional Services.  
(Staff Report – Brian Nakamura, City Manager)

City Manager gave the staff report as contained in the agenda packet.

Mayor Pro Tem Hanna asked staff to help understand the current municipal code under local preference A which states, "In order to promote the economic health of the city and to encourage local participation in the procurement process, the City council shall give a preference to local businesses, to the extent that such preference does not give an unlawful

advantage to such local business over its foreign competition, and is otherwise permitted by law." She asked what might be "an unlawful advantage."

City Attorney said this is the typical way a local vendor preference is set up. It normally basically has some percentage whether it is 2% which is fairly low or 3%, 4%, or 5% and it basically means that if we go out and get bids and a vendor gives you a bid and it fits the definition of being a local vendor, then if their bid is within 5% of the lowest bid we receive then their bid is considered to be, if it was 5% that you picked, the lowest bid. And you have a 2% so if had somebody that was 2% higher but they were the local, then their bid is counted as the low bid even though it is 2% higher. The terminology "unlawful advantage" there could be some circumstances for example if you had a disadvantaged business enterprise potentially there would be other laws that apply in terms of giving preferences to certain kinds of businesses. And again, this is typically when you are dealing with disadvantaged businesses in the federal process there is waiting that goes to businesses that qualify under those criteria so the end result they may not have the lowest bid but are close enough that their bid gets counted as the winning bid.

Mayor Pro Tem Hanna asked if there is any limit to what that percentage is. She understood that it ranges up to 5%.

City Attorney said the ordinances that he has dealt with have been in that range. He is not aware of a case that has said that an 8% would be illegal. At a certain point in time you get into the gift of public funds type of situation and generally purchasing ordinances are set up so that people go through a competitive price and you get the best price. Once you start creating categories where you give people credit even though they don't have the lowest bid it starts to create an issue. He is not aware of anybody that tried to go for some really significant percentage and then that has got legally challenged. Theoretically there would be some amount but he is not sure what that is.

Councilmember Franklin said is this very common for local cities to have this kind of local preference.

City Attorney said yes it is very common for cities to have a local vendor preference type of ordinance.

Councilmember Machisic asked how would you handle if a bid came in from an agency that is part of a larger organization like a national or statewide organization but they maintain an office in Banning, would they be treated as a local.

City Attorney said that the City's ordinance is very vague as to what is really a local business and he thinks that in redoing this or if we do it through a resolution he thinks we would want to focus in on that.

Councilmember Machisic said so there could be some language that would distinguish this. City Attorney said yes, there could be.

Mayor Botts opened the item for public comments.

Edward Miller said just listening to this for the first time it sounds like such a wonderful idea for Banning but again we know that nationwide Canada is furious at America for having the same type of program that blocks out Canadian companies. So it seems to him that we have Beaumont right next to us. If we institute a buy only preference for Banning, Beaumont certainly would do the same thing and who knows where it goes. It seems to him that this is a very dangerous thing to do first. If all the other cities around us have done it, obviously we have to retaliate. But to be the first city that does it he thinks would be very dangerous and we could be blocked out from all the other cities.

Mayor Botts said for clarification we have had this on the books for a number of years at 2% and he thinks their discussion tonight is do they want to look at a different percentage.

Don Smith said that every project that has ever come to the City and say, "you just have to love our project" and they brought their little economist who stood right here who told us that for every dollar you spend it town it circulates seven more times and you actually make seven dollars. Is that true; he doesn't know. But that is what they all swear to. For every dollar they spend in town their sales tax one penny of which belongs to the City of Banning. If it goes around seven times and you spend the dollar here, you make seven cents. If it is five cents, it makes you two cents under that scenario. He would like to say that there is a justification that it is not a gift of funds and that is why these have probably been allowed because they do generate money back to the City.

City Attorney said the thing about having a resolution means that if you want to change it in the future you don't have to go through the ordinance format to change it so it is more flexible that way. He would emphasize that he certainly thinks that if we go to a resolution this needs to be a board type of thing that is applies and is well known. We would certainly not want to get to a situation where after going through a bid process an ad hoc comes along and amends the resolution and change it depending upon a process actually worked. It would always need to be something that in any type of bid process was known in advance how that factor was going to be applied. There was Council consensus.

Mayor Pro Tem Hanna said it would be interesting to talk to Beaumont and Calimesa and consider what the advantages might be of keeping business local in the Pass. For now she would be happy to change this to 5% and the recommendation in the reports of officers is that we make an amendment to municipal code section and you are not recommending that now but bring back the resolution.

City Attorney said that they would have to amend the code to say that we can have a local vendor preference in an amount set by resolution so we need to come back with a code amendment and at the same time give you a resolution with 5% or whatever number you want to go with.

**Mayor Botts said that he would consider the 5% a motion by Mayor Pro Tem Hanna. Councilmember Robinson seconded the motion. Motion carried, all in favor.**

2. Award of a Professional Services Contract o Tramutola for Public Information and Feasibility Services Related to a Potential Transient Occupancy Tax (TOT).  
(Staff Report – Bonnie Johnson, Finance Director)

Finance Director said that staff is recommending moving forward with Phase 1 with Tramutola in an amount not to exceed \$53,200 that includes an \$18,000 consultant fee, as well as, a mailer that would go out in the mail to our residents, as well as a poll and as well as \$2,000 of miscellaneous other expenses. Staff has spoken in depth with Tramutola abut the timing and when the Council would need to be making decisions in order to get this on the November 2009 ballot. The deadline for filing with the County is August 7<sup>th</sup>. If Council chooses in moving forward with putting it on the ballot, Council would need to make that decision by our second meeting in July to move forward. In talking with Tramutola if Council chooses to approve the contract with Tramutola in order to get the process kicked of Tramutola is suggesting the formation of an ad hoc committee of Council Members and they are suggesting that one of the Councilmembers be the Mayor and a second Council Member be appointed to that ad hoc as well. They think that is necessary to help guide the City process, as well as, the public and community process. The estimated cost of Phase 1 with all the extra costs included is \$53,200. The Council has already made an appropriation for those costs so that is accounted for in the budget and there is no additional appropriations being requested at this time.

Councilmember Hanna asked if she has had an opportunity to estimate what a hotel bed tax (transient occupancy tax) might bring into the City on an annual basis.

Finance Director said currently our TOT tax rate is 6% and the estimate going forward into 2009/10 based upon the current hotel occupancy rates that we are seeing and experiencing the estimate for 2009/10 is \$278,000. So for example if the Council was to put a ballot measure together that raises the tax from 6% to 12% we could see an additional \$278,000 in revenue.

Councilmember Franklin said given the nature of the issues and concerns of the public with using Tramutola the first time around when they were doing the sample testing have you talked to any other firms about being able to do the same work that might be able to do a better job in trying to relate to the public.

Finance Director said that she has talked to Tramutola in depth about their pollster and they actually are proposing the use of a different pollster. It wasn't necessary Tramutola but a second company that was a subcontractor to them that did the poll and Tramutola oversaw that process but they have committed to her to use a different company in the polling process.

Councilmember Franklin said her concern would be if Tramutola oversaw the process before then they were obviously okay with it and she would question how concerned they are with making sure that the right message gets out.

Finance Director said she thinks that they are very concerned. In talking with them she has been very candid and very straightforward with them about concerns that were raised and what the concerns were. They were given examples of what the concerns were regarding the polling

company and they have a lot of experience with this other polling that they have been working with as well and they are very confident that we will see a different result with relation to their contact with our community.

Mayor Botts opened the item for public comments.

Edward Miller said as a taxpayer he cannot see taking his tax money to convince him to have a tax. It seems to him that a simple statement in the newspaper is all that is needed to have us know what is going on and to pay \$50,000 for stage one and he hasn't heard how much stage two would cost. Why spend our money to inform us about this tax. There are so many other ways. We could have this sent out with our electric bills, through newspapers, people could watch it on reruns of the City Council meetings. He is sure that this will cost \$100,000.00 and it just seems to him a waste of money.

Larry Spear resident of Peacock Valley addressed the Council stating that listening to the comments and the report it seems to him that in today's society in general we place far too much emphasize on other people's opinions and on polls which are most often very misleading. We have already had one bad experience with this type of situation in the past regarding this. His personal feeling is that the City has people working for it that are intelligent enough to be able to do the research on such a tax as this by simply consulting the tax rolls of other cities facing similar situations and is this successful or is it not. The people of Banning are not ignorant people. He thinks that if you present it to them in a flyer form for that matter that could be generated by the City and put out with the electric bills or in the newspaper informing the people that we have the opportunity to make quite a bit of money at the guest expense and not at the Banning city resident's expense and that the City is trying to raise funds anywhere they can and any way they can rather than trying to spend \$35,000 to a company that is going to say this is a good idea and the people like it. Take his word for it the people in this town are intelligent enough to understand if it is put to them in simple terms. He really doesn't feel that you need to spend this kind of money on a company that is just going to tell you what they think you want to hear. This is going on all over the country and you probably know it as much as he does.

Dorothy Mc Lean, 916 Linda Vista Drive addressed the Council stating that she just read this and would reiterate what the gentleman before her said as far as a consultant. We spend a lot of money on consultants. If she understood this correctly, this tax is going to be imposed on people who come to Banning and stay here. It is going to benefit us and she doesn't know why we have to put it on the ballot and why we have to have a consultant tell us that or even talk to the people and ask them. They would be for it because it is not going to affect the people in town. It is going to affect the people that come here. And if people do come here they are not going to stay weeks and weeks; they are going to stay a day or two. She would think that this tax would benefit us and we don't need a consultant. Also we are going to be spending \$53,000 and it will bring in an additional \$278,000 so we are not really bringing in \$278,000 because we are spending \$53,000 and take it from that amount. She asked the Council to think about whether or not we really need to have a consultant and the need to put it on the ballot.

Don Smith said he would guess the reason you are having these consultants is because the last time we had this on the ballot in which the people of Banning were going to reap the benefit at

no cost to themselves it went down to an overwhelming defeat. If we are going to spend this money, the poll of whether we want it or don't want it is meaningless if you are going to put it on the agenda. What this poll needs to tell you is why people would vote no. What is it that they are misunderstanding that they would vote no so that you could then counter it with an education program that explains to them why their misconceptions were just that. Once again, before this poll goes out he thinks somebody in this City other than this consultant who had great faith in their last pollster, needs to look at these questions and make sure that it is really going to answer the questions you have in deciding how to have your education program.

Mayor Botts said he has expressed to staff that he is willing to expend some money with Tramutola because they are the leading firm. When you talk about pure politics and campaigns they are probably the best in the state and if you recall, several of you sat on the committee that picketed them along with some public members. He thinks that there are a number of issues that they can debate such a polls and surveys and if you believe surveys at all they are legitimate and the last one they did said that it would be very difficult to pass a TOT tax. Surprisingly people were willing to tax themselves in raising the sales tax at a half or quarter percent. We were all sort of shocked at that but if you looked at the survey and polling date, he thinks it was reasonably accurate. Though we have said repeatedly at this table why wouldn't somebody tax somebody passing though because it is not going to impact us. He thinks that they all agreed 5/0 that we are going to put this on the ballot. We have said that this is something that is not new and we already have it and it is changing from 6% to perhaps 12% because 12% is the market and he thinks that is what our neighbors are charging. In Long Beach and other areas it is 14% and 15% and to the east of us it is significantly higher. For those in the audience there are two issues and we cannot get involved in the middle of a campaign. We can do some education and then at some point we have to stop, meaning the City, whether it is Council or staff that we cannot literally get involved in the middle of a campaign so we are going to need a strong campaign committee that will literally take whatever we've done from an education standpoint and then really run with it. His concern is even though we can say this is obvious and why wouldn't people pass it we are dealing in some tuff economic times and the original survey showed for whatever reason people were not in favor of it. He has expressed his position to staff and to Tramutola that he cannot support \$100,000.00 in Phase 2. We have appropriated \$53,200 and we have talked about it and he could probably support that to really give us a good education point with our voters and then be able to hand it off to hopefully a strong campaign committee. One of the things that he clearly said to staff and Tramutola is that he doesn't think we need a lot of polling. We have said lets move forward with this and how do we win that campaign and if there is polling and surveying it should be to fine tune the message. What is the message? Why are people saying they don't know whether they could support that? His feeling is that we scale back polling. There is a \$24,000 figure in Phase 1 and we ask you to come back with a modified, if Council agrees, scaled down, smaller version.

Mayor Pro Tem Hanna said it seems like common sense that everybody is going to support this. As Don Smith, former Council Member said, we cannot assume that this is going to be passed by folks without doing our due diligence. Without doing the work necessary to make sure that the education takes place so that they understand exactly what it is. We had a campaign and it was an informal campaign, she would suggest, and it failed miserably. Again, most recently this last year a survey told us that it was not supported by people. So she thinks to put this on the ballot

and not spend any money for consultants is to potentially doom an additional quarter of a million for not just one year but every year increasing over the time. The previous poll that was done for us was complex and they were not just testing one issue but the sales tax versus a utility tax versus a hotel bed tax so it was a complicated kind of question that some people did not understand and she is glad to see that they are changing the poll company. Now they are only going to be testing the hotel bed tax but we need to know what will change the no vote to a yes vote and that is the importance of the pollster and the polling being done. We must do this and we must do a good job. The other thing that she would say that we need to start immediately is to create this community organization, community group of people to move this forward because once the polling and once we put it on the ballot as the Mayor said this becomes a community effort. But to disengage entirely from Tramutola and not allow them to do the brochures and so forth which will use the data that we have gotten from the survey to convince folks, is very misguided. We need to do everything possible to make this a success. A quarter of a million dollars means a quarter of a million dollars less that we have to cut in the future. It is really very important and we need to do it and do it well. Also, we cannot wait. We cannot have this come back. If we want to go forward, we have to go forward tonight because the polling must be done by the end of this month because we have to put it on the ballot in July. She would hope that the Council would continue its support as it did 5/0 at the last meeting to go forward with this.

Councilmember Machisic said he is thankful that there are people like Ed and Dorothy and other people in the audience who are interested and they go in and they research a subject and they know what they are talking about and they understand the issues. But the question is how about the general public who doesn't come to a meeting. For instance, if we put something out it shows up in the Record Gazette and we put it on the website and put it in the water bill for so many months and we put it in the Press Enterprise and they come to the Council meeting when we are ready to adopt something and they say why didn't you publish it. They don't read, they don't look at the website and that is why he is thankful to people like you who come to the meetings and are informed. The other thing that is important is that if you talk to anybody about a tax election and he doesn't care what kind of tax, 20% of the people are against it immediately before it every gets on the ballot no matter how much information you flood them with the answer is no. So you start with a pool of 80% and that is where education comes in. You have to show them the issues. For instance if you say TOT tax, they don't care; it's a tax. The other thing is that we are going to spend \$100,000.00 and he is a believer that you go and attack a mouse with a canon if you want to be successful. He thinks this is important. You have heard him report of RCA and WRCOG and we have had so many budget sessions where we cut \$4 million plus dollars. We need every dollar we can get and when he goes into an election he wants to go with everything he has. When you talk about employees doing it what you do is assign that to some employee who doesn't want to do it or doesn't have any expertise on that subject and that's important. We want somebody who is going to put their whole heart and whole soul into this thing. It is expensive and there is no question about it but if we are going to be successful we are going to reap the harvest of that from today until forever and as we get more hotels it is going to become bigger. He thinks it is important that we have a professional do it and he is willing to expend the money.

Mayor Pro Tem Hanna asked what does the Council feel about the rate and are you willing to go to 10%, 12%. This is something you don't want to do more than once every ten years she would suggest.

Mayor Botts said the market is at 12% and our neighbors are at 12% and there are very few under that and many over that and that would be his suggestion to staff and Tramutola.

Councilmember Machisic said that he is sure all of you have been to motels and conventions and everything else and he can almost assure you that you didn't know what the percentage of the room tax was. Whether it was 10% or 12%. He went down to Anaheim to a convention and he thinks the tax was 12% and they have an entertainment district and they charge you another \$4 to \$5 dollars per day per room and that is true of Long Beach and Los Angeles, etc. but they never advertise what their tax is. You find out about it when you get your bill.

Councilmember Franklin said she definitely do support moving forward but her only concern is making sure that the firm that does the work they should be staking their reputation on this. That this has to be the kind of issue that they are willing to make sure every single step goes right because no matter what they did in the past it wasn't good enough because what it left in the minds of many people they talked to was a lot of confusion and that is exactly what we do not need. She knows that they talked about multiple issues but she would really want to be sure that this is important to them that they are staking their reputation that they are going to do every single step right to make sure that the correct message gets out.

Mayor Botts said he would certainly agree and they have asked to have Council oversight and he is happy to do that. He thinks this is the right thing to do and for whatever role he can play legally he would be happy to do that and if we move forward another Council person will be appoint to that. The Council certainly has his commitment if we move forward with their recommendation to have the Mayor and someone else liaison working with them. He likes that oversight idea.

Mayor Botts said there is another issue and he believes they ended up at 12% and was that correct. Council said that was correct. The other issue is whether we spend in Plan A \$100,000.000 or Plan B \$53,200.

Mayor Pro Tem Hanna said staff's recommendation is that they would report back after Phase 1 before committing to the second phase.

City Attorney said he would like to clarify and thinks it is an important issue what your budget is. The way the contract is written right now it says that for all these additional services the polling etc. that is not included in the money in the contract and the contract does not commit to a total or budget as to what those other consultants are. The staff report says the approximate cost is \$100,000.00 but that is not a contract term in terms of limiting those other contracts. He thinks that if you do go forward with the first phase obviously the most important part of this contract is the \$46,000 that is the second phase which are all the election materials. He would think that the important phase of this contract is the second phase so you are probably committing to the whole thing and he just thinks that you either would want to set a budget on

what the amount of additional consultant costs are and hold the contractor who is really the general contractor in a term that their consultants will perform in accordance with the budget. The way the contract is now you will be paying them their fees and they can bring in consultants and there is no budget set for what those other subcontractors are going to cost.

Mayor Botts said with their discussion with Tramutola he was very candid and said \$53,000 was it and in that what he said it was to do some more polling and get some more surveying and then a drop dead point do we go forward and his position with them yesterday was that we have already done that and we want to go forward. So you don't need to do \$24,000 dollars worth of polling which is the number called out that refocus the polling and survey on what do we need to have in the 75 words of the ballot measure, what are the things that are going to move people towards yes or no and help form the message and that was his position yesterday. That there is a fee and there is a mailer and a scaled down poll that helps form that message and that is what we get for \$53,200. He asked if that was fair as to how that was presented yesterday.

Finance Director said yes. The contract covers Tramutola's fee which is part of the \$53,200. Tramutola in addition to that has given us quotes, a breakdown of other costs that will be incurred as part of the process and that is delineated in the staff report the polling costs, the mailer costs and those types of things. Those aren't contractually spelled out in Tramutola's agreement she would agree with the City Attorney but those are other project costs that can and were reasonably estimated by Tramutola and staff. If given the go ahead to work on Phase 1, Phase 2 or whatever, staff will work with Tramutola and control those costs and keep them within the budget established by the City Council which is based upon the comprehensive quote that we got from Tramutola.

City Attorney asked if they could put those estimates in the contract so that they can hold their subcontractors to those prices.

Finance Director said we could say contingent upon that.

Mayor Pro Tem Hanna said she really disagrees with the comments that the first phase is somehow not very important. She thinks it is very important because it will absolutely guide Phase 2. She said that they were pretty strong in that survey a year ago and granted things have changed differently for better or worse but if they came back and said we do not believe this can pass, would we will go ahead with the additional costs for Phase 2 and put it on the ballot. She kind of doubts that we would want to do that.

Mayor Botts said that he has already stated his position. We simply need to put it on the ballot and move forward. His position is that we spend \$53,200 and that gets us polling to clarify the message, it gets a brochure probably, it gets us their fee and it gets us to the point where we are really ready to hand it off to the community.

Mayor Pro Tem Hanna said she has no problem in approving the whole thing. She just wanted to make sure that the whole Council was actually convinced that even if they come back and say we tried every way possible and these people are against it, are we still going to go ahead and put it on the ballot.

Councilmember Machisic said he thinks as a result of the polling you will find some things will come to the fore and the publicity that you put out in the second phase will hope to counter some of the concerns and negative points of view. It is a matter of education and when you do that polling and there are 20% who are against it you try to find out why they are against it and put out information that says why it is good for the city. Whatever the rational is that is the education part about it. That is what you find out in the polling and that is what your second phase is.

Mayor Pro Tem Hanna said it is important for us to be clear if that is where we are that is fine. **Motion Hanna that we approve the professional services contract with Tramutola with the contract costs of approximately \$100,000.000 to cover the entire costs for the total project for Phase 1 and Phase 2, subcontractors, additional materials, expenses and everything.** Motion seconded by Councilmember Machisic.

Mayor Botts opened the item for public comments.

Marilyn Miller said in listening to this it seems to her that the first poll was so complicated it scared everybody. All you have to do is tell them our city is below every other city in the area and we want to make our taxes equal to theirs and she thinks you won't have any problem with the people voting for that tax. Just keep it simple. She doesn't think you have to spend all this money. Simply talk to the people and tell them how it is.

Edward Miller said he knows the results of the poll. The poll will simply say as you said before some people are against taxes and that is all there is to it. But again, any poll will simply tell you we have to emphasize that this is a tax that will not cost the city of Banning people anything and why will it not cost us anything. We have to demonstrate two things: first of all it will not cost us anything; just the visitors and the other thing we have to emphasize whether it is true or not is to state that it will not decrease the number of visitors we have. Without emphasizing the fact that it will not decrease the number of visitors then we have a chance of losing this initiative.

Councilmember Franklin asked staff do you think that if we were not to do the first phase that we would be as able to be as successful as we would have to, through going through it.

Finance Director asked if we were not to do the public education. Councilmember Franklin said if they were not to do the polling. Finance Director said the polling will help as we have talked about and will focus and shape the message. Mayor Botts had made reference to dialogue that she and the Mayor had with the consultant and they did talk about the polling and they did talk about the difference between a full on poll and a shorten poll and some streamlined process. For the purpose of getting feedback so they know what the message needs to be going forward not necessarily for the purpose of finding out are people in favor or are people not in favor but trying to get information out of them that will help shape how we move the message and how our community groups move forward the campaign. Her opinion is we could scale back in some fashion the polling that you are doing but it is important to at

least make some community contact, get some information so you can better shape how you move things forward.

Councilmember Franklin asked if you scaled back the polling would that be a reduction in the amount that it would cost. Finance Director said yes, potentially. We would talk with the consultant about streamlining the process, doing some sort of shorter type or more directed polling and we could look at the sample size and various things like that and potentially yes, we could lower the polling costs by going that route and the consultant seemed amenable to looking at that with us, if that was our desired.

**Mayor Botts said the motion is for the \$100,000.00. Mayor Pro Tem Hanna said not to exceed \$100,000.00.** Mayor Botts said he would have to vote against that and he is totally supportive of this program but not to the tune of \$100,000.00.

Mayor Pro Tem Hanna said again if we can negotiate you're going to be making different changes to the contract if the survey is going to be reduced somewhat and that reduces the contact. What we are saying is that they can go forward at this point and that is the critical thing that the surveys can be done.

Finance Director said that she is happy to approach the consultant and have that conversation about the survey if that is the wish of the Council to do so. As proposed it is a full survey but if there is desire to look at shortening that as we talked about to get enough information to help shape the message but it is a more abbreviated process in a shorter poll than what is proposed here she is happy to proceed that way as well.

Mayor Pro Tem Hanna said she wants whatever needs to be done for this to be done successfully. That would be her wish and we will see if the other Council members agree or not. So if they feel it can be shortened and reduced in price and be successful, that is great. They are the experts and they are the best in the state and she would really like to follow their advice.

Mayor Botts said he would support the motion if it was capped at \$53,200 with nothing over that unless they come back to the Council and with the caveat that the \$53,200 is going to get us that data that tells how to do the message and how to focus it.

**Mayor Botts said the motion is up to \$100,000.00 for Phase 1 and 2 and everything and asked the Council to vote.**

**Motion failed three to two with Councilmembers Botts, Franklin and Robinson voting no and Councilmembers Hanna and Machisic voting no.**

Councilmember Franklin said that she would like to make a substitute motion that we move forward with a reduction in the polling piece and that it would be reflective in the contact because she thinks the key is the education. Just the scaled back and the polling and she doesn't know what that would mean dollar wise but definitely a reduction. She asked if that piece was needed for the motion.

Mayor Botts said we need to be fair to staff and be as explicit as we can. Clearly we are not going to know what a reduced polling price is tonight and he thinks that they are all in agreement that if we are going to move forward we need to settle this tonight.

Councilmember Franklin said she would like to move forward; she just doesn't want to spend that much money because she thinks that much polling doesn't need to be done.

Mayor Botts asked if she would be willing to support a motion for \$53,200 with a scaled back polling including their fee, including one mailer and helping us write the 75 word message.

Councilmember Franklin asked if that would be enough to get the message across.

Finance Director said that is a combination of Phase 1 and Phase 2. So the other items that were in Phase 2 the other part of the campaign readiness in getting us to the ballot, if she understands this correctly, \$53,200 would be the entire contact from now until the election. And so there would be some Phase 2 work that they wouldn't be doing related to getting to the ballot and she would say depending on the public education phase and the community support and the community groups that we can rally but she can't predict success for not.

City Attorney asked if the \$46,800 is the full Phase 2 program. Finance Director said that was correct. So that includes all the mail outs which is really the educational program, the two mailers, etc. for \$46,800. It seems to him that at a minimum you need to spend the \$46,800 that is the campaign leading to the election. If he understood the motion you were saying well maybe the polling could be cut back. Well in the staff report it says that the tracking poll is \$24,000 and it also says that there is a mailer that goes out before that tracking poll which is \$9,200. It seems to him in just trying to understand your suggestion was of the \$100,000.00 those are the only components that you are asking Bonnie whether possibly those could be reduced. So out of the \$100,000.00 program that is not \$53,200. That is some portion of \$24,000 and the \$9,000.

There was further Council and staff discussion in regards to what they were willing to spend to make this successful and get the message out.

**Motion Franklin that if we are able to cut back on the polling which is the \$24,000 and the \$9,000 we would be right around \$66,000 and that we actually approve going up to \$66,000 if they are willing to be able to do everything that they need to get the measure on the ballot. Motion seconded by Councilmember Robinson.**

Mayor Botts opened it up for Council discussion.

Mayor Pro Tem Hanna said that she would support it and appreciates the effort to compromise to some degree and expect that it will come back to the Council again for more money.

**Motion carried, all in favor.**

City Attorney said he assumes that we have the direction that if we can have a program that the City Manager and the consultant feel will be as effective as possible for \$66,000 including the

subcontract budgets in there, then we are authorized to enter into this contract without bringing it back.

Mayor Botts said he thinks that is their position and he does want to emphasize that Tramutola would very much like to have Council involvement in all of this and if you so agree he would be happy to be a part of that along with another volunteer from the Council. Mayor Pro Tem Hanna said that she would volunteer.

City Attorney added that he has been involved in a number of TOT campaigns in the past and there is going to come a point where we sign ballot arguments and he would certainly hope that all five Council Members will sign the ballot argument. The support of the entire Council in making this case to the public will be extremely important.

There was Council commitment to support his campaign.

#### ITEMS FOR FUTURE AGENDAS

##### New Items –

##### Pending Items –

1. Service Club Signage on Ramsey Street, Gateway project (ETA 6/23/09)
2. Courthouse Development, Land Assembly for Future Development
3. City Purchasing Policy (ETA 6/23/09)
4. Golf Cart Lane Policy for City of Banning (ETA 6/23/09)
5. Update on Sunset Grade Separation (ETA 7/28/09)
6. Schedule Meetings with Our State and County Elected Officials
7. Set New Date for Joint Meeting with Banning School Board
8. Policy for Naming of Street and also Parks – Policy and Procedures

Mayor Pro Tem Hanna said from the last meeting that perhaps they should add the Local Economic Stimulus Program. She said also in regards to Pending Items in regards to the Golf Cart Lane Policy for the City of Banning is still scheduled for the June 23<sup>rd</sup> meeting and also on the agenda will be the Liberty Energy issue.

City Manager said that was correct.

Mayor Botts confirmed that the budget will be on the agenda for the 23<sup>rd</sup> meeting along with the presentations from the Banning Chamber of Commerce and the Banning Cultural Alliance.

City Manager said that is correct and will be scheduled for the Regular CRA Meeting.

Councilmember Franklin said asked if the agenda could actually be placed on Channel 10 so people will know what will be on the agenda without having to go to the website.

City Manager said that they will would to have an annotated agenda on the Channel 10.

## FUTURE MEETINGS

1. Special Council Meeting - Budget Workshop – June 10, 2009 – 2:00 p.m.

## CLOSED SESSION

City Attorney said that the closed session includes: 1) negotiations with the bargaining units over labor negotiations with include IBEW - Utility Unit and IBEW General Unit, CBAM and BPOA; 2) to consider personnel matters pursuant to Government Code Section 54957; 3) pursuant to the provisions of Government Code Section 54956.9(a) to confer with legal counsel with regards to James C. Smith et al, v. Barbara Hanna – Superior Court No. RIC 474602, Appellate Case No. E045670: Status Update; 4) pursuant to the provisions of Government Code Section 54956.9 (b) to confer with legal counsel with regard to one (1) matter of significant exposure to litigation; and 4) pursuant to the provisions of Government Code Section 54956.9 to confer with legal counsel with regard to one matter of potential litigation.

City Attorney said that in the Smith et al, v. Barbara Hanna matter he is happy to indicate that the City has prevailed in that lawsuit. The court determined that Council Member Hanna's comments were not improper and in fact were protected speech at a City Council Meeting. There were no alleged behind the scene efforts to violate the Brown Act. He said that filed a SLAPP motion which is basically a lawsuit saying that somebody has filed litigation to try to interfere with the expression of first amendment rights. Under that set of laws you can actually recover attorney fees so they have the right to recover attorney fees in this matter. There still is the ability on the part of the plaintiffs to appeal to the California Supreme Court.

City Attorney said that with respect to the other items staff will give reports to the Council on those matters.

Meeting went into closed session at 8:30 p.m. and reconvened at 10:05 p.m. with no reportable action.

## ADJOURNMENT

By common consent the meeting adjourned at 10:05 p.m.

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Marie A. Calderon, City Clerk

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

**CITY COUNCIL AGENDA  
CONSENT ITEM**

**DATE:** **June 23, 2009**

**TO:** **City Council**

**FROM:** **Timothy Steenson, Development Services Manager**

**SUBJECT:** **Nuisance abatement charges to be added to the tax rolls of Riverside County, California.**

**RECOMMENDATION:** The City Council adopt Resolution No. 2009-43, a resolution providing for certain nuisance abatement charges to be added to the tax rolls of Riverside County, California.

**JUSTIFICATION:** The City has incurred costs in the process of abating certain nuisances; adoption of the subject Resolution provides for the collection of such costs. Presentation of such Resolution to the City Council is done on an annual basis and can be considered “standard operating procedure” for purposes of cost recovery.

**BACKGROUND:** The City Council adopted Ordinance No. 1326 (Attachment “2”); the Ordinance establishes the procedures for creating assessment liens; authorizing the recordation of liens assessed against certain properties; and requesting the Riverside County Board of Supervisors to levy and collect such charges. According to the terms of this Ordinance, and the procedures required by the Riverside County Auditor’s office, it is necessary for the City Council to adopt a Resolution each year requesting the Board of Supervisors to place the liens on the tax rolls. Liens on all of the subject parcels have been previously recorded against the properties in the office of the County Recorder.

**FISCAL DATA:** The total amount of the assessments to be placed on the tax roll is \$75,327.36. The assessments will be placed on the Auditor-Controller’s Tax Rolls in August of this year and collected with the ad valorem taxes and any other assessments against the properties.

