

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

February 8, 2011
5:00 p.m.

Banning Civic Center
Council Chambers
99 E. Ramsey St.

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

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

I. CALL TO ORDER

- Invocation – Pastor Tate Crenshaw, Life Point Church
- Pledge of Allegiance
- Roll Call – Councilmembers Botts, Franklin, Machisic, Robinson, Mayor Hanna

II. PRESENTATION

1. Presentation by Riverside County Fair and National Date Festival Queen and Court (ORAL)

III. REPORT ON CLOSED SESSION

IV. PUBLIC COMMENTS/CORRESPONDENCE/PRESENTATIONS/APPOINTMENTS

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.

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.

APPOINTMENTS:

1. Appointment to Parks and Recreation Advisory Committee 1
2. Council Assignments: a) Centennial Committee
b) San Geronio Pass Water Agency (ORAL)

V. CONSENT ITEMS

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

Motion: That the City Council approve Consent Item 1 through 4

Items to be pulled _____, _____, _____ for discussion.

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

1. Approval of Minutes – Joint Meeting – 01/25/11 9
2. Ordinance No. 1434 – 2nd Reading: An Ordinance of the City Council of the City of Banning, California, Adopting an Initial Study/Negative Declaration and Approving Zoning Text Amendment No. 10-97505 to Adopt Development Standards and Guidelines for Tattoo and Body Piercing Parlors, Hookah and Smoking Lounges, Fortune Telling, Mobile Vending and Code Clean-Up 10
3. Ordinance No. 1435 – 2nd Reading: An Ordinance of the City Council of the City of Banning Authorizing the Execution of An Agreement for the Purchase of Renewable Energy from the La Paz Solar Tower Project Through a Power Sales Agreement with Southern California Public Power Authority (SCAPPA) 22
4. Resolution No. 2011-08, Authorizing Staff to Submit a Grant Application For Rubberized Asphalt Concrete (RAC) for Street Improvements Along Wilson Street, From Stargaze Way to West of Sunset Avenue. 26

- Open for Public Comments
- Make Motion

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

CONSENT ITEM

1. Resolution No. 2011-03UA, Approving the Maintenance and Services Agreement with Merlin Johnson Construction, Inc. of Mentone, CA for in the amount “not to exceed” \$125,000.00 for the Banning Water Canyon Storm Damage Repair and Appropriate \$125,000.00 from the Water Operations reserves and authorize the Administrative Services Director to make the necessary budget adjustment for this project. 38

- Open for Public Comments
- Make Motion

Adjourn Joint Meeting of the Banning City Council and the Banning Utility Authority and Reconvene Regular City Council Meeting.

VI. REPORTS OF OFFICERS

1. Discuss Membership to the National League of Cities (ORAL)

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

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

VIII. ITEMS FOR FUTURE AGENDAS

New Items –

Pending Items – City Council

1. Schedule Meetings with Our State and County Elected Officials
2. Schedule Meeting with Banning Library Board (City