For purposes of clarification, the City participates in the Teeter Plan, whereby the County will reimburse the City 100% of the \$75,327.36 amount placed on the tax roll for weed abatement. This amount is received in two payments during the following year (2009). If for whatever reason the tax bill is not paid for a duration of five years the property possessing the lien is offered at a tax sale at which point, if sold and there are excess proceeds, the City is reimbursed.

RECOMMENDED BY:

Timothy Steenson *bj ss*  
Timothy Steenson,  
Development Services Manager

APPROVED BY:

Brian Nakamura  
Brian Nakamura  
City Manager

REVIEWED BY:

Bonnie Johnson  
Bonnie Johnson  
Finance Director

Attachments:

1. Resolution No. 2009-43
2. Ordinance No. 1326

**ATTACHMENT 1**  
**Resolution No. 2009-43**

**RESOLUTION NO. 2009-43**

**A RESOLUTION OF THE CITY COUNCIL OF THE  
CITY OF BANNING PROVIDING FOR CERTAIN  
NUISANCE ABATEMENT CHARGES TO BE  
ADDED TO THE TAX ROLLS OF RIVERSIDE  
COUNTY, CALIFORNIA.**

**WHEREAS**, pursuant to the authority contained in Chapter 8.48 of the Code of the City of Banning, California, and in California Government Code Sections 38773 and 38773.1, the City of Banning did cause a nuisance to be abated on certain properties in the City of Banning, California, and have had liens levied against them for nuisance abatement charges; and

**WHEREAS**, all proceedings required by Ordinance No. 1326, of the City of Banning, have been duly complied with,

**NOW, THEREFORE, BE IT RESOLVED, AS FOLLOWS:**

**SECTION 1:** That the report of the Building and Safety Department, on file with each proceeding along with their report of the cost of abatement be, and the same is hereby approved. That a copy of said account containing a list of all properties by assessment number and the cost of abating the nuisance thereon, is marked "Exhibit A", attached hereto, and made part hereof by reference.

**SECTION 2:** That the parcel numbers shown on "Exhibit A" are hereby certified to be correct according to the latest records of the Riverside County Assessor.

**SECTION 3:** That the maintenance of the public nuisance on each of the properties shown by assessment number on "Exhibit A" attached hereto, did constitute a health and safety hazard.

**SECTION 4:** That the amounts shown on said "Exhibit A" shall be a lien on the respective properties shown by assessment number, and said liens were levied without regard to property valuation.

**SECTION 5:** Request is hereby made of Riverside County Board of Supervisors that the amount shown on said in the attached "Exhibit A" be added to the current tax rolls for the respective parcels indicated thereof, and collected along with other taxes assessed against said parcels.

**SEE ATTACHED EXHIBIT A**

**PASSED, APPROVED, AND ADOPTED** this 23rd day of June 2009.

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Robert E. Botts, Mayor  
City of Banning

**APPROVED AS TO FORM  
AND LEGAL CONTENT**

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

**ATTEST**

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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. 2009-43 was duly adopted by the City Council of the City of Banning, California, at regular meetings thereof held on the 23<sup>rd</sup> day of June 2009, by the following vote, to wit:

**AYES:**

**NOES:**

**ABSTAIN:**

**ABSENT:**

---

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

**“EXHIBIT A”**

<b>APN</b>	<b>FUND NUMBER</b>	<b>ASSESSMENT</b>
419-072-007	68-2053	350.21
419-072-008	68-2053	350.21
419-072-009	68-2053	350.21
419-082-010	68-2053	350.21
419-120-025	68-2053	365.21
532-120-011	68-2053	524.21
532-180-043	68-2053	350.21
532-180-053	68-2053	742.21
534-091-006	68-2053	350.21
534-091-015	68-2053	350.21
534-093-014	68-2053	477.21
534-121-007	68-2053	414.21
534-133-001	68-2053	1,383.21
534-143-015	68-2053	1,700.21
534-143-016	68-2053	2,000.21
534-151-005	68-2053	493.21
534-151-017	68-2053	366.21
534-151-019	68-2053	350.21
534-151-023	68-2053	414.21
534-162-024	68-2053	390.21
534-172-002	68-2053	972.21
534-172-007	68-2053	1,100.21
534-183-001	68-2053	366.21
534-192-014	68-2053	350.21
534-192-018	68-2053	350.21
534-194-005	68-2053	366.21
534-195-002	68-2053	366.21
534-197-002	68-2053	400.21
534-211-009	68-2053	350.21
534-212-014	68-2053	350.21

APN	FUND NUMBER	ASSESSMENT
534-253-006	68-2053	1,796.21
534-253-007	68-2053	2,672.21
534-282-008	68-2053	390.21
535-070-014	68-2053	725.21
535-080-015	68-2053	5,852.21
535-110-002	68-2053	691.21
535-110-006	68-2053	765.21
535-110-011	68-2053	4,238.21
535-180-010	68-2053	600.21
535-180-025	68-2053	450.21
535-180-033	68-2053	558.21
535-193-003	68-2053	350.21
535-381-007	68-2053	350.21
535-392-004	68-2053	350.21
535-393-006	68-2053	350.21
535-401-020	68-2053	350.21
535-401-023	68-2053	350.21
535-423-014	68-2053	920.21
535-432-013	68-2053	620.21
535-432-015	68-2053	560.21
535-432-017	68-2053	632.21
537-090-032	68-2053	368.21
537-090-034	68-2053	378.21
538-070-008	68-2053	498.21
538-111-008	68-2053	366.21
538-121-019	68-2053	350.21
538-121-020	68-2053	350.21
538-150-012	68-2053	350.21

APN	FUND NUMBER	ASSESSMENT
538-190-014	68-2053	788.21
538-190-016	68-2053	600.21
538-250-004	68-2053	783.21
538-261-001	68-2053	546.21
538-312-012	68-2053	350.21
538-312-036	68-2053	350.21
540-052-003	68-2053	350.21
540-151-021	68-2053	534.21
540-151-022	68-2053	534.21
540-162-005	68-2053	390.21
540-230-007	68-2053	923.21
540-250-002	68-2053	549.21
540-250-003	68-2053	548.21
540-250-036	68-2053	478.21
540-262-001	68-2053	350.21
541-042-010	68-2053	414.21
541-044-008	68-2053	390.21
541-051-008	68-2053	366.21
541-055-012	68-2053	438.21
541-055-017	68-2053	366.21
541-081-010	68-2053	414.21
541-081-014	68-2053	414.21
541-093-022	68-2053	350.21
541-094-005	68-2053	350.21
541-094-008	68-2053	350.21
541-094-020	68-2053	1,172.21
541-094-021	68-2053	392.21
541-110-010	68-2053	414.21
541-110-011	68-2053	671.21
541-121-022	68-2053	744.21
541-122-006	68-2053	350.21

<b>APN</b>	<b>FUND NUMBER</b>	<b>ASSESSMENT</b>
541-122-010	68-2053	560.21
541-131-004	68-2053	414.21
541-135-006	68-2053	350.21
541-162-010	68-2053	514.21
541-170-001	68-2053	353.21
541-170-004	68-2053	353.21
541-170-005	68-2053	350.21
541-170-006	68-2053	378.21
541-170-007	68-2053	520.21
541-191-015	68-2053	353.21
541-191-016	68-2053	353.21
541-191-016	68-2053	353.21
541-200-014	68-2053	4,065.21
541-220-001	68-2053	324.21
541-220-002	68-2053	348.21
541-233-016	68-2053	350.21
541-272-002	68-2053	366.21
541-300-023	68-2053	968.21
541-300-025	68-2053	968.21
541-300-027	68-2053	968.21
541-310-007	68-2053	414.21
541-310-017	68-2053	350.21
541-320-008	68-2053	350.21
543-060-013	68-2053	544.21
543-070-023	68-2053	366.21
543-100-016	68-2053	504.21
543-133-013	68-2053	632.21

**ATTACHMENT 2**  
**Copy of Ordinance No. 1326**

## ORDINANCE NO. 1326

### AN ORDINANCE OF THE CITY OF BANNING PROVIDING FOR THE RECOVERY OF COSTS AND ATTORNEYS' FEES FOR NUISANCE ABATEMENT AS CONTAINED IN CHAPTER 11C OF THE BANNING CITY CODE

THE CITY COUNCIL OF THE CITY OF BANNING DOES ORDAIN AS FOLLOWS:

**SECTION 1.** Existing Article IV: Cost of Recovery is repealed in its entirety.

**SECTION 2.** New Article IV: Cost of Recovery is hereby added to Chapter 11C of the Banning City Code as follows:

#### Section 11C-47. Nuisances – General.

In addition to other penalties provided by law, any condition caused or permitted to exist in violation of any provision of this Code shall be deemed a public nuisance and may be summarily abated as such by the City, and each day such condition continues shall constitute a new and separate offense.

#### Section 11C-48. Nuisance Abatement.

(a) The abatement of any public nuisance by the City as prescribed in this Code shall be at the sole expense of the persons creating, causing, committing or maintaining such nuisance. The cost of abatement of any public nuisance and related administrative costs shall include, but not be limited to: inspection costs; investigation costs; attorneys' fees and costs; and costs to repair and eliminate all substandard conditions. All such fees and costs shall be a personal obligation against any person held responsible for creating, causing, committing or maintaining a public nuisance.

(b) The prevailing party in any action, administrative proceeding or special procedure to abate a public nuisance pursuant to this section may recover its reasonable attorneys' fees in those individual actions or proceedings wherein the City elects, at the initiation of that individual action or proceeding, to seek recovery of its own attorneys' fees. In no action, administrative proceeding, or special proceeding shall an award of attorneys' fees to any prevailing party exceed the amount of reasonable attorneys' fees incurred by the City in the action or proceeding.

(c) The City may collect the cost of abatement of any nuisance and related administrative costs, including but not limited to inspection costs, investigation costs, attorneys' fees and costs, and costs to repair and eliminate all substandard conditions by either: (i) obtaining a court order stating that this reimbursement requirement is a personal obligation of any person held responsible for creating, causing, committing or maintaining a public nuisance, recoverable by the City in the same manner as any civil judgment; (ii) recording a nuisance abatement lien pursuant to this Code against the parcel of land on which the nuisance is maintained, or (iii)

imposing a special assessment pursuant to this Code against the parcel of land on which the nuisance is maintained.

**Section 11C-49. Nuisance Abatement Lien.**

(a) Prior to the recordation of the lien against the parcel of land on which the nuisance is maintained, the owner of record of the parcel of land shall receive notice. The notice of the recordation of the lien against the parcel of land on which the nuisance is maintained shall be served on the owner of record of the parcel of land on which the nuisance is maintained, based on the last equalized assessment roll, or the supplemental roll, whichever is more current. Such notice shall be served in the same manner as a summons in a civil action in accordance with Sections 415.10 et seq. of the Code of Civil Procedure. The date upon which service is made shall be entered on or affixed to the face of the copy of the notice at the time of service. However, service of such notice without such date shall be valid and effective.

(b) A nuisance abatement lien shall be recorded in the Riverside County Recorder's office and from the date of recording shall have the force, effect, and priority of a judgment lien.

(c) A nuisance abatement lien authorized by this section shall specify the amount of the lien, the name of the agency on whose behalf the lien is imposed, the date of the abatement order, the street address, legal description and assessor's parcel number of the parcel on which the lien is imposed, and the name and address of the recorded owner of the parcel.

(d) In the event that the lien is discharged, released, or satisfied, either through payment or foreclosure, notice of the discharge containing the information specified in subsection (b) of this section of this Code shall be recorded by the City. A nuisance abatement lien and the release of the lien shall be indexed in the grantor-grantee index.

(e) A nuisance abatement lien may be foreclosed by the City as a money judgment. The City may recover from the property owner any costs incurred regarding the processing and recording of the lien and providing notice to the property owner as part of its foreclosure action to enforce the lien or as a condition of removing the lien upon payment.

**Section 11C-49.1. Special Assessment.**

(a) As an alternative to the recordation of a nuisance abatement lien, the City may make the cost of abatement a special assessment against the parcel of land on which the nuisance is maintained.

(b) Notice shall be given by certified mail, to the property owner, if the property owner's identity can be determined from the county assessor's or county recorder's records. Notice pursuant to this section of this Code shall be given at the time of imposing the assessment and shall specify that the property may be sold after three years by the tax collector for unpaid delinquent assessments. The tax collector's power of sale shall not be affected by the failure of the property owner to receive notice pursuant to this section of this Code.

(c) The assessment may be collected at the same time and in the same manner as ordinary municipal taxes are collected, and shall be subject to the same penalties and the same procedure and sale in case of delinquency as provided for with ordinary municipal taxes. All laws applicable to the levy, collection and enforcement of municipal taxes shall be applicable to the special assessment. However, if any real property to which the cost of abatement relates has been transferred or conveyed to a bona fide purchaser for value, or if a lien of a bona fide encumbrancer for value has been created and attaches thereon, prior to the date on which the first installment of the taxes would become delinquent, then the cost of abatement shall not result in a lien against the real property but instead shall be transferred to the unsecured roll for collection.

(d) The City shall duly execute a report detailing the amount of the special assessment and shall send same to the tax division of the County Auditor-Controller's office, whereupon it shall be the duty of the Auditor-Controller to add the amounts of the respective assessments to the next regular tax bills levied against the respective lots and parcels of land for municipal purposes; and, thereafter, the amounts shall be collected at the same time and in the same manner as ordinary municipal taxes are collected, and shall be subject to the same penalties and the same procedure under foreclosure and sale in case of delinquency as provided for ordinary municipal taxes.

(e) City may conduct a sale of vacant residential developed property for which the payment of that assessment is delinquent, subject to the requirements applicable to the sale of property pursuant to Section 3691 of the Revenue and Taxation Code.

(f) Notices or instruments relating to the abatement proceeding or special assessment shall be entitled to recordation.

#### **Section 11C-49.2. Graffiti Abatement – General Provisions.**

(a) The abatement of any nuisance resulting from the defacement of the property of another by graffiti or any other inscribed material as prescribed in this Code shall be at the sole expense of the person, minor or other person creating, causing or committing the nuisance.

(b) If the person creating, causing or committing the nuisance is a minor, the parent or guardian having custody and control of the minor shall be jointly and severally liable with the minor. The City shall make the expense of abatement of any nuisance, resulting from the defacement by a minor of the property of another by graffiti or any other inscribed material, a lien against the property of a parent or guardian having custody and control of the minor and/or a personal obligation against the parent or guardian having custody and control of the minor.

(c) The prevailing party in any action, administrative proceeding or special procedure to abate a nuisance pursuant to this section may recover its reasonable attorneys' fees in those individual actions or proceedings wherein the City elects, at the initiation of that individual action or proceeding, to seek recovery of its own attorneys' fees. In no action, administrative proceeding, or special proceeding shall an award of attorneys' fees to any prevailing party exceed the amount of reasonable attorneys' fees incurred by the City in the action or proceeding.

(d) The City may collect the cost of abatement of any nuisance, resulting from the defacement of the property of another by graffiti or any other inscribed material, and related administrative costs by either: (i) obtaining a court order stating that this reimbursement requirement is a personal obligation of the minor or other person or parent or guardian having custody and control over the minor who committed the defacement, recoverable by the City in the same manner as any civil judgment; (ii) recording a nuisance abatement lien against a parcel of land owned by the minor or other person or parent or guardian having custody and control over the minor who committed the defacement; or (iii) making the cost of abatement of a nuisance resulting from the defacement of the property of another, a special assessment against a parcel of land owned by the minor or other person or parent or guardian having custody and control over the minor who committed the defacement.

**Section 11C-49.3. Graffiti – Nuisance Abatement Lien.**

(a) Prior to the recordation of a graffiti nuisance abatement lien, notice shall be given to the person or parent or guardian having custody and control over the minor who committed the defacement by graffiti or any other inscribed material. Such notice shall be served in the same manner as a summons in a civil action in accordance with Sections 415.10 et seq. of the Code of Civil Procedure. The date upon which service is made shall be entered on or affixed to the face of the copy of the notice at the time of service. However, service of such notice without such date shall be valid and effective.

(b) A graffiti nuisance abatement lien shall be recorded in the Riverside County Recorder's office and from the date of recording shall have the force, effect, and priority of a judgment lien.

(c) A graffiti nuisance abatement lien authorized by this section shall specify the amount of the lien, the name of the agency on whose behalf the lien is imposed, the date of the abatement order, the street address, legal description and assessor's parcel number of the parcel on which the lien is imposed, and the name and address of the recorded owner of the parcel.

(d) If the lien is discharged, released, or satisfied, either through payment or foreclosure, notice of the discharge containing the information specified in subsection (b) of this section of this Code shall be recorded by the City. A graffiti nuisance abatement lien and the release of the lien shall be indexed in the grantor-grantee index.

(e) A graffiti nuisance abatement lien may be satisfied through foreclosure in an action brought by the City. The City may recover from the property owner any costs incurred regarding the processing and recording of the lien and providing notice to the property owner as part of its foreclosure action to enforce the lien or as a condition of releasing the lien upon payment.

**Section 11C-49.4. Graffiti – Special Assessment.**

(a) As an alternative to the recordation of a graffiti nuisance abatement lien, the City may make the cost of the abatement of any nuisance resulting from the defacement by a minor or other person of property of another by graffiti or other inscribed material, and related

administrative costs, a special assessment against a parcel of land owned by the minor or other person or by the parent or guardian having custody and control of the minor.

(b) The assessment may be collected at the same time and in the same manner as ordinary municipal taxes are collected, and shall be subject to the same penalties and the same procedure and sale in case of delinquency as provided for ordinary municipal taxes. All laws applicable to the levy, collection and enforcement of municipal taxes shall be applicable to the special assessment. However, if any real property to which the cost of abatement relates has been transferred or conveyed to a bona fide purchaser for value, or if a lien of a bona fide encumbrancer for value has been created and attaches thereon, prior to the date on which the first installment of the taxes would become delinquent, then the cost of abatement shall not result in a lien against the real property but instead shall be transferred to the unsecured roll for collection.

(c) Notices or instruments relating to the abatement proceeding or special assessment may be recorded.

(d) Upon entry of a second or subsequent civil or criminal judgment within a two-year period finding a minor or other person or parent or guardian having custody and control of a minor responsible for a condition that may be abated as a nuisance pursuant to subsection (a) of this section of this Code, the court may order such minor or other person or parent or guardian having custody and control of such minor to pay treble the costs of the abatement."

#### **Section 11C-49.5. General Penalty.**

(a) In addition to any other remedy provided by law, the City may recover any fee, cost or charge, including any attorneys' fees incurred in the enforcement of any provision of the Zoning Code, the Housing Code, Building Code, Electrical Code, Plumbing Code, Mechanical Code or the Uniform Code for the Abatement of Dangerous Buildings as provided in this Code. The amount of any such fee, cost, or charge, including any attorneys' fees shall not exceed the actual cost incurred performing the inspections and enforcement activity, including but not limited to permit fees, fines, late charges and interest.

(b) Subsection (a) of this section of this Code, shall not apply to any enforcement, abatement, correction or inspection activity regarding a violation of any provision of sections of the Zoning Code, the Housing Code, Building Code, Electrical Code, Plumbing Code, Mechanical Code or the Uniform Code for the Abatement of Dangerous Buildings as provided in this Code in which the violation was evident on the plans that received the building permit.

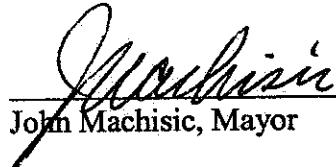
(c) Subsection (a) of this section of this Code shall not apply to owneroccupied residential dwelling units.

**SECTION 3.** The City Clerk shall cause this Ordinance to be published in a newspaper of general circulation printed and published in the county and circulated in the City within fifteen (15) days after its passage, in accordance with Section 36933 of the Government Code, shall certify to the adoption and publication of this Ordinance, and shall cause this Ordinance and its certification, together with proof of publication, to be entered in the Book of Ordinances of the Council of this City.

**SECTION 4.** Severability. If any section, subsection, clause or phrase of this Ordinance is for any reason held to be unconstitutional, or otherwise invalid such decision shall not affect the validity of the remaining sections of this Ordinance. The City Council hereby declares that it would have passed this Ordinance and each section, subsection, clause and phrase thereof irrespective of the fact that any one or more other sections, subsections, clauses, or phrases be declared invalid.

**INTRODUCED** at the regular meeting of the 9<sup>th</sup> day of August, 2005.

**PASSED, APPROVED AND ADOPTED** by the City Council of the City of Banning at a regular meeting held on this 13<sup>th</sup> day of September, 2005.



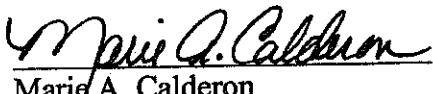
John Machisic, Mayor

APPROVED AS TO FORM  
AND LEGAL CONTENT:



Julie Hayward Biggs  
City Attorney

ATTEST:



Marie A. Calderon  
City Clerk

**CERTIFICATION:**

I, Marie A. Calderon, City Clerk of the City of Banning, California, do hereby certify that Ordinance No. 1326 was duly introduced at a regular meeting of the City Council of the City of Banning, held on the 9<sup>th</sup> day of August, 2005, and was duly adopted at a regular meeting of said City Council on the 13<sup>th</sup> day of September, 2005, by the following vote, to wit:

AYES: Councilmembers Hanna, Palmer, Salas, Welch, Mayor Machisic

NOES: None

ABSENT: None

ABSTAIN: None



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

**CITY COUNCIL  
CONSENT ITEM**

**Date:** **June 23, 2009**

**TO:** **City Council**

**FROM:** **Bonnie J. Johnson, Finance Director**

**SUBJECT:** **Recommendation to adopt Resolution No. 2009-47, a resolution of the City Council of the City of Banning, approving a loan and repayment between the City and the Redevelopment Agency to facilitate the funding of Redevelopment Capital Projects**

**RECOMMENDATION:** "That the City Council adopt Resolution No. 2009-47, a resolution of the City Council of the City of Banning, approving a loan and repayment between the City and the Redevelopment Agency to facilitate the funding of Redevelopment Capital Projects."

**JUSTIFICATION:** This loan is necessary in order to use tax increment revenue for funding various CRA capital project expenses.

**BACKGROUND/ANALYSIS:** This is a housekeeping item. Historically the Agency has simply made operating transfers from the debt service fund, the fund in which all tax increment must be deposited, into the Capital Project Fund to pay for capital project costs other than those paid for with bond proceeds. Under the California Health and Safety Code, tax increment can only be used to pay indebtedness of the Agency. The attached resolution will establish indebtedness on behalf of the Agency as of the fiscal year ending June 30, 2009 in the amount necessary to cover project expenses for 2008-09. The loan will be made from the General Fund to the Agency on June 30, 2009 and then be repaid by the Agency to the General Fund on July 1, 2009. This transaction results in revenue (i.e. loan proceeds) to the capital project fund of the Agency and loan repayment (i.e. expense) from the debt service fund of the Agency. There is no net fiscal effect on the General Fund. Failure to approve the attached resolution will result in the Agency reporting to the County on its Statement of Indebtedness more funds than it actually has available. In other words, on the Statement of Indebtedness, an annual required filing, the Agency can only report indebtedness. To the extent tax increment is spent on items that do not constitute debt, the report will reflect more available fund balance than the Agency actually has. Furthermore, the Agency will only continue to receive the maximum tax increment if it reports a sufficient amount of debt. In as much as the Agency now has two outstanding bond issues, this will not be a problem in the short-term, but ultimately if funds are spent on items other than qualifying indebtedness, the Agency's tax increment allocations from the County may fall short of meeting all its obligations.

**FISCAL DATA:** No additional appropriations are necessary. The budget has been prepared to accommodate the necessary movement of funds.

**RECOMMENDED BY:**



Bonnie Johnson  
Finance Director

**APPROVED BY:**



Brian Nakamura  
City Manager

**RESOLUTION NO. 2009-47**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BANNING APPROVING  
A LOAN AND REPAYMENT BETWEEN THE CITY AND THE REDEVELOPMENT  
AGENCY TO FACILITATE THE FUNDING OF REDEVELOPMENT CAPITAL  
PROJECTS**

**WHEREAS**, Under the California Health and Safety Code, tax increment revenue of the Agency can only be used to pay indebtedness of the Agency; and

**WHEREAS**, the Agency will only continue to receive its full allocation of tax increment revenue by incurring indebtedness; and

**WHEREAS**, the Agency desires to use a portion of its excess tax increment on various capital projects; and

**WHEREAS**, a short-term loan from the City to the Agency establishes qualified indebtedness under the California Health and Safety Code; and

**WHEREAS**, adequate fund and cash balances are available in the City's General Fund to fund the recommended loan;

**NOW, THEREFORE, BE IT RESOLVED** by the City Council of the City of Banning, California that Council hereby authorizes a loan from the City's General Fund to the Redevelopment Agency on June 30, 2009 in the amount of \$2,936,635. The loan will be repaid to the General Fund July 1, 2009. No interest will accrue on this loan.

**PASSED, APPROVED AND ADOPTED** this 23rd day of June 2009.

---

Robert E. Botts, Mayor  
City of Banning

APPROVED AS TO FORM AND  
LEGAL CONTENT:

---

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

ATTEST:

---

Marie A. Calderon, City Clerk  
City of Banning

**CERTIFICATION**

I, MARIE A. CALDERON, City Clerk of the City of Banning, California, do hereby certify that the foregoing Resolution No. 2009-47 was duly adopted by the City Council of the City of Banning, California at a regular meeting thereof held on the 23rd day of June, 2009 by the following vote, to wit:

AYES:

NOES:

ABSTAIN:

ABSENT:

---

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

**CITY COUNCIL AGENDA  
CONSENT ITEM**

**DATE:** **June 23, 2009**

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

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

**SUBJECT:** **Resolution No. 2009-50, "Awarding a contract to Packham & Toomey, Inc. of Hemet, California in an amount of \$42,660.00 for emergency upgrade to the City Yard Fueling Station"**

**RECOMMENDATION:** The City Council adopts Resolution No. 2009-50:

- I.** Awarding a contract to Packham & Toomey, Inc. of Hemet, California in the amount of \$35,550.00 plus a contingency of 20% in the amount of \$7,110.00 for emergency repair to the City Yard Fueling Station; and,
- II.** Authorizing the Director of Finance to make necessary budget adjustments and appropriations to cover expenses in an amount of \$35,550.00 proposal plus a contingency of 7,110.00 totaling \$42,660.00.

**JUSTIFICATION:** Immediate action is required in order to procure the necessary equipment and services in order to prevent the loss of use of the Fueling Station, which is necessary to provide fuel for the public vehicle fleet that includes police cars, fire trucks, school buses, and utility service vehicles.

**BACKGROUND:** The City of Banning owns and maintains the Fueling Station located at 176 E. Lincoln Street (part of the city yard). This station is utilized by the City's vehicle fleet for refueling of gasoline and diesel powered vehicles. The Banning Unified School District also utilizes this fueling station through an agreement with the City.

The Fueling Station is operated under the authority of the South Coast Air Quality Management District (SCAQMD) Permit to Operate No. N19531. Since 2001, the California Air Resources Board (CARB) has adopted a number of significant enhancements to gasoline dispensing facilities' (GDFs') vapor recovery systems. These efforts are necessary to ensure the continued effective operation of the vapor recovery systems during the transfer and dispensing of gasoline. As the regional air pollution control agency responsible for permitting and enforcement activities related to GDFs, the South Coast Air Quality Management District (SCAQMD) enforces these new requirements.

Phase I refers to the transfer of gasoline into fuel storage tanks. As of April 1, 2005, all GDFs were required to be equipped with Phase I vapor recovery systems on their underground tanks to meet enhanced vapor recovery (EVR) standards.

Phase II vapor recovery systems control emissions associated with vehicle fueling and the storage of fuel at a GDF. Phase II EVR systems are certified to several new standards, including Onboard Refueling Vapor Recovery (ORVR systems for new vehicles) compatibility, more stringent spillage and "dripless nozzle" requirements, in-station diagnostics and storage tank pressure limits. GDFs with underground storage tanks must upgrade to Phase II EVR by April 1, 2009. The EVR Phase II systems will reduce gasoline vapor emissions that contribute to ozone formation to protect public health and meet California clean air attainment requirements. Some of these emissions are air toxics that can cause cancer. The proposed contract is to upgrade the City Yard Fueling Station to meet the requirements for Phase II EVR as soon as possible. Non-compliance with these regulations would require closure of the Fueling Station and may include penalties and fines from the SCAQMD.

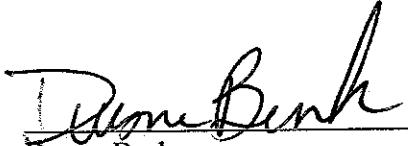
Staff solicited proposals from three contractors listed on the Certified Installer's List with the following results:

No.	Contractor	Certification No.	Total Bid
1	Packham & Toomey, Hemet, CA	2054363761	\$35,550.00
2	TLM Petro Labor Force, Downey, CA	327353761	\$36,450.00
3	Inland Petroleum Equipment and Repair, Bloomington, CA	1723663761	\$50,005.31

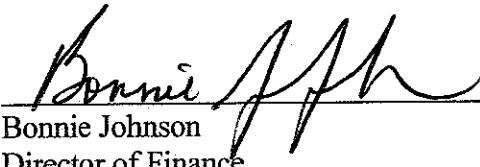
Public Contract Code Section 22050 authorizes the City of Banning to take corrective actions necessary to respond to an emergency situation without giving a formal bid notice. Staff requested bids in accordance with the informal bid procedures (BMC § 3.24.080) from contractors certified to perform the Phase II EVR upgrades. Section 2.24.040 of the Code defines an emergency as a situation where immediate procurement is essential to protect the public health, safety, or *to avoid interruption in service*. Staff believes the abovementioned upgrades are necessary and need to be addressed, as expeditiously as possible, in order to avoid such an interruption in service.

**FISCAL DATA:** The current estimated fund balance in the Air Quality Management Fund is \$245,790.00. An appropriation from this fund to Account No. 132-4900-446.30-06 (CONTRACT SVC REPAIR) in the amount of \$42,660.00, which includes a 20% contingency, is requested to fund the contract with Packham & Toomey, Inc. for the upgrade of the gasoline fueling facility at the City Yard.

**RECOMMENDED BY:**

  
\_\_\_\_\_  
Duane Burk  
Director of Public Works

**REVIEWED BY:**

  
\_\_\_\_\_  
Bonnie Johnson  
Director of Finance

**APPROVED BY:**

  
\_\_\_\_\_  
Brian Nakamura  
City Manager

**RESOLUTION NO. 2009-50**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BANNING,  
CALIFORNIA, AWARDING AN CONTRACT TO PACKHAM &  
TOOMEY, INC. OF HEMET, CALIFORNIA IN THE AMOUNT OF  
\$42,660.00 FOR THE EMERGENCY UPGRADE OF THE FUELING  
STATION AT THE CITY YARD**

**WHEREAS**, the City of Banning owns and maintains the Fueling Station located at 176 E. Lincoln Street and this station is utilized by the City's public vehicle fleet that includes police cars, fire trucks, buses, and utility service vehicles; and

**WHEREAS**, the station also provides fueling services to other agencies including Banning Unified School District; and

**WHEREAS**, the fueling station is operated under the authority of the South Coast Air Quality Management District (SCAQMD) Permit to Operate No. N19531; and

**WHEREAS**, gas dispensing facilities (GDF) must upgrade to Phase II enhanced vapor recovery (EVR) standards by April 1, 2009, or face closure; and, may include penalties and fines from SCAQMD; and

**WHEREAS**, staff solicited proposals from three certified contractors to perform the necessary Phase II EVR upgrade to the fueling facility in accordance with the informal bid procedure; and

**WHEREAS**, in the case of an emergency, which does not permit the delay resulting from the formal bidding process, Public Contract Code Section 22050 authorizes the City of Banning to take corrective actions necessary to respond to the situation without bid notice; and

**WHEREAS**, Packham & Toomey, Inc. of Hemet California provided the lowest bid in response to the informal bidding process;

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

**Section I.** The City Council of the City of Banning hereby finds that it is necessary to act immediately to procure the equipment and services required to upgrade the Fueling Station in order to avoid interruption of services.

**Section II.** That the City Council of the City of Banning awards an emergency contract to Packham & Toomey of Hemet, California in an amount "Not to Exceed" \$42,660.00 and directs that the City Manager take the necessary action to complete the upgrade to the Fueling Station in order to avoid interruption of services.

**Section III.** Authorize the Director of Finance to make necessary budget adjustments and appropriations related to the Fueling Station Phase II EVR upgrade in an amount "Not to Exceed" \$42,660.00.

**Section IV.** The City Manager is hereby authorized to execute the contract for the Phase II EVR Fueling Station repairs. This authorization will be rescinded if the parties do not execute the contract agreement within thirty (30) days of the date of this resolution.

**PASSED, ADOPTED AND APPROVED** this 23<sup>rd</sup> day June, 2009.

---

Robert E. Botts, Mayor

**ATTEST:**

---

Marie A. Calderon, City Clerk

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

---

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

**CERTIFICATION:**

I, Marie A. Calderon, City Clerk of the City of Banning, California, do hereby certify that the foregoing Resolution No. 2009-50 was adopted by the City Council of the City of Banning at a Regular Meeting thereof held on the 23<sup>rd</sup> day of June, 2009.

**AYES:**

**NOES:**

**ABSENT:**

**ABSTAIN:**

---

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

**CITY COUNCIL AGENDA  
CONSENT ITEM**

**Date:** June 23, 2009

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

**FROM:** Brian S. Nakamura, City Manager

**SUBJECT:** Resolution 2009-51 Approving the Maximum Compensation and Benefits in Certain City Department Director Employment Contracts, Pursuant to Section 2.08.090 (C) of the Banning Municipal Code.

**RECOMMENDATION:**

That the City Council approve Resolution 2009-51 establishing the maximum compensation and benefits in certain City department director employment contracts, pursuant to Section 2.08.090 (C) of the Banning Municipal Code

**BACKGROUND & ANALYSIS:**

Banning Municipal Code § 2.08.090(C) requires that the City Council approve, by ordinance or resolution, the maximum compensation and benefits expressly or impliedly included in the Contracts prior to their taking effect.

**FISCAL IMPACT:**

The current FY 2008/09 and proposed FY 2009/10 budget adequately address compensation and benefits for Department Directors.

**RECOMMENDED BY:**



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Brian Nakamura  
City Manager

RESOLUTION NO. 2009-51

A RESOLUTION OF THE CITY OF BANNING, CALIFORNIA, APPROVING THE MAXIMUM COMPENSATION AND BENEFITS IN CERTAIN CITY DEPARTMENT DIRECTOR EMPLOYMENT CONTRACTS, PURSUANT TO SECTION 2.08.090(C) OF THE BANNING MUNICIPAL CODE.

WHEREAS, certain City of Banning Department Directors, including the Finance Director, Community Development Director, Public Works Director, Public Utility Director, and Recreation Director, are anticipated to enter into new contracts of employment, to take effect July 1, 2009 (the "Contracts");

WHEREAS, the City Manager has authority to enter into the Contracts with City Department Directors on behalf of the City, pursuant to Banning Municipal Code § 2.08.090;

WHEREAS, Banning Municipal Code § 2.08.090(C) requires that the City Council approve, by ordinance or resolution, the maximum compensation and benefits expressly or impliedly included in the Contracts prior to their taking effect.

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

**Section I.** The City Council hereby approves the maximum salary expressly or impliedly included in the Contracts, provided that such salary shall not exceed the maximum salary for each respective position in the most recent Classification and Compensation Resolution approved by the Council at any given time.

**Section II.** The City Council hereby approves the maximum level of benefits and other compensation, not including salary, expressly or impliedly included in the Contracts provided that such level of benefits and other compensation for each Department Director shall not exceed the following levels:

A. Professional Development. As determined appropriate by the City Manager

B. Paid Leave.

i. Sick Leave: 96 hours

ii. Vacation Leave. 160 hours

iii. Holiday Leave. 96 hours

iv. Executive Leave. 96 hours

C. Cafeteria/Health & Welfare Benefits. \$17,337.84 annually, but increases each time premiums for the City's health insurance increases. Funds may be used for any of the City's medical plans or, upon proof of coverage under spouse's plan, this amount may be taken as taxable income.

- D. Retirement. 8% employee rate for the 2.5% @ 55 full formula CalPERS
- E. Management Incentive. 4% of salary
- F. Automobile Allowance. \$250.00
- G. City Flexible Spending Plan. \$0
- H. Life Insurance. \$150,000.00
- I. Uniforms & Business Equipment. \$0
- J. Bonding. \$0
- K. Incentives. Education \$275.00 per month
- L. Eyewear/Eyecare Reimbursement. \$250.00 maximum every two years

**Section III.** The levels of salary and benefits contained in Sections I and II above are maximum levels that may be received under the Contracts. The Department Heads are not entitled to these maximum levels. Each Department Head is entitled only to the level of salary and benefits contained in his or her respective Contract.

**PASSED, APPROVED, and ADOPTED** this 23rd day of June, 2009.

---

Robert E. Botts, Mayor  
City of Banning

**ATTEST:**

---

Marie A. Calderon, City Clerk  
City of Banning

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

---

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

**CERTIFICATION:**

I, Marie A. Calderon, City Clerk of the City of Banning, California, do hereby certify that Resolution No. 2009-51 was adopted by the City Council of the City of Banning at the regular meeting thereof held on the 23rd day of June, 2009.

AYES: COUNCILMEMBER:

NOES: COUNCILMEMBER:

ABSENT: COUNCILMEMBER:

ABSTAIN: COUNCILMEMBER:

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Marie A. Calderon, City Clerk  
City of Banning

**CITY COUNCIL AGENDA  
CONSENT ITEM**

**Date:** **May 26, 2009**

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

**FROM:** **Brian S. Nakamura, City Manager**

**SUBJECT:** **Approval of Employment Agreement between the City of Banning and  
Zaiton Abu-Bakar for the position of Community Development  
Director**

**RECOMMENDATION:**

That the City Council approve the employment agreement including compensation and benefits for Ms. Zaiton Abu-Bakar to serve as the City's Community Development Director.

**BACKGROUND & ANALYSIS:**

The City, during the past two months, conducted an intensive recruitment for a Community Development Director. After extensive review of applications and interviews Ms. Abu-Bakar's skills and abilities are recognized as best suited for the position.

**FISCAL IMPACT:**

The Community Development Director position is adequately funded for in the current FY 2008/09 and proposed FY 2009/10 budget.

**RECOMMENDED BY:**



Brian Nakamura  
City Manager

**CITY OF BANNING  
EMPLOYMENT AGREEMENT  
For the Position of  
COMMUNITY DEVELOPMENT DIRECTOR**

This EMPLOYMENT AGREEMENT ("Agreement") is entered into this 23rd day of June, 2009, by and between the CITY OF BANNING ("City"), a California general law city and municipal corporation, and Zaiton Abu Bakar ("Employee"), an individual, pursuant to the authority granted to the City Manager to enter into department head employment contracts on behalf of the City under Banning Municipal Code ("BMC") § 2.08.090.

**RECITALS**

WHEREAS, the City desires to employ Employee to serve in the position of Community Development Director for the City; and

WHEREAS, Employee desires to perform and assume responsibility for the provision of professional services to the City in the position of Community Development Director; and

WHEREAS, the parties wish to establish the terms and conditions of Employee's services to the City through this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants contained herein, City and Employee hereby agree as follows:

**AGREEMENT**

**1.0 EMPLOYMENT & DUTIES**

1.1 Duties. City hereby employs Employee as Community Development Director for the City to perform the functions and duties of that position, as described in the job description attached hereto as Exhibit A and by reference made a part hereof, and to perform such other duties and functions as the City Manager shall from time to time assign consistent with such duties. Employee further agrees to perform all such functions and duties to the best of his or her ability and in an efficient, competent, and ethical manner.

1.2 Work Schedule. Employee is expected to engage in the hours of work that are necessary to fulfill the obligations of the position. Employee acknowledges that proper performance of the duties of the Community Development Director will require Employee to generally observe normal business hours and will also often require the performance of necessary services outside of normal business hours. However, the City intends that reasonable time off be permitted to Employee, such as is customary for exempt employees so long as the time off does not interfere with normal business. Employee's compensation (whether salary or benefits or other allowances) is not based on hours worked and Employee shall not be entitled to any compensation for overtime.

1.3 Other Activities. Employee shall focus his or her professional time, ability, and attention to City business during the term of this Agreement. Employee shall not engage, without the express prior written consent of the City Manager, in any other business duties or pursuits whatsoever or, directly or indirectly, render any services of a business, commercial, or professional nature to any other person or organization, whether for compensation or otherwise, that is or may be competitive with the City, that might cause a conflict-of-interest with the City, or that otherwise might interfere with the business or operation of the City or the satisfactory performance of Employee's duties as Community Development Director.

1.4 Employment Status. Employee shall serve at the will and pleasure of the City Manager under this Agreement and understands he or she is an "at-will" employee serving at the pleasure of City Manager and subject to summary dismissal without any right of notice or hearing, including any so-called *Skelly* hearing. City may terminate the employment of Employee at any time, as set forth in Section 3.3 below.

1.5 Exemption from Personnel System. The City Council intends to amend BMC § 2.68.020 to expressly exempt all department heads from the City's Personnel System established in Chapter 2.68 of the BMC ("Amendment"). Employee agrees that he or she will be subject to the Amendment upon its effective date. In the interim period between the execution of this Agreement and the effective date of the Amendment, Employee agrees that he or she is exempt from the City's Personnel System.

1.6 City Documents. All data, studies, reports, and other documents prepared by Employee while performing her duties during the term of this Agreement shall be furnished to and become the property of the City, without restriction or limitation on their use. All ideas, memoranda, specifications, plans, procedures, drawings, descriptions, computer program data, input record data, written information, and other materials either created by or provided to Employee in connection with the performance of this Agreement shall be held confidential by Employee to the extent permitted by applicable law. Such materials shall not, without the prior written consent of the City Manager, be used by Employee for any purposes other than the performance of his or her duties. Nor shall such materials be disclosed to any person or entity not connected with the performance of services under this Agreement, except as required by law.

1.7 FLSA Exempt Status. Employee agrees that his or her position is that of an exempt employee for the purposes of the Fair Labor Standards Act.

## **2.0 COMPENSATION AND REIMBURSEMENT**

2.1 Compensation. For the services rendered pursuant to this Agreement, Employee shall be compensated One Hundred Twelve Thousand Four Hundred Sixty Seven and 00/100 Dollars (\$112,467.00) annually ("Salary"), which shall be paid on a pro-rated basis bi-weekly at the same time as other employees of City are paid. Such Salary shall be adjusted for payroll taxes, workers' compensation, and other payroll-related liability costs.

2.2 Annual Salary Review. The City Manager and Employee agree to conduct an annual salary review concurrently with the annual performance evaluation set forth in Section 5.2.

2.3 Effectuating Salary Adjustment. Following the annual performance evaluation set forth in Section 5.2 and the annual salary review set forth in Section 2.2, the City Manager may increase Employee's Salary and benefits package based on the results of those reviews. Any adjustments in the Salary and/or benefits following the review under Section 5.2 shall be at the sole discretion of the City Manager, subject to the maximum salary permitted for the position of Community Development Director in the most recent Classification and Compensation Resolution approved by the Council.

2.4 Reimbursement. City shall reimburse Employee for reasonable and necessary travel, subsistence, and other business expenses incurred by Employee in the performance of his or her duties. All reimbursements shall be subject to and in accordance with California law and the City's adopted Employee Reimbursement Policy.

### 3.0 TERM

3.1 Commencement & Effective Date. Employee shall commence his or her services hereunder on July 1, 2009, which shall also be deemed the effective date of this Agreement.

3.2 Term. This Agreement shall remain in effect from the effective date specified at Section 3.1 until this Agreement is terminated pursuant to Section 3.3 or until the effective date of any Management Resolution adopted by the City Council which sets the terms and conditions of employment for management employees, so long as the salary and benefits under the Management Resolution are not less than those provided hereunder.

3.3 Termination by City Manager or Employee. The City Manager may terminate this Agreement at any time with or without cause, provided that if termination is with cause, such termination may be immediate and without prior notice. If termination is without cause, a reasonable period of notice as determined by City shall be required before the effective date of termination. Employee may terminate this Agreement at any time with or without cause upon giving written notice a reasonable time before the effective date of termination, as determined by the City.

3.4 Cause. For the purposes of this Agreement, cause for termination shall include, but not be limited to, the following: theft or attempted theft, material dishonesty, willful or persistent material breach of duties, engaging in unlawful discrimination or harassment of employees or any third party while on City premises or time, conviction of a felony, engaging in conduct tending to bring embarrassment or disrepute to the City, and unauthorized or excessive absences.

3.5 Waiver of Certain Termination Rights. Employee expressly waives any rights provided under the City's Personnel System or Policies, and any rights provided to the Recreation Director under the Banning Municipal Code or under State or Federal law to any form of pre- or post-termination hearing, appeal, or other administrative process pertaining to termination, except any California or Federal constitutional right Employee may have to a name-clearing hearing.

#### 4.0 SEVERANCE

4.1 Severance. In the event Employee is terminated within two years of Employee's start date, City shall pay to Employee severance in an amount equal to the monthly salary of Employee multiplied by three, excluding deferred compensation or the value of any other benefits. If Employee is terminated at any time later than two years after Employee's start date, City shall pay to Employee severance in an amount equal to the monthly salary of Employee multiplied by six, excluding deferred compensation or the value of any other benefits.

4.2 No Severance Pay if Termination for Cause or Initiated by Employee. Should Employee be terminated for cause, the City shall have no obligation to pay the severance provided for in Section 4.1 above. Employee also expressly agrees that he or she shall not be entitled to any severance pay as the result of the termination initiated by Employee.

4.3 Sole Rights. The severance rights provided in this Section 4.0 and any rights to be conferred by the Management Resolution shall constitute the sole and only entitlement of Employee in the event of termination, and Employee expressly waives any and all other rights except as provided herein.

#### 5.0 PERFORMANCE EVALUATIONS.

5.1 Purpose. The performance review and evaluation process set forth herein is intended to provide review and feedback to Employee so as to facilitate a more effective management of the City. Nothing herein shall be deemed to alter or change the employment status of Employee (as set forth in Section 1.4 above), nor shall this Section 5.0 be construed as requiring "cause" to terminate this Agreement, or the services of Employee hereunder.

5.2 Annual Evaluation. The City Manager shall conduct a review and evaluate the performance of Employee on an annual basis, commencing one year from the date of this Agreement. The City Manager shall meet with Employee to establish written criteria for performance which shall serve as the basis of the subsequent performance evaluation. The evaluation shall be predicated on such criteria, as well as any other deemed appropriate by the City Manager, provided it is communicated in writing to Employee. Thereafter, the City Manager shall provide Employee with a written summary statement of the performance evaluation and shall provide an opportunity for Employee to discuss the contents thereof with him or her for the purpose of improving the overall effectiveness of Employee in the position, including an opportunity for Employee to comment on the evaluation should Employee so elect. Such review and evaluation shall be conducted concurrently with the annual salary review provided for in section 2.2 above.

## **6.0 BENEFITS AND OTHER COMPENSATION.**

6.1 Benefits and Other Compensation. Employee shall be entitled to the benefits and other compensation contained in Exhibit B to this Agreement.

## **7.0 OTHER TERMS – CONDITIONS OF EMPLOYMENT**

7.1 Disability Program. Employee agrees to pay the cost of membership in the City-approved long-term disability insurance program. Employee agrees that such premiums will be paid with after-tax dollars in order to maintain the tax-free benefit status to both the City and Employee in the event benefits are paid. It is agreed between the parties that in the event of disability of Employee, Employee shall enjoy all the rights and privileges to which he or she is entitled under state or federal law.

7.2 Other Terms. The City Manager, in consultation with Employee, shall establish any such other terms and conditions of employment as he or she may determine from time to time, provided such terms and conditions are reduced to writing and signed by Employee and the City Manager.

## **8.0 GENERAL PROVISIONS**

8.1 Entire Agreement. This Agreement represents the entire agreement between the parties and supersedes any and all other agreement, either oral or in writing, between the parties with respect to Employee's employment by City and contains all of the covenants and agreements between the parties with respect to such employment. No ordinances or resolutions of City governing employment, including the Personnel System, shall apply unless specified herein. Each party to this Agreement acknowledges that no representations, inducements, promises or agreements, orally or otherwise, have been made by either party, or anyone acting on behalf of either party, which are not embodied herein, and that no other agreement, statement or promises not contained in this Agreement shall be valid or binding upon either party.

8.2 Notices. Any notice required or permitted by this Agreement shall be in writing and shall be personally served or shall be sufficiently given when served upon the other party as sent by United States Postal Service, postage prepaid and addressed as follows:

To City or City Manager:

City Manager  
City of Banning  
Post Office Box 998  
Banning, CA 92220

To Employee:

Zaiton Abu Bakar  
4146 Margarita Street  
Chino, CA 91710

Notices shall be deemed given as of the date of personal service or upon the date of deposit in the course of transmission with the United States Postal Service.

8.3 Conflicts Prohibited. During the term of this Agreement, Employee shall not engage in any business or transaction or maintain a financial interest which conflicts, or reasonably might be expected to conflict in any manner, with the proper discharge of Employee's duties under this Agreement. Employee shall comply with all requirements of law, including but not limited to, Sections 87100 *et seq.*, Section 1090 and Section 1125 of the Government Code, and all other similar statutory and administrative rules. Whenever any potential conflict arises or may appear to arise, the obligation shall be on the Employee to seek legal advice concerning whether such conflict exists and Employee's obligations arising therefrom.

8.4 Effect of Waiver. The failure of either party to insist on strict compliance with any of the terms, covenants, or conditions of this Agreement by the other party shall not be deemed a waiver of that term, covenant, or condition, nor shall any waiver or relinquishment of any right or power at any one time or times be deemed a waiver or relinquishment of that right or power for all or any other times.

8.5 Partial Invalidity. If any provision in this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions shall nevertheless continue in full force without being impaired or invalidated in any way.

8.6 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California, which are in full force and effect as of the date of execution.

8.7 Independent Legal Advice. City and Employee represent and warrant to each other that each has received legal advice from independent and separate legal counsel with respect to the legal effect of this Agreement. City and Employee further represent and warrant that each has carefully reviewed this entire Agreement, and that each and every term thereof is understood, and that the terms of this Agreement are contractual and not a mere recital. This Agreement shall not be construed against the party or its representatives who drafted it or who drafted any portion thereof.

8.8 Assignment. Neither this Agreement, nor any right, privilege, or obligation of Employee hereunder, shall be assigned or transferred by Employee without the prior written consent of the City Manager. Any attempt at assignment or transfer in violation of this provision shall, at the option of the City Manager, be null and void and may be considered a material breach of this Agreement.

IN WITNESS WHEREOF, the City of Banning has caused this Agreement to be signed and executed on its behalf by its City Manager, and duly attested by its City Clerk, and Employee has signed and executed this Agreement, the day and year below written.

EMPLOYEE

CITY OF BANNING

---

Zaiton Abu Bakar  
Community Development Director

Date: \_\_\_\_\_

---

Brian Nakamura  
City Manager

Date: \_\_\_\_\_

ATTEST:

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Maria Calderon  
City Clerk

APPROVED AS TO FORM:

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City Attorney

## EXHIBIT A

### JOB DESCRIPTION

#### DEFINITION

Under administrative direction, plans, organizes, coordinates and directs the programs and activities of the Community Development department; provides expert professional assistance to City management staff on community development matters; performs related work as assigned.

#### CLASS CHARACTERISTICS

This single position class has department level responsibility for overall policy development, program planning, fiscal management, administration and operation of building and planning activities. The incumbent is responsible for accomplishing departmental goals and objectives, supervising staff, administering the annual budget and directing the day-to-day operations and activities of the departments.

#### EXAMPLES OF DUTIES

Develops and directs the implementation of goals, objectives, policies, procedures and work standards for the planning and building functions; prepares and administers the department's budget; works closely with the City Manager, City Council, other City departments, a variety of public and private organizations, and citizen groups in developing programs and implementing projects to solve problems related to economic development and redevelopment issues; advises the City Manager and City Council on related issues and programs; develops specific proposals for action on current and future City community development needs; makes final interpretations of City regulations and various ordinances, codes and applicable laws to ensure compliance; represents the City and works closely with citizen boards and commissions and public and private officials to provide technical assistance, directly or through subordinate staff; coordinates the preparation of a wide variety of reports or presentations for City management outside agencies; administers and supervises the department's subordinate managers and supervisors; directs the selection, supervision and the work evaluation of departmental personnel; monitors and directs employee relations and grievance procedures; provides for staff development and supervisory training programs; directs the development of management systems, procedures and standards for program evaluation; monitors developments related to delegated service area; evaluates their impact on City operations and implements policy and procedure improvements; is responsible for advice, maintenance and recommendations related to urban development and the City's General Plan.

## EXHIBIT B

### BENEFITS AND OTHER COMPENSATION

1. Professional Development. The City Manager recognizes its obligation to the professional development of Employee, and agrees that Employee shall be given adequate opportunities to develop and maintain skills and abilities as a public administrator. Employee is expected and encouraged to and does agree to participate in professional organizations and to attend Area and Regional meetings and conferences related to matters of interest to the City Manager consistent with the time required for such attendance in relationship to Employee's other responsibilities as determined by the City Manager. The City Manager hereby agrees to budget an amount set in the exercise of its sole discretion to pay the cost, travel and subsistence expense of Employee for professional and/or official travel, meetings, and occasions adequate to continue professional development of Employee and to adequately pursue necessary official functions for the City. These activities shall include membership in at least one professional association and attendance at one annual community development conference. Employee shall be responsible for maintaining any professional certifications recognized as necessary or desirable in the performance of the duties hereunder. Tuition and cost of books will be reimbursed to Employee for professional and technical courses approved by the City Manager and taken in an accredited educational institution provided that: the subject matter of the course relates directly to and contributes toward the Employee's position with the City; Employee has received at least a competent proficiency rating on the last evaluation report; Employee has furnished evidence that the course has been completed with at least a 'C' grade.

The City Manager also agrees to budget and pay for travel and subsistence expenses of Employee for short courses, institutes, and seminars that are necessary for his or her professional development and for the good of the City. The City Manager agrees to budget and pay for professional dues and subscriptions of Employee reasonably related to the professional growth, development, education and training of Employee.

#### 2. Paid Leave.

(a) Sick Leave: Employee shall be entitled to 12 days of sick leave annually, with the right to cash in a maximum of 96 hours annually. Sick leave shall accrue at the rate of 3.69 hours per payroll. There shall be no cap on the number of hours which Employee may accrue. Upon termination for any reason, Employee shall be entitled to 100% of the unused sick leave on the books then existing.

(b) Vacation Leave. Employee shall be entitled to 20 days shall be entitled to 20 days of vacation leave annually, with the right to cash in a maximum of 40 hours annually. There shall be no cap on the number of hours which Employee may accrue. Upon termination, for any reason, Employee shall be entitled to 100% of the unused vacation leave on the books then existing.

(c) Holiday Leave. Employee shall be entitled to 12 holidays annually. There shall be no cap on the number of unused days Employee may accrue. Holiday leave shall accrue at the rate of 3.69 hours per payroll. Upon termination, for any reason, Employee shall be entitled to 100% of the unused holiday leave on the books then existing.

(d) Executive Leave. Employee shall be entitled to 12 days (96 hours) of annual executive leave. There shall be no cap on the number of unused days Employee may accrue. Upon termination, for any reason, Employee shall be entitled to 100% of the unused executive leave on the books then existing.

3. Cafeteria/Health & Welfare Benefits. Employee shall be entitled to receive from the City an annual cafeteria benefit in an amount equal to the total highest amount paid for any executive management employee, other than the City Manager, for the purchase of health and welfare benefits under any approved plan provided by the City.

4. Retirement. Employee shall be permitted to participate in the City's CalPERS Retirement Program for Miscellaneous Employees 2.5% at 55 formula. The City Manager agrees that the City will pay to the Public Employee Retirement System eight percent (8%) of the statutory eight percent (8%) Employee Contribution of base salary and other compensation, as required by state law, plus the normal matching Employer's share to secure the PERS retirement plan benefit for Miscellaneous Employees. Such amounts will be applied to the Employee's individual account in accordance with Government Code Section 10615.

5. Management Incentive. Effective April 28, 2009, the City agrees to pay an amount equal to four (4%) of Employee's annual salary as management incentive due to the unique nature of the job. The Management Incentive pay will be reported as special compensation every pay period and will be for duties performed during normal business hours.

6. Automobile Allowance. The City agrees to pay \$250.00 per month to Employee as and for a car allowance to Employee for use of a personal vehicle in the pursuit of recognized official duties. The City Administrative Policy on Travel is applicable.

7. City Flexible Spending Plan. Employee is entitled to participate in the City's Flexible Spending Plan to the same extent as enjoyed by any other employee.

8. Life Insurance. In addition to the annual cafeteria benefit, the City Manager agrees that the City will pay annual premiums as and for life insurance for Employee in the amount of \$150,000.00.

9. Uniforms & Business Equipment. The City Manager agrees that the City will finance at no interest to Employee the purchase of any job-related personal tools or equipment, such as a computer, cell phone, etc., that serve the professional development of the Employee. Such tools shall be approved in advance by the City Manager. Repayment to the City shall be made by payroll deductions until the amount loaned is completely repaid. The maximum period for repayment shall be two (2) years.

10. Bonding. City shall bear the full cost of any fidelity or other bonds required of Employee under any law, state enabling legislation, or City ordinance. The City further agrees to represent and defend the employee pursuant to Government Code Section 995, et seq. in the event Employee is named as a party to litigation arising in the course of any official function.

11. Incentives. The City Manager agrees to pay to employee the sum of \$275.00 per month as and for an education incentive for the possession of a Master's Degree or \$250 per month for a Professional Certification attained in addition to a Bachelor's Degree.

12. Eyewear/Eyecare Reimbursement. Employee shall be entitled to reimbursement for expenses incurred and paid by employee and/or dependents in obtaining prescription eyewear or medical care from a licensed Optician, Optometrist or Ophthalmologist. Such amount is limited to a total for all expenses of \$250.00 every two years commencing on the date of this Agreement.

13. Utility Allowance. Employee residing within the City of Banning shall be entitled to receive a utility credit in the amount of \$100.00 per month against the cost of electric and water service during the period of such residency. The amount of credit will increase to \$150.00 per month on October 1, 2009.

14. Voluntary Employee Beneficiary Association Plan (VEBA). Employee shall participate in the City's VEBA plan.

**CITY COUNCIL AGENDA**  
**CONSENT ITEM**

**Date:** **June 23, 2009**

**TO:** **City Council**

**FROM:** **Bonnie J. Johnson, Finance Director**

**SUBJECT:** **Recommendation to adopt the 2009-2010 Cooperative and Repayment Agreement between the City of Banning and the Banning Redevelopment Agency for the payment of Administrative Expenses**

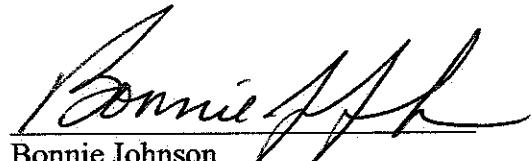
**RECOMMENDATION:** "The City Council adopt the 2009-2010 Cooperative and Repayment Agreement between the City of Banning and the Redevelopment Agency."

**JUSTIFICATION:** This agreement is necessary in order to use tax increment revenue for CRA administrative services provided by the City of Banning.

**BACKGROUND/ANALYSIS:** This is a housekeeping item. Historically, the Agency has simply made operating transfers from the debt service fund, the fund in which all tax increment must be deposited, into the administration fund to pay all administrative expenses of the Agency. Theoretically, all expenses would be paid by the City and the Agency would simply reimburse the City. However, in practice, some of these costs are direct costs of the Agency and others are allocations for City services per the Citywide Cost Allocation Plan. Therefore, although the agreement covers all Agency administrative expenses only a portion of these costs are reimbursed to the City, while the balance are direct charges to the Agency. Under the California Health and Safety Code, tax increment can only be used to pay indebtedness of the Agency. The attached agreement establishes the administrative expenses as indebtedness. The attached agreement will allow the appropriate reimbursements and transfer of funds for 2009-10. Failure to approve this agreement will result in the Agency reporting to the County on its Statement of Indebtedness more funds than it actually has available. In other words, on the Statement of Indebtedness, an annual required filing, the Agency can only report indebtedness. To the extent tax increment is spent on items that do not constitute debt, the report will reflect more available fund balance than the Agency actually has. Furthermore, the Agency will only continue to receive the maximum tax increment if it reports a sufficient amount of debt. In as much as the Agency now has two outstanding bond issues, this will not be a problem in the short-term, but ultimately if funds are spent on items other than qualifying indebtedness, the Agency's tax increment allocations from the County may fall short of meeting all of its obligations.

**FISCAL DATA:** No additional appropriations are necessary. The budget has been prepared to accommodate the transfer of necessary funds.

**RECOMMENDED BY:**



Bonnie Johnson  
Finance Director

**APPROVED BY:**



Brian Nakamura  
City Manager

## **2009-2010 COOPERATION AND REPAYMENT AGREEMENT BANNING REDEVELOPMENT AGENCY**

This 2009-2010 Cooperation and Repayment Agreement ("Agreement") is hereby made and entered into by and between the Banning Redevelopment Agency, a public body corporate and politic ("Agency") and the City of Banning, a general law municipal corporation ("City"), as of June 23, 2009 as set forth below:

### **RECITALS**

- A. The Agency, a subdivision of the State of California, is a separate and distinct legal entity from the City, existing and exercising the powers vested under the California Community Redevelopment Law (California Health and Safety Code section 33000, *et seq.*) ("Community Redevelopment Law").
- B. The City Council of the City of Banning, acting pursuant to the provisions of the Community Redevelopment Law, has activated the Agency and has declared itself to constitute the Governing Board of the Agency.
- C. Pursuant to the Community Redevelopment Law, the Agency is performing a public function of the City and may have access to services and facilities of the City, and may accept assistance from the City.
- D. Pursuant to California Health and Safety Code §§ 33126, 33127, and 33220 the Agency is authorized to obtain and the City to provide staff services, office space, and necessary equipment and supplies, and to give and receive aid and cooperation in the planning, undertaking, construction and operation of redevelopment projects.
- E. City has administrative personnel and necessary facilities required for the operation of Agency and Agency desires to utilize City's personnel and facilities in order to more effectively control Agency's costs of the administration of Agency's redevelopment activities.
- F. Based on the foregoing, City and Agency desire to enter into this Agreement: (i) to provide for the personnel, services and facilities which the City will provide for and make available to Agency in furtherance of the activities and functions of the Agency under the Community Redevelopment Law; (ii) to establish the reasonable costs of the personnel, services and facilities to be provided by City to Agency; and (iii) to set forth the obligation of Agency to repay City for prior expenditures on its behalf and to and/or pay for such future costs and expenses incurred by the City for and on behalf of the Agency.

## OPERATIVE PROVISIONS

NOW, THEREFORE, the parties hereto agree as follows:

1. **Services Provided.** City's officers and employees shall, at the request of the Agency, perform services for the Agency in carrying out its redevelopment work as follows:
  - 1.1 Those City officers and employees who are also appointed to positions or offices with or related to the Agency shall perform services for the Agency in a dual capacity.
  - 1.2 The City Manager shall perform services for the Agency as its Executive Director and shall establish the procedures to be followed in the request for, and the rendering of such services. These services shall include, but not be limited to services by a Redevelopment Director and City's Finance Director.
  - 1.3 City shall provide Agency access to supplies, facilities, and utilities with respect to Agency operations.
  - 1.4 City shall provide for the expenditure of City funds by the City on behalf of the Agency as requested by Agency.
  - 1.5 The foregoing services shall be provided to Agency with regard to the general administration of the Agency as well as with regard to each Project Area of Agency for fiscal year 2009-10.
  - 1.6 Agency shall pay to the City the value of the above-referenced services established in accordance with generally accepted municipal accounting practices on a no-less-than-quarterly basis during the course of fiscal year 2009-10.
2. **Payment.** In consideration of the services and facilities to be provided to Agency pursuant to this Agreement, Agency agrees to pay to City, as soon as is practicable from available tax increment funds, for services, facilities, and utilities provided as follows:
  - 2.1 The sum of \$632,486 for fiscal year 2009-10 as set forth in Exhibit "A" attached hereto and incorporated herein by this reference. City shall invoice Agency no less than quarterly, reflecting all charges attributable to Agency for fiscal year 2009-10.
  - 2.2 Any obligation of Agency to make payments hereunder from tax increment or any other funds shall be subordinate to any obligation to use such funds to service any bonds heretofore or herein after issued by Agency with respect to redevelopment activities which may occur in Agency's project areas.

2.3 The parties agree that tax increment funds subject to Health and Safety Code § 33334.2 shall only be used to reimburse or pay costs related to the preservation, improvement and creation of low and moderate income housing with the Agency's jurisdiction.

3. **Indebtedness Created.** The obligations of the Agency under this Agreement, whether to advance funds or to reimburse the City for services rendered or expenditures made on the Agency's behalf shall constitute an indebtedness of the Agency within the meaning of California Health and Safety Code section 33670, *et seq.*, for each project area for which the debt was incurred. Upon receipt of the billing therefore from the City, the debt will be due and payable by the Agency in accordance with the terms of this Agreement.

4. **Inclusion in Insurance Policy.** The City agrees to include the Agency within the terms of the City's insurance policy.

5. **Remedies.** If either party defaults with regard to any of the provisions of this Agreement, the non-defaulting party shall serve written notice of such default upon the defaulting party. If the default is not cured by the defaulting party within ninety (90) days after service of the notice of default, or if the default is not commenced to be cured within thirty (30) days after service of the notice of default and is not cured promptly within a reasonable period of time after commencement, the defaulting party shall be liable to the other party for damages caused by such default.

6. **Miscellaneous Provisions.** The following provisions shall apply to this Agreement:

6.1 **Integration.** This Agreement consists of pages 1 through 4, inclusive, which constitute the entire understanding and agreement of the parties and supersedes all negotiations or previous agreements between the parties with respect to all or any part of the subject matter hereof.

6.2 **Recitals and Definitions.** The Recitals set forth at the beginning of this Agreement are a substantive and integral part of this Agreement and are incorporated by reference in the Operative Provisions of this Agreement.

6.3 **Severability.** Each provision, term, condition, covenant, and/or restriction, in whole and in part, in this Agreement shall be considered severable. In the event any provision, term, condition, covenant, and/or restriction, in whole and/or in part, in this Agreement is declared invalid, unconstitutional, or void for any reason, such provision or part thereof shall be severed from this Agreement and shall not affect any other provision, term, condition, covenant, and/or restriction, of this Agreement and the remainder of the Agreement shall continue in full force and effect.

- 6.4 Amendments to Agreement. Any amendments to this Agreement must be in writing and signed by the appropriate authorities of the Agency and City.
- 6.5 Counterpart Originals. This Agreement may be executed in duplicate originals, each of which is deemed to be an original.
- 6.6 Effective Date of Agreement. This Agreement shall not become effective until the date it has been formally approved by the Agency's Governing Board and executed by the appropriate authorities of the Agency and Participant.
- 6.7 The Agreement shall supersede any prior agreement between the parties hereto dealing with the subject matter of this Agreement.

WHEREFORE, the parties hereto have executed this Agreement as of the date and year set forth below opposite the name of each such party.

**CITY OF BANNING**  
A Municipal Corporation

Date: \_\_\_\_\_ Attest: \_\_\_\_\_  
City Clerk

**BANNING REDEVELOPMENT AGENCY**  
City of Banning, California

Date: \_\_\_\_\_ By: \_\_\_\_\_  
Chairman

Date: \_\_\_\_\_ By: \_\_\_\_\_  
Secretary

Approved as to Form: David J. Aleshire, City Attorney  
Aleshire & Wynder, LLP

## EXHIBIT A

### REIMBURSEMENT FOR ADMINISTRATIVE SERVICES FOR REDEVELOPMENT AGENCY TO CITY

Fiscal Year 2009-10

	<u>FY 2009-10</u>
Personnel	\$ 408,946
Services and Supplies	72,321
Interfund Services	<u>132,178</u>
<b>TOTAL</b>	<b>\$ 613,445</b>
Add Increase in Fund Balance	<u>+ 19,041</u>
<b>NET REIMBURSEMENT</b>	<b>\$ 632,486</b>

**CITY COUNCIL AGENDA  
CONSENT ITEM**

**Date:** **June 23, 2009**

**TO:** **City Council**

**FROM:** **Bonnie Johnson, Finance Director**

**SUBJECT:** **Approval of Accounts Payable and Payroll Warrants for Month of May 2009**

**RECOMMENDATION:** "The City Council review and ratify the following reports per the California Government Code."

**FISCAL DATA:** The reports in your agenda packet cover "Expenditure Disbursements" and "Payroll Expenses" for the month of May 2009

The reports are:

Expenditure approval lists	
May 7, 2009	516,012.86
May 14, 2009	967,352.69
May 21, 2009	1,016,994.76
May 28, 2009	306,504.87
June 8, 2009	4,274,390.84 (May Month End)
Payroll check registers	
May 1, 2009 Manual Check	14,015.23
May 8, 2009	7,703.34
May 8, 2009 Manual Check	3,809.70
May 22, 2009	7,591.44
May 29, 2009 Manual Checks	18,097.76
Payroll direct deposits*	
May 8, 2009	330,005.30
May 22, 2009	312,552.22

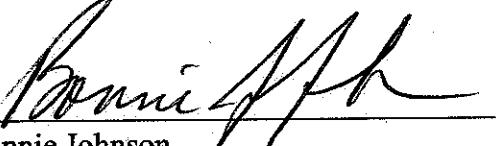
As you review the reports, if you have any questions please contact the Finance Department so that we can gather the information from the source documents and provide a response.

\* Included on the March month end expenditure approval list of 06/08/2009.

<sup>(1)</sup> Due to Positive Pay reporting, manual checks must be recorded in the accounting system separately from the weekly check register.

Report Prepared by: Robin Anderson, Accounts Payable

**RECOMMENDED BY:**



Bonnie Johnson  
Finance Director

**APPROVED BY:**



---

Brian Nakamura  
City Manager

**CITY COUNCIL AGENDA  
CONSENT ITEM**

**Date:** **June 9, 2009**

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

**FROM:** **Brian S. Nakamura, City Manager**

**SUBJECT:** **Request for Donation, San Gorgonio Pass Hispanic Chamber of Commerce and Trade Association 7<sup>th</sup> Annual Christmas Toy Distribution Project**

**RECOMMENDATION:**

That the City Council approve a \$2,000 donation request from the San Gorgonio Pass Hispanic Chamber of Commerce and Trade Association 7<sup>th</sup> Annual Christmas Toy Distribution Project.

**JUSTIFICATION:**

One of the primary goals of the City Council is to continually provide support for programs and community functions that sustain, enhance and expand the social and economic conditions within the City of Banning.

**BACKGROUND & ANALYSIS:**

During FY 2009/10 preliminary budget in January discussions between City Council and staff it was recommended that funds be set aside and made available for special events that the Council wished to support. The San Gorgonio Pass Hispanic Chamber and Trade Association 7<sup>th</sup> Annual Christmas Toy Distribution Project was one of those events.

The San Gorgonio Pass Hispanic Chamber of Commerce and Trade Association request is attached. In 2008 the City Council awarded \$2,000 for this event and based upon the City's current budget situation and remaining balance in the FY 2008/09 Donation and Sponsorship account City staff recommends an appropriation of \$2,000 for the 2009 event.

Below is a list of City Council approved programs and projects funded to date:

\$5,121	State of the City
\$1,000	Relay for Life
\$1,000	Easter Egg Hunt
\$200	United Way Sponsorship
\$2,000	Hispanic Chamber Toy Drive
\$1,000	Family Services Association Event
\$5,000	Stagecoach Days
<u>\$500</u>	<u>Passcom</u>
\$15,821	Funds Expended to date

\$4,179	Funds Available
<u>\$2,000</u>	<u>Staff Recommended Funding of Hispanic Chamber Project</u>
\$2,179	Funds Remaining

**FISCAL IMPACT:**

A City Council appropriation for the 2009 Hispanic Chamber and Trade Association 7<sup>th</sup> Annual Christmas Toy Distribution Project will reduce the remaining fund balance to \$2,179.

**RECOMMENDED BY:**

  
\_\_\_\_\_  
Brian Nakamura  
City Manager

JUN 10 2009

**SAN GORGONIO PASS HISPANIC CHAMBER OF** City Manager's Office  
**COMMERCE & TA**

3800 W. Ramsey St  
Banning, CA 92220  
(951) 849-9029  
ID # 33-0870634

March 12, 2009

City of Banning  
99 E. Ramsey St  
Banning, CA 92220

Dear Council Members:

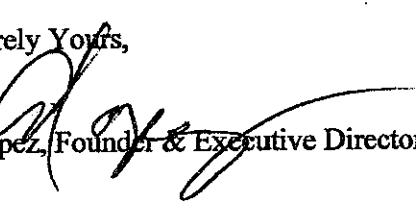
I am writing this letter on behalf of the Board of Directors and the Membership of the San Gorgonio Pass Hispanic Chamber of Commerce & Trade Association. We are currently preparing for our Seventh Annual Christmas Toy Distribution Project entitled "Posadas Navidenas/ Giving Joy on Christmas." The project will take place on Sunday, December 13, 2009 from 1:00 pm to 5:00 pm at the Repplier Park in Banning, California.

The Christmas Toy Distribution Project "Posadas Navidenas/ Giving Joy on Christmas" is a community partnership program. Nearly 100 volunteers will contribute more than 1000 hours of energy and talent to the needy children and families of this community. This event provides NEW toys and entertainment for each and every child without discrimination, food for children and their families, and an opportunity for families to spend time together and make memories of their own.

I like to bring to your attention that due to the economic downturn of our country, we expect to have a substantial increase of children attending our event this year. For example, on Dec 2007 we had little bit over 800 children and on December 2008 our figures went up to 1,200 children. This signifies an increase of 50% meaning that as families struggle to provide for their basic needs there is less money left for toys. We are asking The City of Banning to help us with your sponsorship of \$3,000.00 towards this well recognized & worthwhile project because "No needy child should go without a toy during this Christmas Season".

I thank you for your continued support and the San Gorgonio Pass Hispanic Chamber of Commerce and Trade Association looks forward to working with you on our Seventh Annual Christmas Toy Distribution Project 2009.

Sincerely Yours,

  
Al Lopez, Founder & Executive Director

**CITY COUNCIL  
CONSENT CALENDAR**

**DATE:** June 23, 2009

**TO:** Honorable Mayor and City Council

**FROM:** John Jansons, Redevelopment Manager

**THROUGH:** Brian Nakamura, City Manager

**SUBJECT:** Resolution of the City Council (Resolution No. 2009-52) Temporarily Deferring the Collection of the City's Development Impact Fees for Commercial and Industrial Development in the City of Banning

**RECOMMENDATION:**

That the Council adopt Resolution No. 2009-52 temporarily deferring the collection of certain commercial and industrial development impact fees until the issuance of a Certificate of Occupancy permit.

**JUSTIFICATION:**

The City has the ability to establish development impact fees and collection protocols/policies for such fees. The fee deferral policy adopted in 2008 is recommended for a one year extension in response to the current economic crisis and as a part of the Banning Local Economic Stimulus Program.

**BACKGROUND:**

The City Council on May 27, 2008 adopted resolution 2008-58 approving the deferral of residential development impact fees in an effort to assist home builders deal with the financial burden during the current economic/market conditions. The Council decided to defer collection of the development impact fees until the issuance of certificates of occupancy. Currently, development impact fees are collected when the building permit is issued for a given project.

To address a similar economic situation now facing commercial and industrial developers, staff is proposing that Council also consider deferring development impact fees for commercial and industrial development projects. Attached to this report is Resolution No. 2009-52 that would defer the collection of commercial and industrial development impact fees until the issuance of a Certificate of Occupancy for any given project. If a commercial or industrial developer requests a deferral of development impact fees beyond the issuance of a certificate of occupancy, then staff will bring a project specific deferral agreement for Council consideration (similar to the La Quinta Inn hotel request approved by Council on May 13, 2008).

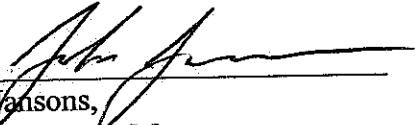
The development impact fees that are routinely collected by the City are used to pay for such things as roadway improvements, including signals and water and sewer facilities. The following is a list of the City's development impact fees (refer to next page):

- Administrative Program Processing Fee
- Development Impact Fee
- Energy Conservation Fee
- Fire Protection Facilities & Equipment Fee (Fire Facilities Fee)
- General Facility & Equipment Fee
- General Plan Fee
- Park Land Fee
- Police Facilities Fee
- Solid Waste Facility and Equipment Fee
- Water Capital Facilities Fee
- Traffic Control Facility Fee (Transportation-Signals Fee)

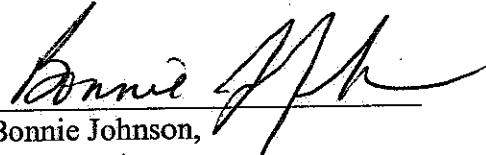
The attached resolution 2009-52 would improve the cash flow and financing challenges for commercial and industrial developers by allowing the flexibility of paying development impact fees when a certificate of occupancy is issued rather than at the time building permits are issued. It is important to note that staff's recommendation to defer development impact fees to certificates of occupancy will not eliminate the option for any given developer to pay development impact fees when the building permit is issued for their project.

**FISCAL DATA:** No direct financial impact to the City, except that the collection of the development impact fees will occur later in the development review process.

**RECOMMENDED BY:**

  
John Jansons,  
Redevelopment Manager

**REVIEWED BY:**

  
Bonnie Johnson,  
Finance Director

**APPROVED BY:**

  
Brian Nakamura,  
City Manager

CC Attachment:

1. Council Resolution No. 2009-52

**ATTACHMENT 1**  
**RESOLUTION NO. 2009-52**

**RESOLUTION NO. 2009-52**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF  
BANNING, CALIFORNIA, TEMPORARILY DEFERRING THE  
COLLECTION OF THE CITY'S COMMERCIAL AND  
INDUSTRIAL DEVELOPMENT IMPACT FEES UNTIL THE  
ISSUANCE OF A CERTIFICATE OF OCCUPANCY**

**WHEREAS**, due to the effects of the current economic factors and conditions within the County of Riverside and based on meetings/discussions with the development community, there is a desire that the collection of commercial and industrial Development Impact Fees (DIF) be deferred to the issuance of a Certificate of Occupancy; and

**WHEREAS**, given the need to promote economic development during the slowdown in the current economic environment, the City Council hereby finds the temporary deferral of the collection of Development Impact Fees until the issuance of a Certificate of Occupancy, to be in the best interest of the City.

**NOW THEREFORE**, the City Council of the City of Banning does hereby resolve, determine and order as follows:

**Section 1.** The City Council hereby determines with the adoption of this Resolution that effective on June 23, 2009, the collection of the City's Commercial and Industrial Development Impact Fees shall be temporarily deferred until the issuance of a Certificate of Occupancy.

**Section 2.** Development Impact Fees shall mean those fees imposed and levied by the City to recover the cost of planned public facilities and to mitigate impacts of development on the City. The Development Impact Fees include the following:

- Administrative Program Processing Fee
- Development Impact Fee
- Energy Conservation Fee
- Fire Protection Facilities & Equipment Fee (Fire Facilities Fee)
- General Facility & Equipment Fee
- General Plan Fee
- Park Land Fee
- Police Facilities Fee
- Solid Waste Facility and Equipment Fee
- Water Capital Facilities Fee
- Traffic Control Facility Fee (Transportation-Signals Fee)

**Section 3.** This Resolution shall be in full force and effect for a period of one (1) year commencing from the effective date of this Resolution.

**PASSED, APPROVED AND ADOPTED** this 23<sup>rd</sup> day of June, 2009.

---

Robert E. Botts, Mayor  
City of Banning

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

---

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

**ATTEST:**

---

Marie A. Calderon, City Clerk

**CERTIFICATION:**

I, Marie A. Calderon, City Clerk of the City of Banning, California, do hereby certify that the foregoing Resolution No. 2009-52, was duly adopted by the City Council of the City of Banning, California, at a regular meeting thereof held on the 23rd day of June 2009, by the following vote, to wit:

AYES:

NOES:

ABSENT:

ABSTAIN:

---

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

**CITY COUNCIL AGENDA  
PUBLIC HEARING**

**DATE:** **June 23, 2009**

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

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

**SUBJECT:** **Resolution No. 2009-44, "Approving the Service Charges Rate Adjustment for the Collection, Transportation and Disposal of Solid Waste"**

**RECOMMENDATION:** The City Council adopt Resolution No. 2009-44, "Approving the Service Charges Rate Adjustment for the Collection, Transportation and Disposal of Solid Waste," as set forth in the City of Banning's Franchise Agreement with Waste Management of the Inland Empire.

**JUSTIFICATION:** It is essential to adjust the rate of service charges annually for the collection, transportation and disposal of solid waste as per the provisions of the Franchise Agreement.

**BACKGROUND:** The City entered into a Franchise Agreement for refuse collection and disposal with Waste Management of the Inland Empire in 1993. Subsequently, the contract was amended in May of 2002, extending the contract to June 30, 2011.

Per Section 18 of the Franchise Agreement, the refuse collection rate can be adjusted annually based on the Consumer Price Index (CPI) for the Los Angeles-Anaheim area, the increase/decrease of the collected tonnage of waste, the increase/decrease of the Tipping Fee charged by the landfill operator, or extraordinary changes in costs related to collection.

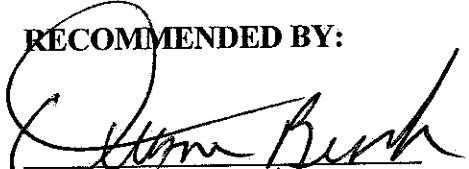
For Fiscal Year 2010, the Tipping Fee charge is \$34.37, an increase of approximately 0.13%, while the number of customers has remained consistent. There will be no changes based on the Consumer Price Index (CPI). The commercial service rates will decrease due to the fact that the average pounds per yard decreased last year from 95 lbs per yard to 82 lbs per yard. This adjustment will affect the disposal component of the rates. Additionally, adjustments have been incorporated to reflect the new \$10.00 per ton Alternative Daily Cover (ADC) green waste surcharge that will go into effect in Riverside County on July 1, 2009. This charge was approved by the County to partially offset the Riverside County Landfill System for the depletion of valuable air space. Staff negotiated this fee which has been reduced to \$8.00 as reflected in the new rate schedule. Due to these changes and per Section 18, the rates need to be adjusted accordingly.

Further, at this time an adjustment is requested allowing for the existing bin exchange rate to be modified from \$67.24 to \$45.00. The current rate structure for a commercial bin exchange charge allows for a fee to apply if there is more than one bin exchange per year. The modified rate will allow for a commercial customer to be charged for a bin exchange upon each request. Lastly, a proposed Haul or Call (HOC) fee is requested to be established in the amount of \$25.00 per occurrence. This HOC fee would apply if the hauler is requested to return to a location that it could not service during the initial visit due to an obstruction of a bin such as a locked gate or car blocking a bin.

All of the abovementioned fees are reflected in the attached rate sheets. If approved, the new rate will be effective on July 1, 2009. The Notice of Public Hearing was advertised on June 05, 2009, as shown as Attachment "A".

**FISCAL DATA:** The current rate for the refuse collection is \$17.02 per month, per household, and if approved, the rate will increase to \$17.26. The commercial rate will be adjusted accordingly, as shown in the attached Exhibit "A".

**RECOMMENDED BY:**



Duane Burk  
Director of Public Works

**REVIEWED BY:**



Bonnie Johnson  
Finance Director

**APPROVED BY:**



Brian Nakamura  
City Manager

**RESOLUTION NO. 2009-44**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BANNING,  
CALIFORNIA, APPROVING THE RATE ADJUSTMENT FOR THE SERVICE  
CHARGES FOR THE COLLECTION, TRANSPORTATION AND DISPOSAL OF SOLID  
WASTE.**

**WHEREAS**, the City of Banning entered into a Franchise Agreement with Waste Management of the Inland Empire in July of 1993; and

**WHEREAS**, on May 28, 2002, during the regularly held City Council Meeting, the Franchise Agreement was extended until June 30, 2011; and

**WHEREAS**, per Section 18 of the Franchise Agreement, the refuse collection rate can be adjusted annually based on the Consumer Price Index (CPI) for the Los Angeles-Anaheim area, the increase/decrease of the collected tonnage of waste, the increase/decrease of the Tipping Fee charged by the landfill operator, or extraordinary changes in costs related to collection; and

**WHEREAS**, it is essential that the City Council adopt Resolution No. 2009-44, so that the City can implement the new solid waste rates.

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

The City Council of the City of Banning hereby approves the Service Charges Rate Adjustment for the Collection, Transportation and Disposal of Solid Waste Effective July 1, 2009, attached herein as Exhibit "A".

**PASSED, APPROVED and ADOPTED** this 23<sup>rd</sup> day of June, 2009.

---

Robert E. Botts, Mayor  
City of Banning

**ATTEST:**

---

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

APPROVED AS TO FORM AND  
LEGAL CONTENT:

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

CERTIFICATION:

I, Marie A. Calderon, City Clerk of the City of Banning, California, do hereby certify that the foregoing Resolution No. 2009-44, was adopted by the City Council of the City of Banning at a Regular Meeting thereof held on the 23<sup>rd</sup> day of June, 2009, by the following vote, to wit:

AYES:

NOES:

ABSENT:

ABSTAIN:

---

Marie A. Calderon  
City Clerk of the City of Banning

**Exhibit "A"**

**CITY OF BANNING**  
**RATE SCHEDULE SUMMARY**

**EFFECTIVE JULY 1, 2009**

Type of Service	Existing Rate	Proposed Rate
Residential Household	\$17.02	\$17.26
Commercial Can Service	\$18.61	\$18.62
Commercial Bin Service		
One Pick-up per Week:		
-2 cubic yard	\$80.39	\$77.83
- 3 cubic yard	\$105.84	\$102.00
-4 cubic yard	\$141.60	\$136.48

**City of Banning  
Rate Components  
As of July 1, 2009**

**Total Rates**

<b>RESIDENTIAL</b>		<b>\$ 17.26</b>
Single Family Refuse Rate		
Additional Containers:	Trash - 96 gallon	\$ 7.20
	Trash - 64 gallon	\$ 5.77
	Trash - 35 gallon	\$ 4.33
	Recycling	\$ 1.85
	Green Waste	\$ 4.63
Exchanges due to size change or customer misuse (as examples)		\$ 21.65
In-excess of one time per year		\$ 21.65

<b>COMMERCIAL CAN SERVICE</b>		<b>\$ 18.62</b>
Refuse Service With Recycling Program A:		
TEMPORARY COMMERCIAL SERVICE		\$ 112.33
Temporary Bin (up to 7 Days)		\$ 183.27

<b>COMMERCIAL BIN SERVICE</b>							
<b>SIZE</b>	<b>QTY</b>	<b>ONE</b>	<b>TWO</b>	<b>THREE</b>	<b>FOUR</b>	<b>FIVE</b>	<b>SIX</b>
2 Yard	1	\$ 77.83	\$ 155.67	\$ 227.58	\$ 300.98	\$ 372.92	\$ 444.84
3 Yard	1	\$ 102.00	\$ 204.00	\$ 298.60	\$ 393.21	\$ 487.80	\$ 582.43
4 Yard	1	\$ 136.48	\$ 272.95	\$ 399.11	\$ 526.73	\$ 652.88	\$ 779.04
6 Yard	1	\$ 192.18	\$ 384.35	\$ 563.25	\$ 740.67	\$ 919.58	\$ 1,096.99
2 Yard	2	\$ 155.67	\$ 311.33	\$ 455.17	\$ 601.96	\$ 745.83	\$ 889.67
3 Yard	2	\$ 204.00	\$ 408.00	\$ 597.19	\$ 786.41	\$ 975.60	\$ 1,164.85
4 Yard	2	\$ 272.95	\$ 545.90	\$ 798.21	\$ 1,053.45	\$ 1,305.76	\$ 1,558.07
6 Yard	2	\$ 384.35	\$ 768.70	\$ 1,126.50	\$ 1,481.34	\$ 1,839.17	\$ 2,193.98
2 Yard	3	\$ 233.50	\$ 467.00	\$ 682.75	\$ 902.95	\$ 1,118.75	\$ 1,334.51
3 Yard	3	\$ 306.00	\$ 612.01	\$ 895.79	\$ 1,179.62	\$ 1,463.41	\$ 1,747.28
4 Yard	3	\$ 409.43	\$ 818.85	\$ 1,197.32	\$ 1,580.18	\$ 1,958.64	\$ 2,337.11
6 Yard	3	\$ 576.53	\$ 1,153.05	\$ 1,689.75	\$ 2,222.01	\$ 2,758.75	\$ 3,290.97
2 Yard	4	\$ 311.33	\$ 622.66	\$ 910.34	\$ 1,203.93	\$ 1,491.66	\$ 1,779.34
3 Yard	4	\$ 408.00	\$ 816.01	\$ 1,194.39	\$ 1,572.83	\$ 1,951.21	\$ 2,329.70
4 Yard	4	\$ 545.90	\$ 1,091.80	\$ 1,596.42	\$ 2,106.90	\$ 2,611.52	\$ 3,116.14
6 Yard	4	\$ 768.70	\$ 1,537.40	\$ 2,253.00	\$ 2,962.68	\$ 3,678.33	\$ 4,387.96
2 Yard	5	\$ 389.16	\$ 778.33	\$ 1,137.92	\$ 1,504.91	\$ 1,864.58	\$ 2,224.18
3 Yard	5	\$ 510.01	\$ 1,020.01	\$ 1,492.99	\$ 1,966.03	\$ 2,439.01	\$ 2,912.13
4 Yard	5	\$ 682.38	\$ 1,364.75	\$ 1,995.53	\$ 2,633.63	\$ 3,264.40	\$ 3,895.18
6 Yard	5	\$ 960.88	\$ 1,921.75	\$ 2,816.25	\$ 3,703.35	\$ 4,597.92	\$ 5,484.95
2 Yard	6	\$ 467.00	\$ 933.99	\$ 1,365.51	\$ 1,805.89	\$ 2,237.50	\$ 2,669.01
3 Yard	6	\$ 612.01	\$ 1,224.01	\$ 1,791.58	\$ 2,359.24	\$ 2,926.81	\$ 3,494.55
4 Yard	6	\$ 818.85	\$ 1,637.70	\$ 2,394.64	\$ 3,160.35	\$ 3,917.28	\$ 4,674.22
6 Yard	6	\$ 1,153.05	\$ 2,306.11	\$ 3,379.50	\$ 4,444.02	\$ 5,517.50	\$ 6,581.93

**City of Banning  
Rate Components  
As of July 1, 2009**

**COMMERCIAL RECYCLING SERVICE**

<u>SIZE</u>	<u>QTY</u>	<u>Pick-ups per week</u>	
		<u>ONE</u>	<u>TWO</u>
2.0 Cubic Yard	One	\$ 72.21	\$ 144.42
3.0 Cubic Yard	One	\$ 92.43	\$ 184.87
4.0 Cubic Yard	One	\$ 122.78	\$ 245.55
6.0 Cubic Yard	One	\$ 158.88	\$ 317.76
3.0 Cubic Yard*	One	\$ 60.25	\$ 120.49

\*Banning Unified School District within city limits only

**ROLLOFF SERVICES**

40 Cubic Yard Container	\$ 185.91	+ landfill fees
10 Cubic Yard Container	\$ 185.91	+ landfill fees
Monthly Minimum Pull	\$ 185.91	
40 Cubic Yard Compactor	\$ 240.00	+landfill
40 Cubic Yard Temporary Container	\$ 338.66	includes 4 tons
Relocation/Trip/Delivery Fee	\$ 67.86	

**OTHER SERVICES**

Bin exchange	\$ 45.00	*
Lost or Stolen Bin:	\$ 273.02	
Burned Bin:	\$ 152.89	
Extra bin dump while on site	\$ 53.59	
Overage Fee	\$ 41.68	
Locking Lids: (per month times service frequency)	\$ 13.11	
Replacement Lock	\$ 27.30	
Replacement Key	\$ 5.46	
Residential Set Up Fee	\$ 9.46	
Commercial Set Up Fee	\$ 15.77	
Industrial Set Up Fee	\$ 15.77	
Additional Bulky Waste - E Waste	\$ 16.46	per item
HOC fee	\$ 25.00	*

\*New on demand user fee

**City of Banning  
Rate Components  
As of July 1, 2009**

**Service Components**

<b>RESIDENTIAL</b>							
Single Family Service Rates:		\$ 12.90					
<b>COMMERCIAL CAN SERVICE</b>							
Refuse Service With Recycling program A:		\$ 12.97					
<b>COMMERCIAL BIN SERVICE</b>							
SIZE	QTY	ONE	TWO	THREE	FOUR	FIVE	SIX
2 Yard	One	\$ 62.36	\$ 124.73	\$ 181.18	\$ 239.11	\$ 295.57	\$ 352.03
3 Yard	One	\$ 78.80	\$ 157.60	\$ 228.99	\$ 300.40	\$ 371.79	\$ 443.21
4 Yard	One	\$ 105.54	\$ 211.08	\$ 306.30	\$ 402.98	\$ 498.20	\$ 593.42
6 Yard	One	\$ 145.77	\$ 291.54	\$ 424.03	\$ 555.05	\$ 687.56	\$ 818.56
2 Yard	Two	\$ 124.73	\$ 249.46	\$ 362.36	\$ 478.22	\$ 591.15	\$ 704.05
3 Yard	Two	\$ 157.60	\$ 315.19	\$ 457.98	\$ 600.79	\$ 743.58	\$ 886.42
4 Yard	Two	\$ 211.08	\$ 422.15	\$ 612.59	\$ 805.96	\$ 996.39	\$ 1,186.83
6 Yard	Two	\$ 291.54	\$ 583.08	\$ 848.07	\$ 1,110.10	\$ 1,375.12	\$ 1,637.12
2 Yard	Three	\$ 187.09	\$ 374.19	\$ 543.54	\$ 717.33	\$ 886.72	\$ 1,056.08
3 Yard	Three	\$ 236.40	\$ 472.79	\$ 686.97	\$ 901.19	\$ 1,115.37	\$ 1,329.63
4 Yard	Three	\$ 316.62	\$ 633.23	\$ 918.89	\$ 1,208.94	\$ 1,494.59	\$ 1,780.25
6 Yard	Three	\$ 437.31	\$ 874.62	\$ 1,272.10	\$ 1,665.15	\$ 2,062.67	\$ 2,455.68
2 Yard	Four	\$ 249.46	\$ 498.92	\$ 724.72	\$ 956.44	\$ 1,182.30	\$ 1,408.10
3 Yard	Four	\$ 315.19	\$ 630.39	\$ 915.96	\$ 1,201.59	\$ 1,487.16	\$ 1,772.84
4 Yard	Four	\$ 422.15	\$ 844.31	\$ 1,225.18	\$ 1,611.91	\$ 1,992.79	\$ 2,373.66
6 Yard	Four	\$ 583.08	\$ 1,166.16	\$ 1,696.14	\$ 2,220.20	\$ 2,750.23	\$ 3,274.24
2 Yard	Five	\$ 311.82	\$ 623.64	\$ 905.90	\$ 1,195.54	\$ 1,477.87	\$ 1,760.13
3 Yard	Five	\$ 393.99	\$ 787.99	\$ 1,144.95	\$ 1,501.98	\$ 1,858.95	\$ 2,216.05
4 Yard	Five	\$ 527.69	\$ 1,055.39	\$ 1,531.48	\$ 2,014.89	\$ 2,490.99	\$ 2,967.08
6 Yard	Five	\$ 728.85	\$ 1,457.70	\$ 2,120.17	\$ 2,775.25	\$ 3,437.79	\$ 4,092.80
2 Yard	Six	\$ 374.19	\$ 748.37	\$ 1,087.08	\$ 1,434.65	\$ 1,773.44	\$ 2,112.15
3 Yard	Six	\$ 472.79	\$ 945.58	\$ 1,373.94	\$ 1,802.38	\$ 2,230.74	\$ 2,659.26
4 Yard	Six	\$ 633.23	\$ 1,266.46	\$ 1,837.78	\$ 2,417.87	\$ 2,989.18	\$ 3,560.50
6 Yard	Six	\$ 874.62	\$ 1,749.24	\$ 2,544.21	\$ 3,330.30	\$ 4,125.35	\$ 4,911.35

**City of Banning  
Rate Components  
As of July 1, 2009**

**Disposal Components**

<b>RESIDENTIAL TRASH</b>	Pounds per household per week						31.43
	Pounds-to-tons factor					divide by	2,000
	Monthly factor				x		4.33
	Riverside County landfill rate				x	\$	34.37
	Franchise Fee factor				divide by		0.79
<b>Monthly Disposal Component for one Residential Household</b>						\$	2.96
<b>RESIDENTIAL GREENWASTE</b>	Pounds per household per week						15.33
	Pounds-to-tons factor					divide by	2,000
	Monthly factor				x		4.33
	Riverside County landfill rate				x	\$	33.40
	Franchise Fee factor				divide by		0.79
<b>Monthly Disposal Component for one Residential Household</b>						\$	1.40
<b>COMMERCIAL CAN</b>	Pounds per customer per week						60.00
	Pounds-to-tons factor					divide by	2,000
	Monthly factor				x		4.33
	Riverside County landfill rate				x	\$	34.37
	Franchise Fee factor				divide by		0.79
<b>Monthly Disposal Component for one Commercial Can Customer</b>						\$	5.65
<b>COMMERCIAL REFUSE</b>	Pounds per yard						82.11
	Pounds-to-tons factor					divide by	2,000
	Monthly factor				x		4.33
	Riverside County landfill rate				x	\$	34.37
	Franchise Fee factor				divide by		0.79
<b>Monthly Disposal Component for One Cubic Yard</b>						\$	7.73
<b>SIZE</b>	<b>QTY</b>	<b>ONE</b>	<b>TWO</b>	<b>THREE</b>	<b>FOUR</b>	<b>FIVE</b>	<b>SIX</b>
2 Yard	1	\$ 15.47	\$ 30.94	\$ 46.41	\$ 61.87	\$ 77.34	\$ 92.81
3 Yard	1	\$ 23.20	\$ 46.41	\$ 69.61	\$ 92.81	\$ 116.01	\$ 139.22
4 Yard	1	\$ 30.94	\$ 61.87	\$ 92.81	\$ 123.75	\$ 154.68	\$ 185.62
6 Yard	1	\$ 46.41	\$ 92.81	\$ 139.22	\$ 185.62	\$ 232.03	\$ 278.43
2 Yard	2	\$ 30.94	\$ 61.87	\$ 92.81	\$ 123.75	\$ 154.68	\$ 185.62
3 Yard	2	\$ 46.41	\$ 92.81	\$ 139.22	\$ 185.62	\$ 232.03	\$ 278.43
4 Yard	2	\$ 61.87	\$ 123.75	\$ 185.62	\$ 247.49	\$ 309.37	\$ 371.24
6 Yard	2	\$ 92.81	\$ 185.62	\$ 278.43	\$ 371.24	\$ 464.05	\$ 556.86
<b>SIZE</b>	<b>QTY</b>	<b>ONE</b>	<b>TWO</b>	<b>THREE</b>	<b>FOUR</b>	<b>FIVE</b>	<b>SIX</b>
2 Yard	3	\$ 46.41	\$ 92.81	\$ 139.22	\$ 185.62	\$ 232.03	\$ 278.43
3 Yard	3	\$ 69.61	\$ 139.22	\$ 208.82	\$ 278.43	\$ 348.04	\$ 417.65
4 Yard	3	\$ 92.81	\$ 185.62	\$ 278.43	\$ 371.24	\$ 464.05	\$ 556.86
6 Yard	3	\$ 139.22	\$ 278.43	\$ 417.65	\$ 556.86	\$ 696.08	\$ 835.29
2 Yard	4	\$ 61.87	\$ 123.75	\$ 185.62	\$ 247.49	\$ 309.37	\$ 371.24
3 Yard	4	\$ 92.81	\$ 185.62	\$ 278.43	\$ 371.24	\$ 464.05	\$ 556.86
4 Yard	4	\$ 123.75	\$ 247.49	\$ 371.24	\$ 494.99	\$ 618.73	\$ 742.48
6 Yard	4	\$ 185.62	\$ 371.24	\$ 556.86	\$ 742.48	\$ 928.10	\$ 1,113.72
2 Yard	5	\$ 77.34	\$ 154.68	\$ 232.03	\$ 309.37	\$ 386.71	\$ 464.05
3 Yard	5	\$ 116.01	\$ 232.03	\$ 348.04	\$ 464.05	\$ 580.06	\$ 696.08
4 Yard	5	\$ 154.68	\$ 309.37	\$ 464.05	\$ 618.73	\$ 773.42	\$ 928.10
6 Yard	5	\$ 232.03	\$ 464.05	\$ 696.08	\$ 928.10	\$ 1,160.13	\$ 1,392.15
2 Yard	6	\$ 92.81	\$ 185.62	\$ 278.43	\$ 371.24	\$ 464.05	\$ 556.86
3 Yard	6	\$ 139.22	\$ 278.43	\$ 417.65	\$ 556.86	\$ 696.08	\$ 835.29
4 Yard	6	\$ 185.62	\$ 371.24	\$ 556.86	\$ 742.48	\$ 928.10	\$ 1,113.72
6 Yard	6	\$ 278.43	\$ 556.86	\$ 835.29	\$ 1,113.72	\$ 1,392.15	\$ 1,670.58

**City of Banning  
Rate Components  
As of July 1, 2009**

<b>COMPACTOR SERVICE RATES</b>							
(COMPACTION RATIO = 3:1)							
SIZE	QTY	ONE	TWO	THREE	FOUR	FIVE	SIX
2 Yard	One	\$ 108.77	\$ 217.54	\$ 320.39	\$ 424.73	\$ 527.60	\$ 630.46
3 Yard	One	\$ 148.41	\$ 296.81	\$ 437.81	\$ 578.83	\$ 719.83	\$ 860.86
4 Yard	One	\$ 198.35	\$ 396.70	\$ 584.73	\$ 774.22	\$ 962.25	\$ 1,150.28
6 Yard	One	\$ 284.99	\$ 569.97	\$ 841.68	\$ 1,111.91	\$ 1,383.63	\$ 1,653.85
2 Yard	Two	\$ 217.54	\$ 435.08	\$ 640.79	\$ 849.46	\$ 1,055.20	\$ 1,260.91
3 Yard	Two	\$ 296.81	\$ 593.62	\$ 875.62	\$ 1,157.65	\$ 1,439.65	\$ 1,721.71
4 Yard	Two	\$ 396.70	\$ 793.39	\$ 1,169.45	\$ 1,548.44	\$ 1,924.49	\$ 2,300.55
6 Yard	Two	\$ 569.97	\$ 1,139.94	\$ 1,683.36	\$ 2,223.82	\$ 2,767.27	\$ 3,307.70
2 Yard	Three	\$ 326.31	\$ 652.62	\$ 961.18	\$ 1,274.19	\$ 1,582.80	\$ 1,891.37
3 Yard	Three	\$ 445.22	\$ 890.44	\$ 1,313.44	\$ 1,736.48	\$ 2,159.48	\$ 2,582.57
4 Yard	Three	\$ 595.05	\$ 1,190.09	\$ 1,754.18	\$ 2,322.66	\$ 2,886.74	\$ 3,450.83
6 Yard	Three	\$ 854.96	\$ 1,709.91	\$ 2,525.04	\$ 3,335.73	\$ 4,150.90	\$ 4,961.55
2 Yard	Four	\$ 435.08	\$ 870.16	\$ 1,281.58	\$ 1,698.92	\$ 2,110.40	\$ 2,521.82
3 Yard	Four	\$ 593.62	\$ 1,187.25	\$ 1,751.25	\$ 2,315.31	\$ 2,879.31	\$ 3,443.42
4 Yard	Four	\$ 793.39	\$ 1,586.79	\$ 2,338.90	\$ 3,096.87	\$ 3,848.99	\$ 4,601.10
6 Yard	Four	\$ 1,139.94	\$ 2,279.88	\$ 3,366.72	\$ 4,447.64	\$ 5,534.53	\$ 6,615.40
2 Yard	Five	\$ 543.85	\$ 1,087.69	\$ 1,601.97	\$ 2,123.64	\$ 2,638.00	\$ 3,152.28
3 Yard	Five	\$ 742.03	\$ 1,484.06	\$ 2,189.06	\$ 2,894.13	\$ 3,599.13	\$ 4,304.28
4 Yard	Five	\$ 991.74	\$ 1,983.49	\$ 2,923.63	\$ 3,871.09	\$ 4,811.24	\$ 5,751.38
6 Yard	Five	\$ 1,424.93	\$ 2,849.85	\$ 4,208.40	\$ 5,559.55	\$ 6,918.17	\$ 8,269.25
2 Yard	Six	\$ 652.62	\$ 1,305.23	\$ 1,922.37	\$ 2,548.37	\$ 3,165.60	\$ 3,782.73
3 Yard	Six	\$ 890.44	\$ 1,780.87	\$ 2,626.87	\$ 3,472.96	\$ 4,318.96	\$ 5,165.13
4 Yard	Six	\$ 1,190.09	\$ 2,380.18	\$ 3,508.36	\$ 4,645.31	\$ 5,773.48	\$ 6,901.66
6 Yard	Six	\$ 1,709.91	\$ 3,419.83	\$ 5,050.08	\$ 6,671.46	\$ 8,301.80	\$ 9,923.10

# ATTACHMENT "A"

## RECORD GAZETTE JUNE 05, 2009

Friday, June 5, 2009

Record Gazette

[www.recordgazette.net](http://www.recordgazette.net) ■ Page 47

### PUBLIC NOTICES

#### NOTICE OF PUBLIC HEARING

PURSUANT TO LAW, notice is hereby given of a Public Hearing before the City Council of the City of Banning, to be heard June 23, 2009 at 6:30 p.m. at the Banning Civic Center Council Chambers, 99 E. Ramsey St., Banning, California, to consider "Adopting Resolution No. 2009-44, Approving the Rate Adjustment for the Service Charges for Collection, Transportation, and Disposal of Solid Waste."

ALL INTERESTED PARTIES are invited to attend said hearing and present oral or written testimony on the matter or to send written comments to the City Clerk, P.O. Box 998, Banning, CA 92220. Data relevant to these fees is available for public review at the office of the City Clerk or at the Engineering Division of the Public Works Department, at 99 E. Ramsey St., for the period of 10 days prior to the Public Hearing.

BY ORDER OF THE CITY CLERK of the City of Banning, California.

Date: June 01, 2009  
Publish: Record Gazette  
June 05, 2009

*Marie A. Calderon*

Marie A. Calderon  
City Clerk  
Publish the Record  
Gazette  
No. 3761

6/5, 2009

**CITY COUNCIL AGENDA  
PUBLIC HEARING**

**Date:** June 23, 2009

**TO:** City Council

**FROM:** Phil Holder, Lieutenant

**SUBJECT:** Resolution 2009-46. 2009 Edward Byrne Memorial Justice Assistance Grant

**RECOMMENDATION:** "The City Council conduct a Public Hearing and accept grant funds provided by the Office of Justice Programs in the amount of \$23,287 to cover overtime costs for police officers participating in Banning Police Activities League (BPAL) activities and training exercises for the department's Emergency Tactical Unit (ETU)."

**JUSTIFICATION:** The Police Department proposes to use the grant funds to cover overtime costs of police officers participating in BPAL activities and ETU training. The use of grant funds to cover these costs will allow police officers to continue their commitment to the department's youth programs and to maintain a highly trained and skilled tactical team as a resource for the Banning Police Department in the handling of both spontaneous and planned critical incidents.

**BACKGROUND:** On June 2, 2009 the Banning Police Department submitted its application for the 2009 Edward Byrne Memorial Justice Assistance Grant in the amount of \$23,287. Per U.S. Department of Justice regulations a public hearing must be conducted to allow citizens to make comments on the intended use of the noted grant funds before funding can be approved.

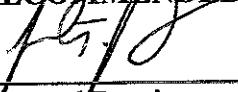
This grant is in addition to the previously submitted 2009 Recovery Act: Edward Byrne Memorial Justice Assistance Grant in the amount of \$95,724.

**ACTION PLAN:** Conduct a public hearing and receive Banning City Council approval to accept the 2009 Edward Byrne Memorial Justice Assistance Grant in the amount of \$23,287.

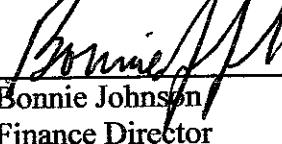
**STRATEGIC PLAN INTEGRATION:** Council approval of this recommendation will help facilitate the Police Department's goals of improving the department's image in the community and maintaining its high level of commitment to training.

**FISCAL DATA:** Accepted Byrne Grant funds will be appropriated to the Police Department's Overtime Account to pay overtime costs of officers' involved BPAL activities and ETU training.

**RECOMMENDED BY:**

  
Leonard Purvis  
Chief of Police

**REVIEWED BY:**

  
Bonnie Johnson  
Finance Director

**APPROVED BY:**

  
Brian Nakamura  
City Manager

**RESOLUTION NO. 2009-46**

**A RESOLUTION BY THE CITY COUNCIL OF THE CITY OF BANNING AUTHORIZING THE ACCEPTANCE OF THE 2009 U.S. DEPARTMENT OF JUSTICE EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT IN THE AMOUNT OF \$23,287 TO BE USED FOR POLICE DEPARTMENT OVERTIME.**

**WHEREAS**, having completed a public hearing on the proposed use of the 2009 U.S. Department of Justice Byrne Grant; and

**WHEREAS**, the City of Banning Police Department is responsible for the security and safety of the Citizens of the City; and

**WHEREAS**, the City of Banning Police Department is committed to bringing together the Police Department, Community, and City Leaders to reduce the crime in the City of Banning; and

**WHEREAS**, the City of Banning Police Department is committed to working with the children in the community to deter them from gang involvement; and

**WHEREAS**, the City's procedures requires the City Council to adopt a resolution authorizing the expenditure of funds procured through grants.

**NOW, THEREFORE, BE IT RESOLVED**, the City Council of the City of Banning approves the proposed use of the 2009 U.S. Department of Justice Edward Byrne Memorial Assistance Grant in the amount of \$23,287 and upon award of the grant appropriates those funds to the Banning Police Department Overtime Account (001-2200-421-1030). The Finance Department is authorized to make necessary budget adjustments related to these accepted funds.

**PASSED, APPROVED, AND ADOPTED** this 23<sup>rd</sup> day of June, 2009.

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Robert E. Botts, Mayor  
City of Banning

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

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

**ATTEST:**

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Marie A. Calderon, City Clerk

**CERTIFICATION:**

I, Marie Calderon, City Clerk of the City of Banning, California, do hereby certify that the foregoing Resolution No. 2009-46 was duly adopted by the City Council of the City of Banning, California, at a regular meeting thereof held on the 23<sup>rd</sup> day of June, 2009, by the following to wit:

AYES:

NOES:

ABSENT:

ABSTAIN:

---

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

**CITY COUNCIL  
PUBLIC HEARING**

**DATE:** June 23, 2009

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

**FROM:** Kahono Oei, City Engineer



**SUBJECT:** Proposed Ordinance No. 1388:

Adding Title 18 to the Municipal Code pertaining to "*Grading, Erosion and Sediment Control*"

**RECOMMENDATION:** The Public Works Department recommends that City Council adopt Ordinance No. 1388 (Attachment 1) adding Title 18 "*Grading, Erosion and Sediment Control*" to the Municipal Code.

**JUSTIFICATION:** The City does not presently have regulations that control land disturbances in accordance with Federal, State, and local requirements. In order to comply with these numerous regulations, and specifically California Regional Water Quality Control Colorado River Basin Region Board Order No. R7-2008-0001 legal authority requirements, the proposed regulations are necessary.

**BACKGROUND:** Growth and development creates permanent changes to the City's landscape and community character. Loss of ground cover, coupled with grading, excavation, and compaction of the soil contributes to decreased groundwater infiltration, increased storm water flow, and erosion and increased sediment runoff into rivers, washes, and lakes. Presently, the City regulates grading in accordance with the California Building Code, which is limited in scope and does not address new water quality regulations or the design policies for development approved in the General Plan adopted by City Council on January 31, 2006.

The proposed ordinance sets forth standards for development that include a Grading Manual implementing the administrative and technical procedures proposed in the new regulations. The City Engineer will have the authority to change, update, or revise the Grading Manual as necessary.

The proposed ordinance establishes the following significant items:

1. A permit will be required for any grading, stockpiling, clearing of land, and alteration of a watercourse.
2. Design standards are set forth for slopes, setbacks, and hillside grading.
3. Erosion and sediment controls are set forth in accordance with Federal and State stormwater regulations.

4. Securities are required guaranteeing that the developer complete grading operations including cost recovery regulations in the event that the City performs emergency work.

The Ordinance sets forth rules and regulations, which reflect the minimum acceptable methods or actions to control land disturbances. This Ordinance establishes procedures for issuance, administration and enforcement of permits for such activities. Any such grading activities within the city limits shall conform with the provisions of this Ordinance and the Grading Manual and other applicable provisions of the City's Municipal Code and the California Building Code, as adopted and amended by the City, together with all other conditions of approval.

The proposed ordinance was first introduced to City Council at the March 27, 2009 study session and again considered at the May 26, 2009 study session.

**ENVIRONMENTAL DETERMINATION:** The City Council, in light of the whole record before it, including but not limited to, the City's Local CEQA Guidelines, the recommendation of the Public Works Department as provided in the Staff Report dated June 23, 2009 and documents incorporated therein by reference, and any other evidence (within the meaning of Public Resources Code § 21080(e) and § 21082.2) within the record or provided at the public hearing of this matter, hereby finds and determines as follows:

1. California Environmental Quality Act (CEQA):

CEQA: The City Council has analyzed this proposed ordinance and has determined that it is exempt from the California Environmental Quality Act ("CEQA") under Section 15061(b)(3) of the CEQA Guidelines which provides that CEQA only applies to projects that have the potential for causing a significant effect on the environment. Where, as here, it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment; the activity is not subject to CEQA. The proposed ordinance does not relate to any one physical project and will not result in any physical change to the environment. Further, projects subject to this ordinance will trigger individual analysis and documentation related to CEQA. Therefore, it can be seen with certainty that there is no possibility that this ordinance may have a significant adverse effect on the environment, and therefore the adoption of this ordinance is exempt from CEQA pursuant to Section 15061(b)(3) of the CEQA Guidelines.

2. Multiple Species Habitat Conservation Plan (MSHCP):

The proposed ordinance does not relate to any one physical project and is not subject to the MSHCP. Further, projects subject to this ordinance will trigger individual project analysis and documentation related to the requirements of MSHCP including mitigation through payment of the MSHCP Mitigation Fee.

**FINDINGS FOR PROPOSED ORDINANCE NO. 1388:** Although not required by the Municipal Code, the following findings are provided for City Council consideration:

1. The proposed ordinance is consistent with the goals and policies of the General Plan.

Findings of Fact:

The proposed ordinance is consistent with the goals and policies of the General Plan, insofar as the General Plan designations and Zoning designations will not change, and the proposed ordinance will result in clarifying the goals, policies and programs of the General Plan. The primary General Plan Land Use Goal states "*A balanced, well planned community including businesses which provides a functional pattern of land uses and enhances the quality of life for all Banning residents*". The minimum standards and requirements relating to land grading, clearing, excavations and fills, and procedures by which these standards and requirements may be enforced, will help to ensure soil is not stripped and removed from lands in the City, leaving them unsightly and susceptible to erosion, subsidence, faulty drainage and sediment deposition thus enhancing the quality of life for Banning residents.

Additionally Program 2.A of the Open Space and Conservation Element of the General Plan states: "*The Zoning Ordinance shall be amended to include detailed provisions for the preservation of natural hillsides above the toe of slope. These provisions shall include, but not be limited to, density transfers from hillside areas to developable areas within the same parcel, building prohibitions for lands with grades exceeding 25%, permitted uses and building standards for developable areas in these hillsides, and grading parameters in these hillsides. The Zoning Ordinance shall also include procedures for the development of slope analyses to be reviewed and approved by the City Engineer, as a prerequisite to determining whether development can occur on any portion of a parcel.*" The regulations of the Grading Ordinance directly address hillside grading in accordance with the General Plan requirements.

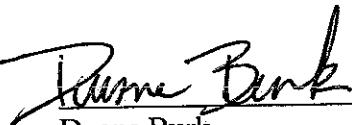
**PUBLIC COMMUNICATION:** The proposed Ordinance No. 1388 was advertised in the Record Gazette newspaper on June 12<sup>th</sup>, 2009. As of the date of this report, staff has not received any verbal or written comments for or against the proposed Ordinance.

**FISCAL DATA:** The proposed Ordinance has provisions for fees to cover the cost of reviewing plans, reports, and providing inspection services to implement the regulations. All fee amounts are subject to adoption by the City Council through fee resolution.

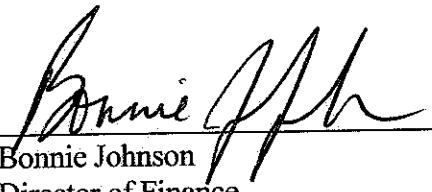
**PREPARED BY:**

  
\_\_\_\_\_  
Brian Guillot  
Planning Engineer

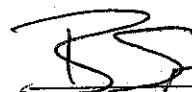
**REVIEWED BY:**

  
\_\_\_\_\_  
Duane Burk  
Director of Public Works

**RECOMMENDED BY:**

  
\_\_\_\_\_  
Bonnie Johnson  
Director of Finance

**APPROVED BY:**

  
\_\_\_\_\_  
Brian Nakamura  
City Manager

**CC Attachments:**

1. Ordinance No. 1388

ATTACHMENT 1

ORDINANCE NO. 1388

**CITY OF BANNING**  
**ORDINANCE NO. 1388**  
**GRADING, EROSION, AND SEDIMENT CONTROL**

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## ORDINANCE NO. 1388

### **AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF BANNING, CALIFORNIA, ADDING TITLE 18 TO THE BANNING MUNICIPAL CODE PERTAINING TO GRADING, EROSION, AND SEDIMENT CONTROL, AND AUTHORIZING THE CITY ENGINEER TO PREPARE A GRADING MANUAL SETTING FORTH THE ADMINISTRATIVE PROCEDURES AND TECHNICAL REQUIREMENTS NECESSARY TO IMPLEMENT THIS ORDINANCE**

The City Council of the City of Banning, does ordain as follows:

**Section 1:** Growth and development have created permanent changes to the City's landscape and its natural resources. Open space and naturally vegetated areas have been permanently altered through clearing and grading activities associated with construction and land development. Loss of ground cover, coupled with grading, excavation, and compaction of the land contributes to decreased groundwater infiltration, increased storm water flow, erosion and increased sediment runoff into washes, streams and other water bodies. Controlling erosion and sedimentation represents a vital component of protecting the water quality of our watercourses, water bodies and wetlands.

**Section 2:** Grading and land clearing activities also impact the City's aesthetic value and community character. Establishing minimum standards and requirements relating to land grading, clearing, excavations and fills, and procedures by which these standards and requirements may be enforced, will help to ensure soil is not stripped and removed from lands in the City, leaving them unsightly and susceptible to erosion, subsidence, faulty drainage and sediment deposition.

**Section 3:** It is desirable to adopt regulations for grading private property that will help to ensure that future grading, clearing and development of land within the City occurs in the manner most compatible with surrounding areas, and is paramount to protecting life, limb and property, and promoting and enhancing the general public welfare and a superior community environment.

**Section 4:** The Banning Municipal Code is hereby amended by adding TITLE 18, consisting of Articles 1 through 11, and the various Chapters and Sections within each Article, to read as follows:

## **TITLE 18**

### **THE CITY OF BANNING GRADING, EROSION, AND SEDIMENT CONTROL ORDINANCE**

#### **Chapter 18.01**

#### **ARTICLE 1. GENERAL PROVISIONS**

##### **Sections:**

<b>18.01.020</b>	<b>Title</b>
<b>18.01.040</b>	<b>Grading Manual</b>
<b>18.01.060</b>	<b>Purpose</b>
<b>18.01.080</b>	<b>Scope</b>

##### ***18.01.020 Title***

The ordinance codified in these Titles shall be known as the “City of Banning Grading, Erosion, and Sediment Control Ordinance” and will be referred to herein as “this Ordinance.”

##### ***18.01.040 Grading Manual***

The City Engineer (“City Engineer”) shall formulate a manual setting forth the administrative procedures and technical requirements necessary to implement the provisions of this Ordinance. Such rules, procedures, and requirements shall be entitled “The City of Banning Administrative and Technical Procedures Manual for Grading, Erosion, and Sediment Control” (“Grading Manual”). The City Engineer shall have the authority to change, update or revise the Grading Manual as necessary in order to implement the provisions of this Ordinance and all revisions thereto arising from time to time.

In the event of any conflict between the Grading Manual and this Ordinance, the more restrictive provisions shall govern. The provisions of the Grading Manual shall, to the extent they are made conditions of a permit by the City Engineer, be binding upon the permittee and those claiming under said permittee.

##### ***18.01.060 Purpose***

This Ordinance is enacted for the purpose of regulating grading activity on property within the city limits of the City of Banning to safeguard life, limb, health, property and the public welfare; to avoid discharges of pollutants such as sediment, hazardous materials, wastes and debris from entering public or private storm water conveyance facilities and surface waters; and to ensure that the intended use of a graded site within the city limits is consistent with the City’s General Plan, any specific plans adopted thereto and all applicable City ordinances and zoning regulations.

## **18.01.080 Scope**

This Ordinance sets forth rules and regulations, which reflect the minimum acceptable methods or actions to control land disturbances, landfill, soil storage, pollution, and erosion and sedimentation resulting from construction, grading, excavation, and land clearing activities. This Ordinance establishes procedures for issuance, administration and enforcement of permits for such activities. Any such grading activities within the city limits of the City of Banning shall conform to the provisions of this Ordinance and the Grading Manual and other applicable provisions of the City's Municipal Code and the California Building Code, as adopted and amended by the City, together with all other conditions of approval.

In the event that a particular topic is not covered in either this Ordinance or the Grading Manual, the applicable provisions of the City's Municipal Code or the California Building Code, as adopted and amended by the City, shall govern. If a conflict arises between this Ordinance and the City's Municipal Code or the California Building Code, the more restrictive provision shall govern, unless otherwise approved by the City Engineer.

## **Chapter 18.03**

### **ARTICLE 2. PERMITS REQUIRED**

#### **Sections:**

- 18.03.020 Permits Required**
- 18.03.040 Permit Exemptions**

#### ***18.03.020 Permits Required***

No person shall conduct any grading, stockpiling, excavating, paving, earth moving, filling, clearing, disking, brushing, or grubbing on natural or existing grade, or perform work that is preparatory to grading, without first having obtained a permit in accordance with this Ordinance, except as specified below in Section 18.03.040, "Permit Exemptions" of this Ordinance and without having obtained coverage under the State Water Resources Control Board (SWRCB) National Pollution Discharge Elimination System (NPDES) permit for construction activity (if applicable).

#### ***18.03.040 Permit Exemptions***

Grading permits are not required for:

- A. An excavation below the existing finished grade for recompaction within the building zone (within five feet (5') of footings) or for basements and footings for a building, mobile home, retaining wall, septic system, well, or structure authorized by a building permit. This shall not exempt any fill made with the material from such excavation or exempt any excavation having an unsupported height greater than two feet (2') after the completion of such structure.

- B. Cemetery graves;
- C. Refuse disposal sites controlled by other statutorily authorized regulations or agencies;
- D. Earthwork or construction controlled by the Federal, State, County, or City Governments, or by a local agency as defined by Government Code Section 53090 through 53095 (Special Districts). This exemption, however, shall apply only when the grading activity takes place on the property, or dedicated rights-of-way or easements of the above agencies;
- E. Excavation and backfill for installation of underground utilities by public utilities or companies operating under the authority of a franchise or public right-of-way permit;
- F. Mining, quarrying, excavating, processing stockpiling of rock, sand, gravel, aggregate or clay for commercial purposes where established and provided for by a conditional use permit, provided such operations do not affect the lateral support of any adjacent or adjoining properties, or alter the direction of, or contribute to, sedimentation to natural watercourses.
- G. Exploratory excavations under the direction of civil engineers, geotechnical engineers, engineering geologists, and/or archaeologists or paleontologists, or pursuant to a well permit, provided all excavations are properly backfilled or otherwise restored. All such elevations and trenches are subject to the applicable sections of Title 8 of the State Orders, Division of Industrial Safety and the following:
  - 1. When such work involves removal of any native vegetation, it shall be accompanied by an administrative clearing permit in accordance with Section 18.09.120(D), "Administrative Clearing Permit" of this Ordinance. Any access roadways or pads constructed for this work shall only be constructed as approved in the administrative clearing permit and shall be restored as required in the permit.
- H. An excavation not intended to support structures or mobile homes and which, (a) is less than two feet (2') in vertical depth, or (b) which does not create a cut slope greater than three feet (3') in vertical height and steeper than two horizontal to one vertical (2:1). This exemption shall not apply when finish grading is proposed, subsequent to a permit authorizing rough grading in accordance with Section 18.09.120(A), "Types of Grading Permits" of this Ordinance.
- I. A fill less than one foot (1') in vertical depth, placed on natural terrain with a slope flatter than five (5) horizontal to one (1) vertical (5:1), or less than three feet (3') in depth, not intended to support structures or mobile homes, which does not exceed fifty (50) cubic yards on any one site and does not obstruct a drainage course. This exemption shall not apply when finish grading is proposed, subsequent to a permit

authorizing rough grading in accordance with Section 18.09.120(A), "Types of Grading Permits" of this Ordinance.

- J. The construction or maintenance of roads or facilities for the generation, storage or transmission of water including floodwaters or electrical energy by public agencies or their agents. Work may be subject to Water Quality Management Plan (WQMP) requirements. A WQMP project includes the construction or reconstruction of 5,000 square feet of impervious surface in a parking lot, street, roadway or highway.
- K. The maintenance of private roads by private individuals or their agents, but not the construction or widening of such roads.
- L. Clearing and brushing when directed by the Fire Chief to mitigate a potential fire hazard in accordance with Section 8.48.50 "Fire Hazard" of the Banning Municipal Code.
- M. Clearing and brushing, expressly for the following purposes:
  - 1. Routine landscaping and maintenance of already landscaped areas, and the removal of dead or diseased trees or shrubs.
  - 2. Clearing which conforms to the location, extent and purpose authorized explicitly by a construction permit pursuant to a discretionary land use permit or a discretionary development permit. An Administrative Clearing Permit, in accordance with Section 18.09.120 (D) of this Ordinance, shall be required for any purpose that is not specifically addressed by the construction permit.
- N. Repaving, resurfacing, and maintenance of existing private roads and parking lots and the preparation necessary for that work, provided no grading beyond the limits of other exemptions is performed.
- O. Minor maintenance and alterations to natural drainage areas that do not:
  - 1. Obstruct or redirect drainage from adjacent properties, nor
  - 2. Divert the outflow of drainage from the existing or natural discharge point of the property, nor
  - 3. Concentrate or accelerate the flow of drainage as it leaves the property, nor
  - 4. Create ponding, siltation, or erosion in or of the streambed, nor
  - 5. Disturb wetlands.

Note: The above listed exemptions do not apply to clearing, grubbing, brushing, disking or grading when:

- a. Work will occur in, or physically impact, designated or dedicated open space or environmentally sensitive areas as designated in the General Plan, or the finally adopted plan of any public agency or governmental office with jurisdiction over the site, or as shown on any approved Specific Plan; or,

- b. Work will occur in any waterway or wetland, stream, river, channel, pond, lake, marsh, bog, lagoon, vernal pool, or riparian habitat except as provided in exemption "O" of this section, minor maintenance; or,
- c. Work will occur in any floodway or floodplain as shown on the Federal Emergency Management Agency (FEMA) Flood Plain Maps, or on City revised maps except as provided in exemption "O" of this section, minor maintenance.

## **Chapter 18.06**

### **ARTICLE 3. GRADING APPLICATION REQUIREMENTS**

#### **Sections:**

- 18.06.020      Grading Application**
- 18.06.040      Plans and Specifications**
- 18.06.060      Geotechnical (Soils) Reports**
- 18.06.080      Seismicity Reports**
- 18.06.100      Dust Prevention and Control Plan**
- 18.06.120      Haul Route Plan**
- 18.06.140      Erosion and Sediment Control Plan**
- 18.06.160      Expiration and Renewal of Grading Application Submittals**

#### ***18.06.020      Grading Application***

To obtain a grading permit, the applicant shall first file an application in writing on a form furnished by the City Engineer for that purpose.

#### ***18.06.040      Plans and Specifications***

- A. Each application for a grading permit shall be accompanied by plans and specifications, soils engineering and geological reports, erosion and sediment control plans, proof of application for coverage under the State Water Resources Control Board (SWRCB) National Pollution Discharge Elimination System (NPDES) permit for construction activity, and all other information required by the City Engineer as specified in Subarticle 3 of the Grading Manual, and payment of the appropriate fees. Additionally, a Water Quality Management Plan (WQMP) as specified in the MS4 permit must be accepted by the City Engineer prior to issuance of a grading permit. The information required on the application form shall be kept current until the conclusion of the permitted activities.
- B. Plans and specifications for grading projects requiring permits as defined in Section 18.03.020, "Permits Required" of this Ordinance shall be prepared and signed by the Engineer of Record. This requirement may be extended to any project when, in the

opinion of the City Engineer, drainage or geologic factors may warrant a need for civil engineering design and control.

C. Grading plans and specifications shall be prepared in accordance with Subarticle 3 of the Grading Manual.

**18.06.060 *Geotechnical (Soils) Reports***

A. Surface and Subsurface Conditions. The City Engineer shall require a geotechnical report to correlate surface and subsurface conditions with the proposed grading plan. The results of the investigation shall be presented in a report in conformance with the requirements of this Ordinance and Subarticle 3 of the Grading Manual.

B. Supplemental Reports/Data. The City Engineer shall require such supplemental reports and data, as he deems necessary upon his review of the site and the reports and other data submitted. Such required data may include tests for soil fertility and agricultural suitability to be performed at the conclusion of rough grading by a recognized agronomic soil-testing laboratory, with written analysis and recommendation, to be utilized during any required revegetation.

C. Waiver of Geotechnical Report Requirements. For a specific project, the City Engineer may determine that the geological and geotechnical conditions at the site are such that public safety is adequately protected and no mitigation is required. This finding shall be based on a report presenting evaluations of site in the immediate vicinity having similar geologic and geotechnical characteristics. The report shall be prepared by a certified engineering geologist or registered civil engineer, having competence in the field of seismic hazard evaluation and mitigation. The City Engineer shall provide a written commentary that addresses the report conclusions as justification for waiving the requirement of a geotechnical report for the project. All such waivers shall be recorded with the Riverside County Recorder and a separate copy, together with the report and commentary, filed with the State Geologist within 30 days of the waiver, in accordance with Public Resources Code Section 2697(a).

**18.06.080 *Seismicity Reports - Alquist-Priolo Earthquake Fault Zoning Act***

A seismicity report shall be required as a condition for issuance of a grading permit for all grading applications associated with subdivisions (tracts); all grading projects that propose development with occupancy category II, III, IV structures as shown in table 1604A.5 of the California Building Code; and all real estate development that lies within an earthquake fault zone. Said reports shall comply with the requirements of the Alquist-Priolo Earthquake Fault Zoning Act (Public Resources Code, Section 2621, et seq.) and as specified in the Grading Manual.

**18.06.100 *Dust Prevention and Control Plan***

Dust control and prevention procedures shall be employed while construction activity occurs to minimize wind borne particles. At the minimum, all grading operations, land clearing,

loading, stockpiling, landscaping, vehicular track-out and haul routes shall comply with South Coast Air Quality Management District (SCAQMD) Rule 403 (Fugitive Dust Emissions) and the Grading Manual.

#### ***18.06.120 Haul Route Plan***

Where soil or construction materials are moved on public roadways from or to the site of a grading operation, a haul route shall be approved by the City Engineer in accordance with the Grading Manual. Deviation from the designated haul route shall constitute a violation of the conditions of the permit issued under this Ordinance. Vehicular track-out shall be controlled, as directed by the City Engineer, to prevent sediment deposition outside of the project site boundaries.

#### ***18.06.140 Erosion and Sediment Control Plan***

All grading plans, regardless of the date of submittal, shall include an erosion and sediment control plan designed to limit erosion and sediment of all disturbed portions of the property and to minimize the transport of soil onto adjacent properties or into streets, storm drains, or drainage ways in accordance with the provisions of Chapter 18.15 of this Ordinance and Subarticle 6 of the Grading Manual.

#### ***18.06.160 Expiration and Renewal of Grading Application Submittals***

- A. Applications for which no permit is issued within 180 days following the date of application shall expire, and plans submitted for checking may thereafter be returned to the applicant or may be destroyed by the City Engineer without additional notice to the applicant.
- B. The City Engineer may extend the time for action by the applicant for a period not exceeding 180 days upon written request by the applicant showing that circumstances beyond the reasonable control of the applicant have prevented action from being taken.
- C. In order to renew action for an application after expiration, the applicant shall resubmit grading application submittals and pay the most current plan check fees.
- D. Plan check fees shall be forfeited for all expired permits.

#### ***18.06.180 Slope Analysis Plan***

For Hillside developments a slope analysis plan shall be submitted with all development applications of five acres or more in any Hillside development area, or as requested by the Community Development Director. A slope analysis plan shall distinguish existing slopes 0-15% grade, 16-20% grade, 21-24% grade and those grades greater than 25% in accordance with the provisions of Section 18.12.180 of this Ordinance and Subarticle 5 of the Grading Manual.

## Chapter 18.09

### ARTICLE 4. GRADING PERMIT REQUIREMENTS

#### Sections:

<b>18.09.020</b>	<b>Permit Issuance – Terms and Conditions</b>
<b>18.09.040</b>	<b>Responsibility of Permittee</b>
<b>18.09.060</b>	<b>Contractor Qualifications</b>
<b>18.09.080</b>	<b>Right of Entry</b>
<b>18.09.100</b>	<b>Tentative Subdivision or Conditional Use Permit Required</b>
<b>18.09.120</b>	<b>Types of Permits</b>
<b>18.09.140</b>	<b>Protection of Adjoining Property</b>
<b>18.09.160</b>	<b>Protection of Utilities</b>
<b>18.09.180</b>	<b>Maintenance of Protective Devices</b>
<b>18.09.200</b>	<b>Time of Operations</b>
<b>18.09.220</b>	<b>Debris on Public Streets</b>
<b>18.09.240</b>	<b>Disposal of Materials</b>
<b>18.09.260</b>	<b>Expiration and Renewal Issued of Permits</b>
<b>18.09.280</b>	<b>Denial of Permit</b>

#### *18.09.020      Permit Issuance – Terms and Conditions*

- A. Upon receipt and approval of the required application, fees, plans, reports, and other requirements of this Ordinance, the City Engineer may issue a permit, subject to any terms and conditions deemed necessary to ensure conformance with the provisions of this Ordinance and the Grading Manual.
- B. The City Engineer shall have the discretion to impose or modify conditions as necessary to prevent a possible nuisance or hazard, or to eliminate a nuisance or hazard, to persons or to public or private property in accordance with Section 18.27.060, "Hazardous Conditions" of this Ordinance.
- C. The issuance of a permit shall constitute an authorization to do only that work which is described or illustrated on the application for the permit, or on the plans and specifications attached to the permit and approved by the City Engineer. A separate permit shall be required for each (noncontiguous) grading project.

#### *18.09.040      Responsibility of Permittee*

It shall be the responsibility of the permittee to be knowledgeable of the conditions and/or restrictions placed on the permit as outlined in the applicable sections of this Ordinance, the Grading Manual, and as contained on the approved grading plans and geotechnical reports. The permittee shall also be responsible for maintaining a copy of the permit and approved plans at the work site, and implementing the applicable requirements of the City's Standard Notes, as identified in the Grading Manual.

### ***18.09.060 Contractor Qualifications***

All persons performing work pursuant to this Ordinance shall have all valid licenses and insurance required by the State of California and by the City of Banning.

### ***18.09.080 Right of Entry***

As a prerequisite for issuance of any grading permit, the owner, contractor, or authorized agent of the site to be graded acknowledges and grants permission to the City for right of entry into the site for inspection, emergency work, or correction of grading not performed in compliance with the terms and conditions of the permit. The owner, contractor, or authorized agent shall agree to indemnify the City for any claims or damages, which may result from the City's entry onto the property including any corrective or emergency action taken pursuant to such right of entry.

### ***18.09.100 Tentative Subdivision or Conditional Use Permit Required***

Under either of the following circumstances, a permit shall not be issued unless and until a tentative map or a Conditional Use Permit (CUP) has been approved by the City:

- A. If the purpose of the proposed grading or clearing is to prepare the land for a subdivision or for some use for which a conditional use permit is required; or
- B. Notwithstanding the purpose of the proposed grading or clearing as stated in the application, if the City Engineer finds that the purpose of the proposed grading or clearing is to prepare the land for subdivision or for some use for which a conditional use permit is required.

### ***18.09.120 Types of Permits***

- A. Mass, Rough, or Precise Grading. The City Engineer may issue a mass, rough, or precise grading permit for grading work upon completion of an application in accordance the Grading Manual. The issuance of building permits shall be determined as follows:
  1. Building permits may be issued for a site graded under a precise grading permit upon completion and approval of the rough grade inspection as specified in the Grading Manual.
  2. Building permits shall not be issued for a site graded under a rough grading permit unless a precise grading permit has been issued.
- C. Stockpiling. Upon approval by the Planning Commission of a Conditional Use Permit (CUP), a stockpile permit may be issued for the stockpile of soil materials on a lot or parcel provided that the soil materials shall be removed from the site or compacted and graded thereon under a subsequently issued mass, rough, or precise

grading permit within six (6) months of issuance of a stockpile permit, unless modified by the Planning Commission, in accordance with the Grading Manual.

- D. Administrative Clearing. No person shall commence any clearing and grubbing operation without first obtaining a grading or administrative clearing permit in accordance with the Grading Manual.
- E. Borrow Sites. A grading and/or administrative clearing permit shall not be issued when, in the opinion of the City Engineer, a significant amount of borrow or waste material is to be removed from a grading site for commercial purposes unless a Conditional Use Permit in accordance with Chapter 17.52, "Conditional Use Permits" of the Banning Municipal Code has been issued for the operation of a borrow pit on the grading site.
- F. Paving. No person shall construct concrete or bituminous pavement surfacing on natural or existing grade in excess of five thousand (5,000) square feet for any commercial, industrial, multi-residential, or other parking lot, without a valid grading permit for such paving. Maintenance and repaving of existing paved sections shall be exempt from this requirement.
- G. Watercourse Alteration. No person shall alter an existing watercourse, channel, or revetment by excavating, or placing fill, rock protection or structural improvements therein without a grading permit unless (i) the requirement for a grading permit is waived by the City Engineer, or (ii) the grading is performed as interim protection in an emergency to prevent flooding, or (iii) a separate improvement plan for such alteration is approved by applicable state agencies and the City Engineer.
- H. Rock Blasting. No rock blasting shall be permitted until a preblast survey of the surrounding property is conducted to the satisfaction of the City Engineer. During rock blasting, seismic recordings shall be taken for all blasts at locations and levels approved by the City Engineer. All blasting shall conform to the requirements of the City Engineer, as specified in the Grading Manual.

#### ***18.09.140 Protection of Adjoining Property***

Each adjacent owner is entitled to the lateral and subjacent support that his land receives from the adjoining land, subject to the right of the property owner of the adjoining land to make proper and usual excavations on the same for purposes of construction or improvement, as follows:

- A. Any person causing an excavation to be made to a depth of ten feet (10') or more below the grade and within ten feet (10') of the property line(s) shall protect the excavation so that the soil of adjoining property will not cave in or settle. The person making or causing the excavation to be made shall provide written notification to the adjoining property owner(s) not less than ten (10) days before such excavation is to be made, stating the depth for which such excavation is to be made and when the excavation will begin.

- B. If at any time it appears that the excavation is of greater depth than are the walls or foundation of an adjoining building or other structure, and the distance from the edge of the excavation to an adjoining building or other structure is less than the depth of the excavation, the person causing the excavation shall notify the owner of the adjoining building or other structure not less than ten (10) days before such excavation is to be made to protect the same from any damage, or to brace or extend the foundations of the noted building or other structure from possible damage from the excavation.
- C. Excavations shall meet all State and Federal regulations, including but not limited to, obtaining CAL OSHA permits
- D. No grading shall be approved which, in the opinion of the City Engineer, physically prevents the use of existing legal access to any parcel.

#### ***18.09.160 Protection of Utilities***

- A. During grading operations, the permittee shall be responsible for the prevention of damage to public utilities or services and for confining grading activities to the area permitted on the approved plans. This responsibility applies within the limits of grading or clearing and along any routes of travel of equipment.
- B. Before starting any excavation work, the permittee shall be responsible to contact Underground Service Alert of Southern California and coordinate the proposed excavation with all interested utility companies, districts, and agencies.

#### ***18.09.180 Maintenance of Protective Devices***

The owner or agent in control of such property on which a grading activity has occurred pursuant to a permit granted under the provisions of this division, shall maintain in good condition and repair all structures, planting and other protective devices as per the approved plans or required by the permit. Any facilities dedicated for public use and accepted by a public agency are exempt.

#### ***18.09.200 Time of Operations***

- A. Time of any grading, clearing and equipment operations pursuant to this Ordinance shall be consistent with Chapter 8.44 "Noise" of the Banning Municipal Code. Grading operations within one-quarter (1/4) mile of an occupied residence shall not be conducted between the hours of 6:00 p.m. and 7:00 a.m., Monday through Friday; or between the hours of 6:00 p.m. and 7:00 a.m. on Saturdays. Further, no such activity shall be undertaken on Sunday or nationally recognized holidays. The City Engineer may extend the hours permitted for grading or equipment operations if the City Engineer determines that such operations are not detrimental to the health, safety or welfare of the inhabitants of nearby structures. Permitted hours of operation may

be shortened by the City Engineer's finding of a previously unforeseen effect on the health, safety or welfare of the surrounding community.

B. Public Works projects of any Federal, State or local entity or emergency work by public utilities are exempt from the provisions of this Ordinance. Residents working on their property are exempt from the prohibition of construction activities on Sundays and holidays but shall comply with the hourly restrictions set forth for Saturday when working on Sundays and holidays.

#### ***18.09.220 Debris on Public Streets***

The throwing, leaving, maintaining, keeping, placing, dumping, depositing or spilling soil materials, or debris on public streets or any portion of the public right-of-way is strictly prohibited. The permittee shall be responsible for the complete removal and cleanup of such materials from the street or any portion of the public right-of-way. If the permittee fails to immediately remove said spillage or deposit from the street and/or public right-of-way, and it is necessary for the City to cause such removal to be made, the cost of such removal work shall be the responsibility of the permittee. The City may use the grading deposit in accordance with Section 18.24.120, "Grading and Erosion Control Securities" of this Ordinance for this purpose without notice to the owner. An additional cash deposit may be required prior to resumption of grading to insure the cleanup of public streets.

#### ***18.09.240 Disposal of Materials***

The disposal of all waste and recycling materials removed as part of any grading project shall be in compliance with the City's Solid Waste Franchise Agreement, as specified within the provisions of Chapter 8.28 "Garbage Collection and Disposal" of the Banning Municipal Code and the Grading Manual.

#### ***18.09.260 Expiration and Renewal Issued Permits***

A. A grading permit shall be valid for a period of one-hundred eighty (180) days from the date of issuance.

B. The time limitation for all grading permits is also subject to the following provisions:

1. Change of ownership. A permit issued in accordance with these requirements shall terminate upon a change of ownership if the work for which said grading permit was issued has not been completed. In such instances, a new permit shall be required for completion of the work.
  - a. If the time limitations of paragraph (A) of this section are not applicable, and no changes have been made to the plans and specifications last submitted to the City Engineer, no charge shall be made for the issuance of a new permit.
  - b. If changes have been made to the plans and specifications last submitted to the City Engineer, fees based on the valuation of the

additional or new work, such as additional earthwork and necessary plan checking shall be charged to the permit applicant.

c. New securities and/or deposits shall be submitted by the new owner in accordance with Section 18.24.120, "Grading, Erosion and Sediment Control Securities" of this Ordinance.

2. Permit Extensions. The City Engineer may extend the time limit on permits by one (1) or more successive periods of up to one-hundred eighty (180) days upon written request by the applicant showing to the satisfaction of the City Engineer that circumstances beyond the control of the applicant have prevented, delayed or extended the time required to complete the grading operations.

3. Weather-related delays. The City Engineer may require that grading operations and project designs be modified if delays occur which incur weather-related problems not considered at the time the permit was originally issued.

C. As a condition of the extension of any time period, the City Engineer may require the payment of additional permit, plan checking, inspection, and/or soils review fees required to cover the administration of the extensions and/or increased costs to the City and to bring the project into conformance with any fee schedule in effect at the time of extension.

#### ***18.09.280 Denial of Permit***

A. Hazardous Conditions. A permit shall not be issued in any case where the City Engineer determines that the work as proposed by the applicant will:

1. Expose any property to landslide or geologic hazard; or
2. Adversely interfere with existing drainage courses or patterns; or
3. Cause erosion and/or flooding, which could result in the depositing of mud, silt, or debris on any other property or public or private street; or
4. Create any hazard to person or property; or
5. Damage or endanger any environmentally sensitive species and habitats, rocks and/or archaeological artifacts.

B. General Conditions. A permit shall not be issued if any of the following apply:

1. If the submittal is incomplete;
2. If the plan as submitted does not comply with the provisions of this Ordinance;
3. If the required security is not posted;
4. If the application contains false information.

C. Other. The City Engineer shall deny the issuance of a permit if any of the following conditions apply:

1. If prohibited by a duly elected moratorium, court order, injunction, or other legal order;
2. If the applicant or owner has failed to comply with the provisions of this Ordinance;
3. If the work proposed is not consistent with the City's General Plan, or any element thereof, or any specific plan, conditional use permit, land use ordinance or regulation, zoning ordinance or regulation, or permit, or approved subdivision map.

## Chapter 18.12

### ARTICLE 5. GRADING DESIGN STANDARDS

#### Sections:

<b>18.12.020</b>	<b>Cuts</b>
<b>18.12.040</b>	<b>Fills</b>
<b>18.12.060</b>	<b>Setbacks</b>
<b>18.12.080</b>	<b>Terraces and Terrace Drains</b>
<b>18.12.100</b>	<b>Subsurface Drainage</b>
<b>18.12.120</b>	<b>Pad Grading</b>
<b>18.12.140</b>	<b>Asphalt Concrete Pavement</b>
<b>18.12.160</b>	<b>Disabled Access</b>
<b>18.12.180</b>	<b>Hillside Grading</b>

#### ***18.12.020 Cuts***

Unless otherwise recommended by the geotechnical engineer, and engineering geology reports, or both, and approved by the City Engineer, cuts slopes shall be no steeper than two (2) horizontal to one (1) vertical (2:1). All cuts and excavations shall conform to the provisions of this Ordinance and the Grading Manual.

Exception: In the absence of an approved geotechnical engineering report, these provisions may be waived by the City Engineer for minor cuts not intended to support structures.

#### ***18.12.040 Fills***

Unless otherwise recommended by the geotechnical engineer or engineering geology reports, or both, and approved by the City Engineer, fills shall conform to the provisions of the Grading Manual.

Exception: In the absence of an approved geotechnical engineering report, these provisions may be waived by the City Engineer for minor fills not intended to support structures.

#### ***18.12.060 Setbacks***

All setbacks and other restrictions specified by the Grading Manual are minimum and may be increased by the City Engineer, pursuant to the recommendation of a civil or geotechnical engineer, to prevent damage to adjacent properties from erosion or to provide access for slope and drainage structure maintenance. Retaining walls may be used to reduce the required setbacks when approved by the City Engineer.

#### ***18.12.080 Terraces and Terrace Drains***

Drainage facilities and terraces shall conform to the provisions of the Grading Manual unless otherwise approved by the City Engineer.

#### ***18.12.100 Subsurface Drainage***

- A. Cut and fill slopes shall be provided with subsurface drainage as necessary for stability, and as recommended by the geotechnical engineer, geologist, and/or engineering geologist.
- B. All canyons and buttress fills shall be provided with sub drains approved by the City Engineer.

#### ***18.12.120 Pad Grading***

Storm water runoff from lots or adjacent properties shall not be carried over cut or fill slopes steeper than five (5) horizontal to one (1) vertical (5:1). Such runoff shall conform to the provisions of the Grading Manual.

#### ***18.12.140 Asphalt Concrete Pavement***

Asphalt concrete pavement for surfacing of parking lots, private streets, driveways or other similar uses shall conform to the provisions of the Grading Manual unless otherwise approved by the City Engineer.

#### ***18.12.160 Disabled Access***

All site development and precise grading shall be designed to provide access to all entrances and exterior ground-floor exits and to normal paths of travel in accordance with California Disabled Access Regulations (California Code of Regulations, Title 24, Part 2).

#### ***18.12.180 Hillside Grading***

Development proposed in any hillside zoning district, open space district, or any hillside site shall conform to the following standards:

- A. Development on lands with slopes of more than 25% is prohibited.

- B. Development on plateaus shall include a one-hundred foot (100') building setback from all ridgelines or edge of plateau.
- C. Ridgelines are to be preserved.
- D. Natural hillsides above the toe of slope shall be preserved. The toe of slope for the purposes stated herein shall mean the dividing line between the land or rock formations where there is a noticeable break in the angle of slope.

## Chapter 18.15

### ARTICLE 6. EROSION AND SEDIMENT CONTROL

#### Sections:

- 18.15.020      Construction Runoff Compliance**
- 18.15.040      Erosion and Sediment Control Plans Required**
- 18.15.060      Erosion and Sediment Control Systems**
- 18.15.080      Temporary Site Vegetation – When Required**
- 18.15.100      Erosion and Sediment Control Maintenance**
- 18.15.120      Erosion and Sediment Control – Agricultural**
- 18.15.140      Additional NPDES Requirements**

#### ***18.15.020      Construction Runoff Compliance***

- A. All individual construction and grading projects shall implement measures to ensure that pollutants are not discharged from the site, will be reduced to the Maximum Extent Practicable (MEP), and will not cause or contribute to an exceedance of water quality objectives in the local natural watercourses. All construction and grading activities will be in compliance with applicable ordinances, permits and other Federal, State and local requirements.
- B. The permittee shall adhere to the following requirements:
  1. Develop and implement an erosion and sediment control plan to manage storm water and non-storm water discharges from the site at all times in accordance with the Grading Manual. Projects disturbing, exposing or stockpiling one (1) acre or more of soil are also required to have coverage under the State General Construction Permit and generate a Storm Water Pollution Prevention Plan (SWPPP) per the State General Construction Permit;
  2. Conduct phased grading operations and minimize grading activities during the rainy season. Coincide grading with dry weather periods to the extent feasible. Implement additional “Best Management Practices” (BMP’s) for all rain events;

3. Install a combination of erosion and sediment control measures to effectively prevent erosion and retain sediment on-site throughout the duration of all construction activities.
4. Minimize exposure time of disturbed soil areas;
5. Temporarily stabilize and re-seed disturbed soil areas as rapidly as possible;
6. Permanently re-vegetate or landscape as early as feasible;
7. Stabilize all slopes;
8. The permittee shall abide by all of the provisions set forth in the State Water Resource Control Board (SWRCB) NPDES General Permit for construction activity. The City must be provided with a Waste Discharge Identification (WDID) number issued by the SWRCB prior to an issuance of a grading permit.
9. Implement the applicable requirements of the City's Standard Erosion and Sediment Control Notes, as identified in the Grading Manual.

Note: The above requirements are applicable to all construction sites regardless of whether the construction site is subject to the State General Construction Permit or other individual National Pollutant Discharge Elimination System (NPDES) permit.

#### ***18.15.040 Erosion and Sediment Control Plans Required***

- A. No grading work will be allowed on any single grading site under permit unless the City Engineer has approved an erosion and sediment control plan.
- B. All grading plans, regardless of the date of submittal, shall include an erosion and sediment control plan designed to limit erosion of all disturbed portions of the property and to minimize the transport of soil onto downgrade perimeters, curbs, gutters, streets, drainage inlets, private and public storm water conveyance systems, environmentally sensitive areas, adjacent properties and watercourses in accordance with the provisions of this Ordinance and the Grading Manual.
- C. All erosion and sediment control "Best Management Practices" (BMPs) outlined in the Storm Water Pollution Prevention Plan (SWPPP), if applicable, will be shown on the erosion and sediment control plan and implemented prior to October 1<sup>st</sup> of each year.

#### ***18.15.060 Erosion and Sediment Control Systems***

- A. The permittee shall be responsible for the control of erosion and sediment discharge on and from all disturbed areas of grading until issuance of certificate of occupancy at which time the BMP's of the WQMP shall be in place.
- B. No grading work shall be allowed on any site when the City Engineer determines that erosion, mudflow or sediment discharge may adversely affect downstream properties, drainage courses, storm drains, streets, easements, or public or private facilities or improvements unless an approved erosion and sediment control system has been implemented on the site. If the City determines that it is necessary for the City to cause

erosion and sediment control measures to be installed or cleanup to be done, the permittee shall pay all of the City's direct and indirect costs including extra inspection, supervision and reasonable overhead charges in accordance with Section 18.24.100, "Cost Recovery Fees" of this Ordinance.

- C. All protective devices shown on the erosion and sediment control plan and in the SWPPP, if applicable, shall be in place within seven (7) days prior to any forecasted rain. If the permittee does not install or maintain erosion and sediment controls, the City Engineer may order City crews to do the work or may issue contracts for such work and charge the cost of this work along with reasonable overhead charges to the cash deposits or other instruments implemented for this work without further notification to the owner. No additional work on the project except erosion and sediment control work shall be performed until the full amount drawn from the cash deposit, in accordance with Section 18.24.120, "Grading, Erosion and Sediment Control Securities" of this Ordinance is restored by the permittee.
- D. "Best Management Practices" (BMP's) shall be implemented on a continual basis during construction activities. The following minimum criteria shall be met:
  - 1. An effective combination of erosion and sediment controls shall be implemented within seven (7) working days of clearing or inactivity in construction.
  - 2. Soil stockpiles must be stabilized with a combination of erosion and sediment controls and have a daily maintenance frequency or as directed by the City Engineer.
  - 3. Waterway and watercourse protection shall include, but not be limited to, stabilization of the channel before, during and after in-channel work.
  - 4. Additional erosion and sediment control materials shall be stockpiled at various locations throughout the site for immediate implementation within seven (7) days of a forecasted rain. The developer/contractor shall make available equipment and workers for emergency work to protect the site.
- E. Cut and fill slopes shall be protected to control against erosion and sediment discharge.
- F. Permittee shall implement BMP's year round. Additional site specific BMP's shall also be implemented, as necessary, to comply with this Ordinance which may be more stringent than those required under the General Construction Permit.
- G. Permittee shall implement additional controls for construction sites tributary to Clean Water Act (CWA) Section 303(d) water bodies impaired for sediment. Each Permittee shall implement additional controls for construction sites within, adjacent, or discharging directly to receiving waters within environmentally sensitive areas.
- H. Permittee shall conduct construction site inspection for compliance with this Ordinance and all applicable permits.

#### ***18.15.080      Temporary Site Vegetation – When Required***

Temporary site vegetation shall be required, as determined by the City Engineer, on any disturbed soil areas of the site for prolonged periods of grading inactivity or expiration of a grading permit in accordance with Section 18.09.260, “Expiration and Renewal of Issued Permits” of this Ordinance. Temporary vegetation shall not negate any City requirement or condition of approval to install permanent landscaping.

#### ***18.15.100      Erosion and Sediment Control Maintenance***

- A. Prior to and after each rainstorm, all on-site and off-site flow-lines, storm water conveyance systems, check dams, chevrons, silt fences and desilting basins shall be free of sediment, construction materials, waste, miscellaneous debris and deteriorated erosion and sediment controls at all times.
- B. Prior to and after each rainstorm, the erosion and sediment control system shall be evaluated and revised and repaired as necessary.
- C. The permittee shall be responsible for and shall take necessary precautions to prevent public trespass onto areas where impounded water, due to erosion and sediment control devices, creates a hazardous condition. Signage indicating “ponded water – do not enter” shall be posted.
- D. The permittee shall be responsible for continual maintenance of the devices during all construction activities.
- E. In the event the City Engineer must cause emergency work to be done, he or she may revoke the grading permit. The permit shall not be renewed until an approved erosion and sediment control system has been installed and the owner has paid any applicable fees.
- F. If any grading or clearing subject to Section 18.03.020 “Permits Required” of this Ordinance has commenced on private property without a valid grading permit, the property owner will be required to stop work, prepare and implement an erosion and sediment control plan which has been approved by the City and obtain a valid grading permit.

#### ***18.15.120      Erosion and Sediment Control – Agricultural***

- A. Resource Conservation Plans. For all lands used for agricultural purposes within the City of Banning, the property owner shall cause to be prepared a resource conservation plan, utilizing the best management practices for the prevention of erosion and sedimentation. The resource conservation plan shall be prepared by the USDA Soil Conservation Services or a registered agricultural engineer consultant.
- B. Implementation of Resource Conservation Plans. The resource conservation plans to be prepared for best management practices implementation is to be prioritized based

upon the soil conservation service “soil erosion hazard map” with those areas of high erosion hazard receiving top priority. Resource conservation plans for agricultural areas shall be submitted for review and filing by the City after acceptance by the Regional Water Quality Control Board

C. Annual Report. The property owner of agricultural land shall be responsible for the preparation and submittal to the City Engineer an annual report setting forth their progress in the preparation of resource conservation plans and best management practices implementation. Progress reports may be required more frequently if deemed necessary by the City Engineer.

#### ***18.15.140 Additional NPDES Requirements***

A. General Requirements. All grading activities subject to the regulations of this Ordinance shall be designed and conducted to minimize runoff of all pollutants onto public or private properties and into waters of the United States as required by this Ordinance and City Municipal Code Chapter 13.24 “Stormwater Management System”.

B. Responsibility. It shall be the permittee’s responsibility to obtain coverage under the SWRCB General Construction Permit, submit a Notice of Intent (NOI) and appropriate fee to the SWRCB, complete all site-specific Storm Water Pollution Prevention Plans (SWPPP), monitoring and reporting program plans, reports, certifications, and other information required by the permit and or requested by the Regional Water Quality Control Board (RWQCB), United States Environmental Protection Agency (USEPA), or the City Engineer. The permittee shall update all plans as construction activities are modified from their original schedule and/or progress as originally planned. The permittee shall also maintain all erosion and sediment control measures at the site throughout the duration of the project as required by the permit. All of the information noted above shall be maintained on-site during construction and shall be presented upon demand by the SWRCB and/or City of Banning inspectors. NPDES requirements will remain in effect until Notice of Termination (NOT) requirements are fulfilled.

### **Chapter 18.18**

## **ARTICLE 7. GRADING INSPECTION**

### **Sections:**

- 18. 18.020      Inspections Required**
- 18. 18.040      Grading Requirements**
- 18. 18.060      Transfer of Responsibility**
- 18. 18.080      Notification of Noncompliance**
- 18. 18.100      Special Inspections**
- 18. 18.120      Stopping and Correction of Work**

### ***18. 18.020 Inspections Required***

All grading operations for which a permit is issued pursuant to the provisions of this Ordinance shall be subject to inspection by the City Engineer or his or her representative.

### ***18. 18.040 Grading Requirements***

- A. Civil Engineer. It shall be the responsibility of the civil engineer who prepared the grading plans to incorporate the applicable recommendations from the geotechnical engineer and engineering geologist and to incorporate any City Engineer approved alternatives into the grading plan.
  1. The civil engineer shall be responsible for establishing line and grade for the grading and drainage improvements and shall act as the coordinating agent in the event the need arises for liaison between the other professionals, the contractor and the City Engineer.
  2. The civil engineer shall be responsible for the preparation of plan revision, and upon completion of the work, the submission of as-graded drawings incorporating all changes and/or additions made during construction.
  3. Prior to issuance of building permits for any given lot or lots, the civil engineer shall be responsible for submitting a pad certification letter stating line and grade as evidence that the grading activity has been completed within standard tolerances in accordance with the approved plans and that all embankments and cut slopes and pad sizes are as shown on the approved plans.
- B. Geotechnical Engineer. The geotechnical engineer's area of responsibility shall include, but not be limited to, performing the preliminary geotechnical engineering investigation and preparing the preliminary geotechnical engineering report, determining the suitability of soils during grading, providing compaction inspection and testing, and preparing the final geotechnical engineering report.
- C. Engineering Geologist. The engineering geologist's area of responsibility shall include, but not be limited to, professional inspection and approval of the stability of cut slopes with respect to geological matters, and the need for subdrains or other groundwater drainage devices. He shall report his findings to the geotechnical engineer for engineering analysis.
- D. Landscape Architect. The landscape architect shall incorporate applicable recommendations from the geotechnical engineering reports into the landscape and irrigation plans. The landscape architect shall also prepare plan revisions, to be approved by the City Engineer, and shall submit as-graded drawings incorporating all changes and/or additions made during construction.
  1. All ground cover shall provide one hundred percent (100%) coverage within nine (9) months of planting, or additional landscaping shall be required in order to meet this standard.

### ***18. 18.060 Transfer of Responsibility.***

If the civil engineer, engineer of record, the geotechnical engineer, the engineering geologist, or the grading contractor of record is changed during the course of the work, the project shall be stopped until:

1. The permittee submits a letter of notification verifying the change of the responsible professional; and
2. The new responsible professional submits in writing that he has reviewed all prior reports and/or plans (specified by date and title) and work performed by the responsible professional party, and that he concurs with the findings, conclusions and recommendations, and is satisfied with the work performed. He or she must state that they assume all responsibility within his or her purview as of a specified date. All exceptions shall be justified to the satisfaction of the City Engineer.

Exception: Where clearly indicated that the firm, not the individual engineer and/or geologist, is the contracting party, the designated engineer or geologist may be reassigned and another engineer and/or geologist within the firm may assume responsibility.

### ***18. 18.080 Notification of Noncompliance***

If, in the course of fulfilling their responsibility under this division, the engineer of record, the geotechnical engineer, the engineering geologist, or the testing agency finds that the work is not being performed in accordance with approved plans, specifications, or this Ordinance, the discrepancies shall be reported immediately in writing to the grading contractor, the permittee and the City Engineer. Recommendations for corrective measures shall be submitted for approval to the City Engineer.

### ***18. 18.100 Special Inspections***

The City Engineer may establish special inspection requirements in accordance with Chapter 17, "Structural Tests and Special Inspections", of the California Building Code, as amended, for special cases involving grading or paving related operations. Special cases may apply to work where, in the opinion of the City Engineer, it is necessary to supplement the resources or expertise available for inspection.

### ***18. 18.120 Stopping and Correction of Work.***

- A. The provisions of Section 114, "Stop Work Order", of Appendix Chapter 1 "Administration" of the California Building Code, as amended, shall apply to all grading work. Whenever the City Engineer or his or her representative determines that any work does not comply with the terms and conditions of the permit, or that that the work is being done improperly or in a hazardous manner, he or she may order the work stopped by notice in writing served on any persons engaged in doing or

causing such work to be done, and any such persons shall stop conducting such work until authorized by the City Engineer to proceed with the work.

- B. Whenever any work on which inspections are required is covered or concealed by additional work without first having been inspected, the City Engineer may require that such work be exposed for examination. Such work may be subject to additional inspection fees in accordance with Section 18.24.040(D), "Grading Permit and Inspection Fee" of this Ordinance.
- C. If the City inspector finds the soil or other conditions not as stated in the approved plans and geotechnical reports or in additional information which was required for issuance of the grading permit, he may issue a stop work order until a revised grading plan has been approved by the City Engineer.
- D. If, during the course of any clearing, grubbing or grading operations, discovery is made of items of archaeological or paleontological interest, the permittee shall immediately cease operation in the area of discovery and notify the City inspector. Discoveries that may be encountered include, but are not limited to, dwelling sites, stone implements or other artifacts, animal bones, and fossils. The permittee shall obtain the services of a qualified archeologist or paleontologist to investigate the site and assess the significance of the find. Under no circumstances shall anyone remove or disturb any artifacts or remains. Work shall be resumed in the area of discovery at the direction of the City Engineer.
- E. Work may resume and the stop order shall be rescinded upon the City Engineer's determination that conditions have changed, corrections have been made, or the causes or actions which required a stop order have been remedied or alleviated to his or her satisfaction.

## **Chapter 18.21**

### **ARTICLE 8. COMPLETION OF WORK**

#### **Sections:**

- 18.21.020      Final Reports**
- 18.21.040      Notification of Completion**

#### ***18.21.020      Final Reports***

Upon completion of the rough grading work and at final completion of the work, the City Engineer may require the written approvals, reports, plans and supplements specified in Subarticle 8 of the Grading Manual.

**18.21.040      *Notification of Completion***

The permittee or his agent shall notify the City Engineer when the grading operation is ready for final inspection. Final approval shall not be given until all work, including installation of all drainage facilities and their protective devices, and all erosion and sediment control measures, including landscaping and its irrigation system, have been completed in accordance with the approved grading plan, and the required reports have been submitted. Where landscape planting for erosion and sediment control has been installed, final clearance, i.e., release of security deposits, shall not be granted until the plantings have become established. The establishment of such erosion and sediment control plantings shall be certified by a licensed landscape architect and approved by the City Engineer.

**Chapter 18.24**

**ARTICLE 9. GRADING FEES AND SECURITIES**

**Sections:**

- 18.24.020      Grading, Erosion and Sediment Control Plan Checking Fee**
- 18.24.040      Grading Permit and Inspection Fee**
- 18.24.060      Review of Geotechnical Reports Fee**
- 18.24.080      Refunds**
- 18.24.100      Cost Recovery Fees**
- 18.24.120      Grading, Erosion and Sediment Control Securities**

**18.24.020      *Grading, Erosion and Sediment Control Plan Checking Fee.***

Before accepting an application and a set of plans and specifications for review, the City Engineer shall collect a plan-checking fee. Separate permits and fees shall apply to retaining walls or major drainage structures. All applicants submitting plans as required by this Ordinance shall pay all fees and/or deposits as required by this Ordinance and by City Council resolution establishing applicable fees and deposits.

**18.24.040      *Grading Permit and Inspection Fee***

- A. All applicants requesting a mass, rough, or precise grading permit, stockpile permit, or administrative clearing permit as required by this Ordinance shall pay all fees and/or deposits as required by this Ordinance and by City Council resolution.
- B. The fee for a grading permit authorizing additional work to that under a valid permit shall be the difference between the fee paid for the original permit and the fee shown for the entire project as indicated in the City's fee schedule.
- C. A separate permit shall be required for each separate (noncontiguous) site. One permit may cover both an excavation and a fill on the same site.

D. Failure to pay fees and obtain a permit before commencing work shall be deemed a violation of this Ordinance, except where it can be proven to the satisfaction of the City Engineer that an emergency existed that made it impractical to first obtain the permit. A violation shall result in an assessment of double permit fees for work done prior to permit issuance. Payment of a double fee shall not relieve any person from fully complying with the requirements of this Ordinance.

#### ***18.24.060      Review of Geotechnical Reports Fee***

Before accepting a geotechnical (soils) report for review, the City Engineer shall collect a report review fee. A separate fee will be charged for each individual report fee submitted for review. The amount shall be as set forth by City Council resolution.

#### ***18.24.080      Refunds***

After submittal and commencement of processing by the City, no fee collected pursuant to this division, shall be refunded in whole or in part, except as provided as follows:

- A. Inspection fees may be refunded, less any City expenses incurred, including an overhead charge of twenty percent (20%), at any time prior to the start of the work authorized by the permit, upon the applicant's written request, provided the grading application has expired or has been withdrawn.
- B. No refund shall be made if corrective work remains to be done on the grading work itself.
- C. No refund shall be made pursuant to this section if a request for refund is submitted to the City more than one (1) year from the date of payment of the fee as to which a refund is claimed.

#### ***18.24.100      Cost Recovery Fees***

If the City Engineer performs emergency work relating to grading and erosion and sediment control on private property, he shall charge the property owner all direct and indirect costs that are necessary to complete the work to his satisfaction. Any costs assessed against the property owner under this section may be appealed to the City Council in accordance with Section 18.27.100, "Appeals" of this Ordinance.

#### ***18.24.120      Grading, Erosion and Sediment Control Securities***

- A. Security required. A grading permit shall not be issued unless the permittee first posts a security with the City comprised of a cash deposit, letter of credit, or a combination cash deposit and a corporate surety bond issued by a surety authorized to do business in the State of California, in an amount specified in Subarticle 9 of the Grading Manual. The security amount is required to assure that the work, if not completed in accordance with the approved plans and specifications, will be corrected

to eliminate any deficiency or hazard created by the work or its lack of maintenance, as follows:

1. A cash deposit, in accordance with Subarticle 9 of the Grading Manual, may be required by the City Engineer to ensure the elimination of hazardous conditions and the emergency maintenance of erosion and sediment control systems.
2. A cash deposit, in accordance with Subarticle 9 of the Grading Manual, may be required by the City Engineer for stockpiles to ensure their removal in accordance with Section 18.09.120(C), "Types of Permits" of this Ordinance.
3. On developments where progressive individual grading projects or several concurrent projects are being constructed by one owner, a continuing (blanket) bond or other approved security that covers all such projects may be accepted in an amount determined by the City Engineer.

B. Failure to Complete the Work. In the event of failure to complete the work and failure to comply with all of the conditions and terms of the permit, the City Engineer may order work required by the permit to be completed or put in a safe condition to his satisfaction. The surety executing such bond, deposit, instrument of credit, or letter of credit shall continue to be firmly bound under a continuing obligation for the payment of all necessary costs and expenses that may be incurred or expended in causing any and all such required work to be done.

C. Default in Performance Conditions. Whenever the City Engineer finds or determines that a default has occurred in the performance of any requirement of a condition of a permit issued under the provisions of this Ordinance, written notice thereof shall be given to the principal and to the surety named on the bond. Such notice shall specify the work to be done, the estimated cost thereof and the period of time deemed by the City Engineer to be reasonably necessary for the completion of such work. After receipt of such notice, the surety shall, within the time specified, cause or require the work to be performed, or failing therein, shall pay the estimated cost of doing the work as set forth in the notice. The surety shall pay the City for actual costs in accordance with Section 18.24.100, "Cost Recovery Fees" of this Ordinance.

## Chapter 18.27

### ARTICLE 10. ORGANIZATION AND ENFORCEMENT

#### Sections:

<b>18.27.020</b>	<b>Powers and Duties of the City Engineer</b>
<b>18.27.040</b>	<b>Violations and Penalties</b>
<b>18.27.060</b>	<b>Hazardous Conditions</b>
<b>18.27.080</b>	<b>Public Nuisance</b>
<b>18.27.100</b>	<b>Appeals</b>

### ***18.27.020 Powers and Duties of the City Engineer***

The provisions of the California Building Code Section 104, "Duties and Powers of the Building Official", of Appendix Chapter 1 "Administration" shall apply to the City Engineer and his or her representative for all grading construction and earthwork to be done as required by any conditions of a permit issued pursuant to this Ordinance.

### ***18.27.040 Violations and Penalties***

- A. It shall be unlawful for any person, firm or corporation to do grading work in the City of Banning, or cause the same to be done, contrary to or in violation of any of the provisions of this Ordinance or State or Federal Law.
- B. The issuance of a building permit, performance of building permit inspections, or issuance of a certificate of occupancy may be withheld on property on which a violation of the provisions of this Ordinance exist, including work not performed in accordance with the approved plans, until such violation(s) has been corrected to the satisfaction of the City Engineer.
- C. Any person, firm, or corporation violating any of the provisions of this Ordinance shall be deemed guilty of a misdemeanor. Each such person, firm or corporation shall be deemed guilty of a separate offense for each and every day or portion thereof during which any violations of any provisions of this Ordinance are permitted, continued or committed by such person, firm or corporation and shall be punishable as provided for in Chapter 1.28, "General Penalty" of the Banning Municipal Code.

### ***18.27.060 Hazardous Conditions***

- A. Hazardous conditions exist when the state of any natural ground, natural slopes, excavation, fill or drainage devices are situated on private property in such a manner that they are a hazard to life or limb, or a danger to public safety, or endangers the safety, usability, or stability of adjacent property, structures or public facilities.
- B. The City Engineer or their designee (including City Code Enforcement) may examine, or cause to be examined, every condition reported as hazardous as set forth in subsection (A) of this section.
- C. Upon confirmation of a hazardous condition, the City Engineer or their designee (including City Code Enforcement) shall provide written notification to the permittee, owner or agent in control of property with confirmed hazardous condition, requiring mitigation of said hazardous condition and stipulation of an acceptable time frame for compliance.
- D. The permittee, owner or agent in control of the property shall comply with any demand for corrective work or repairs as required. In the event that corrective action is not completed within the period specified in writing, the City may exercise any

available recourse for correction of said hazardous condition in accordance with Chapter 8.48, "Nuisances" of the Banning Municipal Code.

**18.27.080      *Public Nuisance***

For purposes of this Ordinance, the following shall constitute a public nuisance:

- A. Any grading or other work conducted without a permit where it is required by this Ordinance.
- B. Any grading or other work done in violation of any of the conditions imposed thereon by a permit issued pursuant to this Ordinance.
- C. Any grading or other work, which fails to be done as required by any conditions of a permit, issued pursuant to this Ordinance.
- D. The existence of a hazardous condition as defined in Section 18.27.060, "Hazardous Conditions" of this Ordinance upon the determination by the City Engineer that such condition exists.

**18.27.100      *Appeals***

- A. The applicant, permittee, or any person(s) not satisfied with the decision by the City Engineer in regards to issuance of a grading permit or the performance of the permitted work, may file a written appeal to the City Clerk for a hearing before the City Council.
- B. Any such appeal must be made within three (3) calendar days following the decision.
- C. The City Council will set a hearing to consider the appeal at the earliest possible regularly scheduled City Council meeting.
- D. The City Council, after receiving and considering all testimony and pertinent documents, may:
  - 1. Uphold the City Engineer's decision; or
  - 2. Approve the appeal; or
  - 3. Modify the City Engineer's decision, consistent with the requirements of this Ordinance.

## Chapter 18.33

### ARTICLE 11. DEFINITIONS OF TERMS

Whenever, in this Ordinance and the Grading Manual, or in any resolution or standard adopted by City Council pursuant to this Ordinance, the following terms are used, they shall have the meaning ascribed to them in this section, unless it is apparent that some other meaning is intended:

**“Administrative Clearing Permit”** means a permit that authorizes the clearing, brushing, or grubbing of a portion of land beyond that scope exempted from the permit process by this Ordinance.

**“As-Graded”** means the site configuration upon completion of grading. This includes all horizontal and vertical dimensions and relationships and all physical features installed, reconstructed, eliminated, or altered by the grading operations as shown on the record drawings prepared by the Engineer of Work.

**“Accessibility”** is the combination of various elements in a building, facility, site or area, or portion thereof which allows access, circulation and the full use of the building and facilities by persons with disabilities in conformance with the Chapter 11B of the California Building Code.

**“Accessible Route of Travel”** means the continuous unobstructed path connecting all accessible elements and spaces in an accessible building or facility that can be negotiated by a person with a severe disability using a wheelchair and that is also safe for and usable by persons with other disabilities, and that also is consistent with the definition of “Path of Travel” in this section. Interior accessible routes may include parking access aisles, curb ramps, crosswalks at vehicular ways, walks, sidewalks, ramps and lifts. An accessible route does not include stairs, steps or escalators.

**“Accessibility”** means the combination of various elements in a building or area, which allows access, circulation, and the full use of the building and facilities by handicapped persons.

**“Applicant”** means any person, corporation, partnership association of any type, public agency or any other legal entity who submits an application for a grading permit pursuant to this Ordinance.

**“Approval”** means that the proposed work or completed work conforms to the requirements of this Ordinance, in the opinion of the City Engineer.

**“ASTM Standards”** means the American Society for Testing Materials, which develops standardized test methods, specifications, practices, guides, classifications and terminology in such subject areas as metals, paints, construction, consumer products and many others.

**“Base”** means a layer of specified material of planned thickness placed immediately below the pavement or surfacing.

**“Bedrock”** means in-place solid rock.

**“Best Management Practices” (BMPs)** means the management practices, operating procedures, and devices implemented to prevent or reduce the discharge of pollutants directly or indirectly to public or private drainage systems.

**“Bench”** means a relatively level step excavated into soil materials on which fill is to be placed.

**“BMP’s”** means the management practices, operating procedures, and devices implemented to prevent or reduce the discharge of pollutants directly or indirectly to public or private storm water conveyance systems.

**“Borrow”** means soil material acquired from an off-site location for use in grading on a site.

**“Buttress Fill”** means an engineered fill designed to stabilize an adverse geologic condition (landslide, adverse bedding, etc.).

**“Certify” or “Certification”** means a signed written statement that the specific inspections and/or tests required to be performed on real property have been performed and that the works comply with the applicable requirements of this Title, the plans, and the permit.

**“City Engineer”** means the City Engineer of the City of Banning or his or her duly delegated representative.

**“Civil Engineer”** means a professional engineer registered in the State of California to practice in the field of civil engineering.

**“Clearing, Brushing and Grubbing”** means the removal or disturbance of vegetation (grass, brush, trees, and similar plant types), weed abatement, manmade structures, environmentally sensitive species and habitats, rocks, archaeological artifacts and sites, or other environmentally sensitive features by any means for purposes of development or compliance with laws, rules or regulations. For purposes of this Title, references to “clearing” means clearing, brushing and grubbing individually and separately.

**“Community Development Director”** means the individual responsible in the City of Banning for community development and/or community planning as appointed by the City Manager or his or her duly delegated representative.

**“Compaction”** means the densification of a fill by mechanical or other acceptable means.

**“Construction Site”** means any project requiring a local grading or building permit, including projects requiring coverage under the General Construction Permit.

**Contour Grading** means grading that creates or results in land surfaces that reflect the pre-graded natural terrain, or that simulates natural terrain (i.e. rounded, non-planer surfaces and rounded, non-angular intersections between surfaces).

**Crib Wall** means a crib type wall as described in the most recent publication of "Standard Plans", Department of Transportation, State of California.

**Cross-Lot Drainage** means any drainage course created through grading or excavation that crosses on to another lot either within or outside the subdivision or construction site.

**Curb Cut** means the interruption of a curb at a pedestrian way, which separates surfaces that are substantially at the same elevation.

**Curb Ramp** means a sloping pedestrian way, intended for pedestrian traffic, which provides access between a walk, or sidewalk to a surface located above or below an adjacent curb face.

**Cut** see definition for "Excavation."

**Dry Season** means May 1<sup>st</sup> thru September 30<sup>th</sup> of each year.

**Engineer of Record** means the professional engineer holding a current registration in the State of California who supervised the design and signed the grading plan accepted by the City Engineer.

**Erosion** means the wearing away of the ground surface as a result of the movement of wind, water or ice.

**Erosion Control** means anything that keeps soil in place.

**Erosion and Sediment Control Plan** is a plan prepared under the direction of and signed by a civil engineer competent in the preparation of such plans and knowledgeable about current erosion and sediment control methods. Said plan shall be submitted to the City and shall provide for protection of exposed soils and desiltation of runoff at frequent intervals prior to discharging from a site or to a storm water conveyance system (natural watercourses, streets, flow-lines, inlets, outlets, etc.).

**Erosion and Sediment Control System** means combination of erosion and sediment controls (including effective planting and the maintenance thereof) to protect the project site, adjacent private property, watercourses, public facilities, graded improvements, existing natural features, archaeological artifacts, and to relieve waters of suspended sediments or debris prior to discharge from the site.

**Excavation** or **Cut** means an act by which soil, sand, gravel, or rock is cut into, dug, quarried, uncovered, removed, or relocated, and shall include the conditions resulting there from.

**“Expansive Soils”** is any soil with an expansion index greater than twenty (20), as determined by the Expansive Index Tests of the California Building Code.

**“Fault”** means a fracture in the earth’s crust along which movement has occurred. A fault, as defined by the California Division of Mines and Geology, is considered active if the movement has occurred within the last eleven thousand years (Holocene geologic time).

**“Flow-line”** means v-ditches, brow-ditches, terrace drains, ribbon gutters, curb gutters, etc.

**“Fill”** means a deposit of soil, sand, gravel, rock, or other material placed by artificial means.

**“Fugitive Dust”** means the particulate matter entrained in the ambient air as a result of man-made fugitive dust sources as determined by South Coast Air Quality Management District Rule 403.

**“General Construction Permit”** means the permit issued by the SWRCB to regulate discharges from construction activity.

**“Geohydrology”** means all groundwater information, water-well usage rate requirement, seepage elevations, pollution evaluations, projected usage rate considerations, evaluations of impact on existing and future users, and long term projections appropriate to site development.

**“Geologic Hazard”** means any geologic feature capable of producing structural damage or physical injury. Geologic hazards include:

- A. Landslides and potential slope instabilities resulting from bedding faults, weak clay stone beds, and over steepened slopes.
- B. Deposits potentially subject to liquefaction, seismically induced settlement, severe ground shaking, surface rupture, debris flows, and rock falls resulting from fault activity.
- C. Deposits subject to seepage conditions or high-ground water table.

**“Geotechnical Engineering Report”** means a geotechnical report prepared under the responsible supervision of a geotechnical engineer and approved by the City Engineer or his representative, which includes:

- A. Preliminary information concerning engineering properties of soil and rock on a site prior to grading, present, historical, and future groundwater levels, analysis for both gross and surficial slope stability, fill settlement, liquefaction potential, alluvium deposits, describing locations of these materials and providing recommendations for preparation of the site for its intended use.

B. A grading report which includes information on site preparation, compaction of fills placed, providing recommendations for structural design and approving the site for its intended use.

**“Grade”** means the vertical elevation of the ground surface, and:

- A. **“Existing grade”** means the ground surface prior to any grading activity.
- B. **“Finish grade”** means the final grade of the site, which conforms precisely to the City-approved plans, approved construction changes or approved record drawings.
- C. **“Natural grade (or natural ground)”** means the ground surface unaltered by artificial means.
- D. **“Rough grade”** means the stage at which the work is in to precise conformance with the approved plan and when all excavations for drainage structures and retaining walls are complete.

**“Grading,”** means any process of excavation or filling or combination thereof.

**“Greenbook Standards,”** means the most recent publication of the Standard Specifications for Public Works Construction, which provides specifications that, have general applicability to public works projects.

**“Hillside Site,”** means a site where the existing grade is 20 percent (%) or greater and which may be adversely affected by drainage and/or stability conditions within or from outside the site, or which may cause an adverse affect on adjacent property.

**“Key”** means a designed compacted fill placed in a trench excavated in earth material beneath the toe of a proposed fill slope.

**“Keyway”** means an excavated trench into competent earth material beneath the toe of the proposed fill slope.

**“Landslide”** means a perceptible down slope movement of rock, soil, or artificial fill ranging in speed from moderately slow (slump) to very rapid (avalanche).

**“Maximum Extent Practicable (MEP)”** means the standard established by Congress in the Clean Waters Act that operators of MS4 permits must meet. To achieve the MEP standard, Best Management Practices must be implemented that are technically feasible (i.e. are likely to be effective) in combination with treatment methods serving as a backup.

**“Mined Lands”** includes the surface, subsurface, and groundwater’s of an area in which surface mining operations will be, are being, or have been conducted. This includes private ways and roads appurtenant to any such area, land excavations, mining waste, and areas in

which structures, facilities, equipment, machines, tools, or other related materials or property are located.

**“Municipal Separate Storm Sewer System/MS4 (Permit)”** means the certification/regulation requirements that the City must meet to allow storm water discharges into the Waters of the State.

**“Natural Terrain”** means the lay of the land prior to any grading or other artificial landform modification.

**“National Pollutant Discharge Elimination System (NPDES)”** means the permitting and program requirements established by the Federal Clean Water Act and administered by the Environmental Protection Agency to regulate the discharge of pollutants to waters of the United States.

**“Owner”** means a person who owns a site upon which is located grading, clearing, mining, quarrying, and/or commercial extraction operations that are being conducted or may be conducted.

**“Path of Travel”** means a passage that may consist of walks and sidewalks, curb ramps and pedestrian ramps, lobbies and corridors, elevators, other improved areas, or a necessary combination thereof, that provides free and unobstructed access to and egress from a particular area or location for pedestrians and/or wheelchair users. A “path of travel” includes a continuous, unobstructed way of pedestrian passage by means of exits, and which connects a particular area with an exterior approach (including sidewalks, streets and parking areas), an entrance to the facility and other parts of the facility. In existing buildings, when alterations, structural repairs or additions are made, the term “path of travel” also includes the sanitary facilities, telephones, drinking fountains and signs serving the altered area.

**“Permit”** means the authorization issued pursuant to this Ordinance, together with the application for the same, the conditions upon which it was issued, and any plans, specifications, reports, and approved modifications thereto.

**“Permittee”** means any person, property owner, contractor or authorized agent to whom a permit is issued pursuant to this Ordinance.

**“Person”** means any individual, firm, association, corporation, organization, or partnership or any city, county, district, the State or any department or agency thereof. (14 Cal. Code of Regulations, Sec. 3501)

**“Pollutant”** means any agent that may cause or contribute to the degradation of water quality. The term may include, but is not limited to, dredged spoil, rock, sand, silt, solid and liquid waste, oil, fuels, construction related materials, debris and other contaminates.

**“Precise Conformance”**, for purposes of this ordinance, means:

- A. Pad elevations within plus or minus four-tenths of a foot of planned elevation or approved construction change;
- B. Street subgrade within plus or minus four hundredths of a foot of planned elevation or approved construction change;
- C. Slope grades within plus or minus one foot of planned elevation or approved construction change;
- D. Rock slopes (rip-rap armoring) and horizontal locations within two feet of planned elevation and location or approved construction change;
- E. Drainage gradient to within two-tenths of one percent of planned slope or approved construction change; and
- F. Structures within the tolerances specified in the latest adopted version of the "Standard Specifications for Public Works Construction" (Green Book).

**Precise Grading Permit** means a permit that is issued on the basis of approved plans that show the precise locations of structures, finished elevations, drainage details and all on-site improvements on a given property.

**Priority Development Projects** means new development and redevelopment projects, as indicated in the City's MS4 permit requirements.

**Private Roads** are roads that have been dedicated to the public, but not accepted for public use or that have been retained as "Private" for private use by the owners or may simply be a road created by private use or easement.

**Quarrying**" means the process of removing or extracting stone, rock, or similar materials from an open excavation for financial gain.

**Rainy Season**" means the period beginning October 1<sup>st</sup> and ending April 30<sup>th</sup> the next calendar year.

**Record Drawings** means plans prepared by the engineer of work subsequent to the completion of all work on the approved plans and approved changes thereon depicting the as-graded condition.

**Regional Water Quality Control Board** (RWQCB) means the Regional Water Quality Control Board for the San Diego Region, which includes the City of Banning.

**Retaining Wall**" means a wall designed to resist the lateral displacement of soil or other materials.

**Rough Grading Permit** means a permit that is issued on the basis of approved plans that show finished elevations, interim building pad elevations and drainage.

**“Sediment Control”** means anything that captures soil particles after being displaced.

**“Site”** means the real property on which activities subject to this Ordinance may occur.

**“Slope”** means an inclined ground surface of fill, excavation or natural terrain, the inclination of which is expressed as a ratio of horizontal distance to vertical distance.

**“Slope Revegetation”** means the planting of graded slopes with native and/or naturalizing plant species, which, after an initial establishment period, usually requiring irrigation, will survive with normal precipitation.

**“Slope Stability”** shall be defined as follows:

- A.     **“Gross stability”** means the factor of safety against failure of slope material located below a surface approximately three to four feet deep, measured from and perpendicular to the slope face.
- B.     **“Surficial stability”** means the factor of safety against failure of the outer three to four feet of slope material measured from and perpendicular to the slope face.

**“Soil”** means any rock, natural soil, or fill, and/or any combination thereof.

**“South Coast Air Quality Management District” (SCAQMD)** means the regulatory authority for all or portions of Los Angeles, Orange, San Bernardino and Riverside Counties that oversees air pollution emissions from stationary sources, including fugitive dust sources generated by construction activity.

**“State Water Resources Control Board” (SWRCB)** means the regulatory authority that allocates water rights, adjudicates water right disputes, develops statewide water protection plans, establishes water quality standards, and guides the nine Regional Water Quality Control Boards located in the major watersheds of the state.

**“Stockpile”** means a temporary uncompacted fill or embankment placed by artificial means, which is designated or intended to be moved, or relocated at a later date.

**“Stop Work Order”** means an order issued by a City official who requires that specific activity or all activity on a work site be stopped.

**“Storm Water”** means surface runoff and drainage associated with storm events.

**“Storm Water Conveyance System”** means any natural watercourses, curbs, gutters, streets, flow-lines, inlets, outlets, etc., either public or private, leading to waters of the State.

**“Storm Water Management Plan (SWMP)”** means a plan submitted in connection with an application for a City permit or other City approval, identifying the measures that will be used for storm water and non-storm water management during the permitted activity.

**“Storm Water Pollution Prevention Plan” (SWPPP)** means a document which meets the requirements set in the State’s NPDES General permits for Construction and Industrial activities. The SWPPP must describe the BMP’s to be implemented to meet the requirements of the General Permits and this Ordinance.

**“Sub-base”** means a layer of specified material of planned thickness between a base and the subgrade.

**“Subgrade”** means the soil prepared to support structures, or that portion of the roadbed on which pavement, surfacing, base or subbase, or layer of other material is placed.

**“Terrace”** means a relatively level step constructed in the face of a graded slope surface for drainage and maintenance purposes.

**“Topsoil”** means soil which is within the uppermost horizon of a soil profile, and which contains organic matter, nutrients, and microorganisms necessary for plant growth.

**“Ultimate Right-of-Way”** means the right-of-way shown as ultimate on an adopted precise plan of highway alignment, or a street right-of-way shown within the boundary of a recorded tract map, or a recorded parcel map. The latest adopted or recorded document in the above cases shall take precedence. If none of these exist, the Ultimate Right-of-Way shall be considered to be the right-of-way required by the highway classification as shown on the Master Plan of Arterial Highways. In all other instances, the Ultimate Right-of-Way shall be considered to be the existing right-of-way.

**“Water Quality Management Plan (WQMP)”** means a plan submitted in connection with an application for a City permit or other City approval, identifying the measures that will be used to mitigate the impacts of urban runoff from development projects.

**“Watercourse”** means a permanent or intermittent stream or other body of water, either natural or improved, which gathers or carries surface water.

**“Watershed”** means the geographical area which drains to a specified point on a water course, usually a confluence of streams or rivers (also known as a drainage area, catchment, or river basin).

**“Waters of the State”** means any water, surface or underground, within the boundaries of the State, including those covered by the MS4 permit.

**Section 5:** The provisions of TITLE 18, Articles 1 through 11, shall apply to all grading permits issued on or after the effective date of this Ordinance.

**Section 6:** The City Council authorizes and directs the City Engineer to prepare and utilize a manual of standards setting forth the administrative procedures and technical requirements necessary to implement the provisions of this Ordinance. Such rules, procedures, and requirements shall be entitled "Administrative and Technical Procedures Manual for Grading, Erosion, and Sediment Control" in substantially the form set forth in Exhibit A.

**Section 7:** If any provision of this Ordinance or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or application, and to this end, the provisions of this Ordinance are declared to be severable.

**Section 8:** The potential grading and land clearing activities regulated by this Ordinance represent components of the adopted General Plan that has already received the appropriate review when the General Plan was approved. Based on this fact, the City Council hereby finds that the adoption of this Ordinance is exempt from further review pursuant to CEQA Guideline Sections 15162(a) and 15061(b)(3) of the CEQA Guidelines. Section 15162 states that when an EIR has been certified for a project, no additional environmental review is required unless there is substantial evidence that the project has changed. The Final EIR for the City General Plan was certified on January 31, 2006.

**Section 9:** The City Clerk shall certify the Ordinance and cause it to be published as required by law. This Ordinance shall take effect on the 30<sup>th</sup> day after adoption pursuant to state law.

**PASSED, APPROVED AND ADOPTED**, by the City Council of the City of Banning on the

\_\_\_\_ day of \_\_\_\_\_, 2009.

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Robert E. Botts, Mayor

ATTEST:

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Marie Calderon  
City Clerk

[SEAL]

STATE OF CALIFORNIA )  
COUNTY OF RIVERSIDE ) ss  
CITY OF BANNING )

I, Marie Calderon, City Clerk of the City of Banning, do certify that the foregoing Ordinance No. \_\_\_\_\_ was duly introduced and placed upon its first reading at a regular meeting of the City Council on the \_\_\_\_\_<sup>th</sup> day of \_\_\_\_\_, 2009, and that thereafter, said Ordinance was duly adopted and passed at a regular meeting of the City Council on the \_\_\_\_\_<sup>th</sup> day of \_\_\_\_\_, 2009 by the following vote:

AYES: COUNCILMEMBERS:

NOES: COUNCILMEMBERS:

ABSENT: COUNCILMEMBERS:

ABSTAIN: COUNCILMEMBERS:

---

Marie Calderon  
City Clerk

EXHIBIT A  
TO  
ORDINANCE NO. 1388  
(Grading Manual)  
Under Separate Cover

EXHIBIT A  
TO  
ORDINANCE NO. 1388  
(Grading Manual)

*Available for public viewing in the  
Office of the City Clerk*

**CITY COUNCIL/UTILITY AUTHORITY AGENDA  
JOINT MEETING  
REPORTS OF OFFICERS**

**Date:** **June 23, 2009**

**TO:** **City Council and Utility Authority Board**

**FROM:** **Bonnie J. Johnson, Finance Director**

**SUBJECT:** **Recommendation to Adopt Three Resolutions (1) Adopting the City's Annual Budget for the Fiscal Period 2009-10, (2) Adopting the Fiscal Year 2009-10 Gann Limit Calculation and (3) Adopting the Utility Authority's Annual Budget for the Fiscal Period 2009-10**

**RECOMMENDATION:**

1. "The City Council adopt Resolution No. 2009-48 approving the Annual Budget for the Fiscal Period July 1, 2009 to June 30, 2010"
2. "The City Council adopt Resolution No. 2009-49 approving the Fiscal Year 2009-10 Gann Limit Calculation."
3. "The Banning Utility Authority Board adopt Resolution No. 2009-02UA approving the Annual Budget for the Fiscal Period July 1, 2009 to June 30, 2010."

**JUSTIFICATION:** At the end of each fiscal year the Council and Board adopt a budget for the upcoming fiscal year, which serves as a guideline for staff to follow in providing the desired level of service to the citizens. The budget being proposed for adoption covers the fiscal year 2009-10.

**BACKGROUND/ANALYSIS:** At the June 3<sup>rd</sup> and June 10th Budget Workshops, the City Manager and Finance Director submitted the proposed budget to the City Council and Banning Utility Authority (BUA) Board. The Finance Director made a presentation to the Council which provided an overview of the budget process as well as the content of the proposed budget. During the workshop, City Council discussed the City's overall financial condition. At the conclusion of the meetings, Council directed staff to incorporate certain line item reductions as suggested by councilmembers during the process. Those reductions total \$28,800 citywide. In addition, staff has since discovered a keying error related to an MOU required item representing an expenditure increase of \$18,601 citywide. The net affect is a reduction of \$10,199 citywide. The General Fund net affect is a reduction of \$7,950. A 2009-10 fund summary status report is attached to this report. It reflects all Council directed revisions to date. If additional revisions are approved by Council at this meeting, the City will still meet the June 30<sup>th</sup> deadline for budget adoption and staff will subsequently publish a final version of the adopted budget.

In addition, existing budgetary and fiscal policies were presented at the budget workshops. The policies have been revised to reflect a change in the Electric transfers to the General from 8.5% to 10%. Also, the portion of the policy referring to a two-year budget cycle has been revised to reflect a one-year cycle. Adoption of Resolution 2009-48 includes approval of those policies and recommendations.

The bound Proposed Budget Document, revised for the above changes, is on file with the City Clerk's Office. Even though budgetary line items are being approved at this time, staff will, on an ongoing basis, suggest amendments to the Budget as deemed appropriate.

**GANN LIMIT CALCULATION**

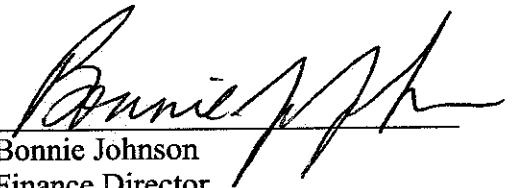
In accordance with Article XIIIIB of the California Constitution, the City is limited as to how much revenue from taxes it may receive. The appropriations limit is based on actual appropriations during the 1978-79 fiscal year, and is increased each year using the growth of population and inflation. Not all revenues are restricted by the appropriations limit, only those which are referred to as "proceeds of taxes".

The limit is calculated by taking the prior year's limit and applying growth factors as appropriate. When growth factors are applied to the FY 2009-10 appropriation limit, the limit for Fiscal Year 2009-10 is calculated to be \$30,938,428. The City's proceeds of taxes for 2009-10 are estimated to be \$7,347,001. The limit exceeds taxes subject to limitation by \$23,591,427.

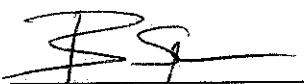
**FISCAL DATA:** 2009-10 estimated revenues and proposed expenditures for all City funds are incorporated into the Proposed Budget document. Remaining budget balances allocated in previous fiscal years for capital improvement projects or other necessary continuing appropriations will be brought back to the Council for approval after the close of the current fiscal year. These carryover balances have been accounted for in the 2008-09 estimated actual figures presented in the Budget and therefore will not impact fund balance as presented.

Based on the preliminary budget for the 2009-10 fiscal year, the proceeds of taxes is \$7,347,001 which is less than the appropriation limit of \$30,938,428, therefore, there will be no fiscal impact with the adoption of the appropriation limit.

**SUBMITTED BY:**

  
\_\_\_\_\_  
Bonnie Johnson  
Finance Director

**APPROVED BY:**

  
\_\_\_\_\_  
Brian Nakamura  
City Manager

CITY OF BANNING  
*Fund Summary Status*  
 Proposed Budget  
 FY 2009-2010

FUND NAME	(1) Estimated Balance @ July 1, 2009	(2) FY 2009-10 Proposed	(3) FY 2009-10 Proposed	(4) Proj. YTD Gain/(Loss)	(5) Proj. Balance @ June 30, 2010 (Col. 1+4)
<b><i>Governmental &amp; Special Revenue Fds</i></b>					
General	3,387,224	12,920,555	13,662,494	(741,939)	2,645,285
Developer Deposits - Community Dev.	-	22,397	22,397	0	0
County of Riverside - Police MOU	432,353	307,000	493,935	(186,935)	245,418
Gas Tax	136,856	791,135	878,900	(87,765)	49,091
Gas Tax - AB 2928	69,706	0	0	0	69,706
Gas Tax - Prop 1B	57,294	0	0	0	57,294
Measure A Street	1,080,021	445,000	0	445,000	1,525,021
SB300 Street Improvement	145,190	3,000	0	3,000	148,190
Article 3 - Sidewalk Construction	11,695	300	0	300	11,995
C.D.B.G.	-	171,456	171,456	0	0
Landscape Maintenance Assmt. Dist.#1	115,215	130,333	135,978	(5,645)	109,570
Air Quality	245,790	37,500	0	37,500	283,290
Asset Forfeiture	2,458	60	0	60	2,518
Local Law Enforcement Block Grant	-	0	0	0	0
San Gorgonio Task Force	2,795	50	400	0	2,795
Supplemental Law Enforcement	-	0	0	0	0
Public Safety - Sales Tax	21,764	191,000	200,000	(9,000)	12,764
State Park Bond Act	910	0	0	0	910
Special Donations	15,565	1,750	4,000	(2,250)	13,315
Senior Center Activities	65,497	15,150	17,945	(2,795)	62,702
Animal Control Reserve	4,823	100	0	100	4,923
Police Volunteer	1,029	3,025	2,901	124	1,153
D.A.R.E./Great Grant	-	0	0	0	0
City Hall COP Debt Service	26,717	516,296	516,296	0	26,717
Sun Lakes CFD #86-1	34,537	750	250	500	35,037
Assessment Dist - #91-1 Wilson St. Debt	215,898	330,293	330,293	0	215,898
Area Police Computer	19,603	45,750	48,600	(2,850)	16,753
Fair Oaks 2004-1 Debt Service	122,822	208,815	208,815	0	122,822
Cameo Homes	44,842	1,000	0	1,000	45,842
<b>Sub-Total</b>	<b>6,260,604</b>	<b>16,142,715</b>	<b>16,694,660</b>	<b>(551,595)</b>	<b>5,709,009</b>

## CITY OF BANNING

*Fund Summary Status*

## Proposed Budget

FY 2009-2010

FUND NAME	(1) Estimated Balance @ July 1, 2009	(2) FY 2009-10 Proposed Revenue	(3) FY 2009-10 Proposed Expenditures	(4) Proj. YTD Gain/(Loss) (Col. 2-3)	(5) Proj. Balance @ June 30, 2010 (Col. 1+4)
<b><u>Capital Improvement Funds</u></b>					
Police Facilities Development	15,131	100	0	100	15,231
Fire Facility Development	897,468	22,000	0	22,000	919,468
Traffic Control Facility	147,655	8,000	0	8,000	155,655
Ramsey & Highland Home Traffic Signal	79,123	1,500	0	1,500	80,623
General Facilities	454,829	10,000	0	10,000	464,829
Sunset Grade Separation Fund	-	0	0	0	0
Wilson Median	370,581	0	0	0	370,581
Park Development	15,610	8,000	0	8,000	23,610
Capital Improvement Funds	1,978,757	25,000	107,080	(82,080)	1,896,677
<b>Sub-Total</b>	<b>3,959,154</b>	<b>74,600</b>	<b>107,080</b>	<b>(32,480)</b>	<b>3,926,674</b>
<b><u>Enterprise Funds</u></b>					
Airport	37,407	259,560	213,117	46,443	83,850
Transit Operations	-	1,073,089	1,073,089	0	0
Water Operations	1,840,627	7,924,000	8,999,409	(1,075,409)	765,218
Water Capital Facility Fee	4,775,011	419,000	5,194,000	(4,775,000)	11
Irrigation Water	2,961,469	65,000	0	65,000	3,026,469
BUA Water Capital Project Fund	42,000	275,000	0	275,000	317,000
BUA Water Debt Service Fund	52,287	2,298,701	2,298,201	500	52,787
Electric Operations	4,486,829	27,978,525	30,499,862	(2,521,337)	1,965,492
Rate Stability	5,894,425	1,910,400	1,785,400	125,000	6,019,425
Electric Improvement	11,024,694	258,045	1,785,400	(1,527,355)	9,497,339
Electric Bond Project Fund	20,794,140	200,000	0	200,000	20,994,140
Public Benefit Fund	2,098,628	703,000	681,440	21,560	2,120,188
Electric Debt Service Fund	-	2,960,826	2,960,326	500	500
Wastewater Operations	2,282,494	2,402,445	3,007,725	(605,280)	1,677,214
Wastewater Capital Facility Fees	11,663,318	357,500	300,000	57,500	11,720,818
BUA Wastewater Capital Project Fund	2,319,249	75,000	1,000,000	(925,000)	1,394,249
State Revolving Loan	765,678	301,000	300,413	587	766,265
BUA Wastewater Debt Service Fund	14,831	524,125	523,625	500	15,331
Refuse	373,100	3,144,418	3,096,782	47,636	420,736
<b>Sub-Total</b>	<b>71,426,187</b>	<b>53,129,634</b>	<b>63,718,789</b>	<b>(10,589,155)</b>	<b>60,837,032</b>

## CITY OF BANNING

*Fund Summary Status*

## Proposed Budget

FY 2009-2010

FUND NAME	(1) Estimated Balance @ July 1, 2009	(2) FY 2009-10 Proposed Revenue	(3) FY 2009-10 Proposed Expenditures	(4) Proj. YTD Gain/(Loss)	(5) Proj. Balance @ June 30, 2010 (Col. 1+4)
<b><i>Internal Service Funds</i></b>					
Insurance	1,194,654	1,691,411	2,306,342	(614,931)	579,723
Fleet Maintenance	143,227	1,160,531	1,199,071	(38,540)	104,687
Information Systems Services	220,124	313,533	447,492	(133,959)	86,165
Utility Billing Services	403,030	1,360,302	1,458,934	(98,632)	304,398
<b>Sub-Total</b>	<b>1,961,035</b>	<b>4,525,777</b>	<b>5,411,839</b>	<b>(886,062)</b>	<b>1,074,973</b>
<b><i>Community Redevelopment Agency Funds</i></b>					
Low\Mod Housing	3,719,589	1,093,064	552,127	540,937	4,260,526
Debt Service Fund	1,600,688	5,530,708	6,107,176	(576,468)	1,024,220
Administration Fund	65,015	641,886	613,445	28,441	93,456
1992 Low\Mod Housing Bond Proceeds	53,490	750	0	750	54,240
Tax Allocation Bonds-2007 Tabs	11,468,659	75,000	0	75,000	11,543,659
Tax Allocation Bonds-2003 Tabs	1,558,743	5,000	0	5,000	1,563,743
Low\Mod Tax Alloc Bonds-2003 Tabs	1,693,729	20,000	0	20,000	1,713,729
Project Fund	3,610,051	1,025,000	638,168	386,832	3,996,883
<b>Sub-Total</b>	<b>23,769,964</b>	<b>8,391,408</b>	<b>7,910,916</b>	<b>480,492</b>	<b>24,250,456</b>
<b>GRAND TOTAL ALL FUNDS</b>	<b>107,376,944</b>	<b>82,264,134</b>	<b>93,843,284</b>	<b>(11,578,800)</b>	<b>95,798,144</b>

**RESOLUTION NO. 2009-48**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BANNING ADOPTING THE ANNUAL BUDGET FOR THE FISCAL PERIOD JULY 1, 2009 THROUGH JUNE 30, 2010 AND MAKING APPROPRIATIONS TO MEET EXPENSES APPROVED THEREIN AND APPROVING BUDGETARY POLICIES AND RECOMMENDATIONS**

**WHEREAS**, the City Manager prepared the annual budget for Fiscal Year 2009-10 which set forth all of the expected revenue of the City of Banning, and the recommended appropriations to meet the operating and capital expenses for all City of Banning funds; and

**WHEREAS**, the City Council at public sessions has considered the recommendations and approved or modified them so as to best serve the interests of the citizens of the City of Banning; and

**WHEREAS**, it is essential that the City of Banning adopt a budget plan establishing the revenues and expenditures for all of its governmental, proprietary and fiduciary funds;

**NOW, THEREFORE, BE IT RESOLVED** as follows:

The Annual Budget for the fiscal period from July 1, 2009 through June 30, 2010 as summarized in the bound Proposed Budget document (as presented and revised at the June 10, 2009 Budget Workshop and on file in the City Clerk's Office), and the Budgetary and Fiscal Policies as presented in the Proposed Budget workshop, are hereby approved and adopted, and the appropriations therein shall be expended in accordance with all applicable laws.

**PASSED, APPROVED AND ADOPTED** this 23rd day of June 2009.

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Robert E. Botts, Mayor  
City of Banning

APPROVED AS TO FORM AND  
LEGAL CONTENT:

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

ATTEST:

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Marie A. Calderon, City Clerk

**CERTIFICATION**

I, Marie A. Calderon, City Clerk of the City of Banning, California, do hereby certify that the foregoing Resolution No. 2009-48 was duly adopted by the City Council of the City of Banning, California, at a regular meeting thereof held on the 23rd day of June, 2009, by the following vote, to wit:

AYES:

NOES:

ABSTAIN:

ABSENT:

---

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

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## BUDGETARY AND FISCAL POLICIES

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### I. Philosophy

To maintain a financially viable City that can provide an adequate level of municipal services and to ensure a stable and diverse financial condition of the City through budgeting and fiscal policies.

### II. Methods

#### OPERATIONAL POLICIES

1. The City will maintain a budgetary control system to ensure compliance with the budget. The City will prepare monthly status reports comparing actual revenues and expenditures to budgeted amounts. Where practical, the City will develop performance measures to be included in the operating budget.
2. The City will provide for adequate maintenance of capital plant and equipment and for the orderly replacement thereof.
3. The City will project its equipment replacement and maintenance needs for the next several years and will update this projection each year. For this projection, a maintenance and replacement schedule will be developed and followed.
4. During the budget process, the City will reassess services and service levels. Staff may seek citizen input by surveys, citizen's forums and similar methods to accomplish this evaluation.
5. The City will maintain all of its assets at an adequate level in order to protect the City's capital investment and to minimize future maintenance and replacement costs.

#### CAPITAL IMPROVEMENT POLICIES

1. Capital improvements are to be funded primarily by user fees, service charges, assessments, special taxes or developer agreements when benefits can be attributed to users of the facility.
2. The City will require that project costs and related funding be submitted with requested capital projects. "Full life" costs including operating, maintenance and demolition, if any, should be identified.
3. Although the City will strive to finance projects on a pay-as-you-go basis, the City Council may conclude, based on a study of the economy and other matters, that the most equitable way of financing a project that benefits the entire community would be debt financing (pay-as-you-use) in order to provide the services in a timely manner. The City will use the following criteria to evaluate the use of long-term financing and pay-as-you-go funding for capital projects:

Factors favoring pay-as-you-go

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## BUDGETARY AND FISCAL POLICIES

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- current revenues and excess reserves are available or project phasing can be accomplished.
- debt levels adversely affect credit rating.
- market conditions are unstable or marketing difficulties exist.

Factors favoring long-term financing

- revenues available for debt service are determined to be sufficient and reliable to provide funding for long-term financing which can be marketed with investment grade credit ratings.
- the facility securing the financing is of the type that will support an investment grade credit rating.
- market conditions present favorable interest rates and demand for City financing.
- a project is mandated by state and/or federal requirements and current revenues or fund surplus balances are insufficient.
- the facility is immediately required to meet or relieve capacity needs.
- the life of the asset financed is ten years or longer.

### REVENUE POLICIES

1. The City will maintain a diversified revenue system to protect it from short-run fluctuations in any one revenue source.
2. State and Federal funds may be utilized, but only when the City can be assured that the total costs and requirements of accepting funds are known and judged not to adversely impact the City's General Fund.
3. The City, where allowed by law, will strive to review all fees for licenses, permits, fines, utility user fees and other miscellaneous charges on an annual basis, but in no instances less than every three years. They will be adjusted as necessary after considering inflation, processing time, expenses to the City and any other factors pertinent to the specific item.
4. An administrative fee will be charged where allowed by law for administrative services, provided the fee is based on the reasonable estimated costs incurred.
5. All proposed projects will have a detailed capital budget specifying total costs and total revenues, and shall identify the source of proposed revenues.

### DEBT MANAGEMENT POLICIES

1. The City will not use long-term debt to finance current operations. Long-term borrowing will be confined to capital improvements or similar projects with an extended life which cannot be financed from current revenues.
2. Debt payments shall not extend beyond the estimated useful life of the project being financed. The City will try to keep the average maturity of bonded debt at or below 20 years.

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## BUDGETARY AND FISCAL POLICIES

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3. The City will maintain good communications with bond rating agencies concerning its financial condition.
4. The City may utilize lease purchasing with specific approval of the City Manager. The useful life of the item must be equal to or greater than the length of the lease. A lease purchase will require City Council approval beyond a five-year lease term or principal amount over the City Manager's authorized contract level.
5. The City will not obligate the General Fund to secure financing unless the marketability of the issue will be significantly enhanced.
6. A feasibility analysis shall be prepared for each request for long-term financing which analyzes the impact on current and future fiscal year budgets for debt service and operations. The analysis shall also address the reliability of revenues supporting annual debt service.
7. The City shall conduct financing on a competitive basis unless, for reasons of market volatility, the use of an unusual financing structure or a complex security structure indicates the negotiated financing is preferred.
8. The City will monitor all forms of debt on an annual basis and report concerns or suggested restructuring, if any, to the City Council as part of the budget hearing process.
9. Enterprise and Property owner based financing will only be issued under the assumption that the issue is self-supporting from user fees and charges, assessments and special taxes without impacting the General Fund.
10. The City's minimum acceptable rating objective on any direct debt is "Baa/BBB". Appropriate credit enhancements, such as insurance or letters of credit shall be considered for marketing purposes, availability and cost effectiveness.
11. The City shall diligently monitor its compliance with bond covenants and ensure its compliance with federal arbitrage regulations.
12. The City may issue interfund loans rather than outside debt instruments. Interfund loans will be permitted only if an analysis of the lending fund indicates excess funds are available, and the use of these funds will not impact the fund's current operations. The average annual interest rate, as established by the Local Agency Investment Fund (LAIF), will be paid to the lending fund.

### AVAILABLE FUND BALANCE RESERVES POLICIES

1. The City's General Fund will maintain a minimum Available Fund Balance (cash flow) reserve equal to 10% of the upcoming fiscal year's budgeted operational appropriations. As the City's financial condition changes, the minimum Available Fund Balance reserve will be reviewed and appropriately adjusted. This available fund balance will significantly contribute to

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## BUDGETARY AND FISCAL POLICIES

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the City's favorable credit rating and financial stability. A minimum reserve of 10% is recommended to maintain the City's creditworthiness and to adequately address provisions for:

- Economic uncertainties, local disasters, recessions or other financial hardships.
- Contingencies to subsidize unforeseen operating or capital needs.
- Cash flow requirements.

2. Each fund shall maintain, if necessary, an appropriate Available Fund Balance reserve to fund prior year's incomplete capital projects, continuing appropriations, cash flow needs and any other financial need not included in the current fiscal year budget.

3. The Water and Wastewater enterprise operational funds shall maintain a minimum Available Fund Balance reserve of 10% of the upcoming fiscal year's total operating appropriations and debt service payments.

4. The Electric enterprise operational fund shall maintain a minimum Available Fund Balance reserve of 10% of the upcoming fiscal year's total operating appropriations and debt service payments. The Available Fund Balance for the Electric Rate Stability Fund shall be maintained at a minimum of 20% of the upcoming fiscal year's total operating appropriations and debt service payments.

5. The Self-Insurance Fund shall maintain a \$500,000 minimum Available Fund Balance reserve which is in excess of the estimated loss reserve as reported at the end of the fiscal year by the City's claims administrator.

### ELECTRIC ADMINISTRATIVE TRANSFER POLICY

1. The Electric Operation's fund administrative transfer to the General Fund is for 2009-10 is authorized at 10% of metered sales. The rate will be reviewed by the City Council during the budget process.

### BUDGET AND BUDGETARY ACCOUNTING POLICIES

The City uses the following procedures in establishing the budget:

1. Before the beginning of the fiscal year the City Manager submits to the City Council a proposed budget for the period commencing July 1.
2. A budget workshop(s) is conducted to obtain citizen comments.
3. The budget is subsequently adopted through passage of a resolution.

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## BUDGETARY AND FISCAL POLICIES

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4. For a given fiscal year, all appropriations are as originally adopted or as amended by the City Council and all unencumbered budgeted amounts lapse at year-end as well as encumbrances outstanding for items that have not been received by fiscal year end, June 30<sup>th</sup>.
5. Continuing Appropriations requests and Authorized Capital Projects are approved by the City Council after the adoption of the original budget. The original budget is then adjusted accordingly.
6. The legal level of budgetary control is at the fund level. A Department Head may transfer budget appropriations within a major category in a department or fund under his authority. The City Manager's approval must be obtained when a budget appropriation transfer request moves from one major appropriation category to another within a department.
7. The City Council may, at any time, amend the budget or delete appropriations, transfer between appropriations within a fund or change appropriation transfers between funds.

### ACCOUNTING, AUDITING & FINANCIAL REPORTING POLICIES

1. The City's accounting and financial reporting system will be maintained in conformance with generally accepted accounting principles and standards of the Government Accounting Standards Board.
2. Accounts payables warrant registers and payroll totals will be submitted to the City Council monthly for review and ratification.
3. Quarterly financial reports will be submitted to the City Council for review.
4. An annual audit will be performed by an independent public accounting firm with the subsequent issue of general-purpose financial statements.
5. The Finance Director will annually submit an investment policy to the City Council for review and approval.

**RESOLUTION NO. 2009-49**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BANNING, CALIFORNIA  
ESTABLISHING AN APPROPRIATIONS LIMIT FOR THE FISCAL YEAR 2009-10,  
PURSUANT TO ARTICLE XIIIIB OF THE CALIFORNIA CONSTITUTION**

**WHEREAS**, Article XIIIIB of the California Constitution provides that the total annual appropriations subject to limitation of each governmental entity, including this City, shall not exceed the appropriation limit of such entity of government for the prior year adjusted for changes in the cost of living or personal income and population, except as otherwise provided for in said Article XIIIIB and implementing State statutes; and

**WHEREAS**, pursuant to said Article XIIIIB of said California Constitution, and Section 7900 et seq. of the California Government Code, the City is required to set its appropriation limit for each fiscal year; and

**WHEREAS**, the Finance Department of the City of Banning has interpreted the technical provisions of said Article XIIIIB and Section 7900 et seq., performed computations and a technical review of the documentation for the City's said appropriation limitation, and has caused the numbers upon which the City's appropriation limit was and is based; and

**WHEREAS**, based on such calculations the Finance Department has determined the said appropriation limit and, pursuant to Section 7910 of said California Government Code, has made available to the public the documentation used in the determination of said appropriation limit;

**NOW THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF BANNING**, that said appropriation limit for Fiscal Year 2009-10 is set in the amount of \$30,938,428 for said fiscal year as reflected in *Exhibit A*.

**PASSED, APPROVED AND ADOPTED** this 23rd day of June, 2009.

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Robert E. Botts, Mayor  
City of Banning

APPROVED AS TO FORM AND  
LEGAL CONTENT:

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

ATTEST:

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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. 2009-49 was duly adopted by the City Council of the City of Banning at a regular meeting thereof held on the 23rd day of June, 2009, by the following vote, to wit:

AYES:

NOES:

ABSTAIN:

ABSENT:

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

## GANN LIMIT CALCULATION

Article XIII B of the California State Constitution was adopted by California voters in November 1979, and is more commonly referred to as the Gann Limit. The Article places limits on the amount of revenue which can be appropriated (spent) each fiscal year. Only revenues which are considered proceeds of taxes are subject to the limit. The limit is different for each agency and changes each year, modified for changes in inflation and population.

(1)	(2)	(3)	(4)	(5)	(6)	(7)
Fiscal Year	Prior Year Gann Limit	Previous Year's Population	Current Year's Population	City Population % Change (Col.2 / Col.3)	County Population % Change In Per Capita Income	% Change In Per Capita Income Current Year Gann Limit
01-02	16,752,075	23,813	23,867	0.23%	3.38%	7.82%
02-03	18,663,555	23,867	24,655	3.30%	3.88%	4.27%
03-04	19,141,477	24,655	25,581	3.6%	3.69%	2.31%
04-05	20,319,990	25,581	27,192	6.0%	3.37%	3.28%
05-06	22,308,634	27,192	27,954	2.80%	3.87%	5.29%
06-07	24,390,824	27,954	28,128	0.62%	3.45%	3.96%
07-08	26,231,507	28,128	28,272	0.51%	3.31%	4.42%
08-09	28,297,580	28,272	28,348	0.27%	2.71%	4.29%
09-10	30,311,309	28,348	28,457	0.38%	1.44%	0.62%

The Gann Limit is adjusted annually by multiplying the "Prior Year Gann Limit" (column 1) by the greater of the "City or County % Change in Population" (column 4 or 5) and then by the "% Change in Per Capita Income" (column 6) This annual Gann adjustment figure is then added to the Prior Year's limit amount to obtain the Current Year Gann Limit amount in column 7. The shaded boxes indicate the calculation factors that were used in determining the adjustment to the Gann Limit.

**BUA RESOLUTION NO. 2009-02UA**

**A RESOLUTION OF THE BANNING UTILITY AUTHORITY OF THE CITY OF BANNING ADOPTING THE ANNUAL BUDGET FOR THE FISCAL YEAR JULY 1, 2009 TO JUNE 30, 2010 AND MAKING APPROPRIATIONS TO MEET EXPENSES APPROVED THEREIN**

**WHEREAS**, the Executive Director prepared the annual budget for the fiscal year 2009-10 which set forth all of the expected revenues of the City of Banning Utility Authority, and the recommended appropriations to meet the operating and capital expenses for all Authority funds; and

**WHEREAS**, the Authority Board has considered the recommendations and approved or modified them so as to best serve the interest of the citizens of the City of Banning; and

**WHEREAS**, it is essential that the City's Utility Authority adopt a budget plan establishing the revenues and expenditures for all of its funds;

**NOW, THEREFORE, BE IT RESOLVED BY THE BANNING UTILITY AUTHORITY BOARD** that the Annual Budget for the Fiscal Years 2009-10, as summarized in the bound Proposed Budget (as presented and revised at the June 10, 2009 budget workshop and on file in the City Clerk's office) and the appropriations therein shall be expended in accordance with all applicable laws.

**PASSED, APPROVED AND ADOPTED** this 23rd day of June, 2009.

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Robert E. Botts, Chairman  
Banning Utility Authority

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

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David J. Aleshire, Authority Counsel  
Aleshire & Wynder, LLP

**ATTEST:**

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Marie A. Calderon, Secretary  
Banning Utility Authority

CERTIFICATION:

I, Marie A. Calderon, Secretary to the Utility Authority of the City of Banning, California, do hereby certify that the foregoing Resolution 2009-02UA was adopted by the BUA of the City of Banning, at a regular meeting thereof held on the 23rd day of June 2009, by the following vote, to wit:

AYES:

NOES:

ABSENT:

ABSTAIN:

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Marie A. Calderon, Secretary  
Banning Utility Authority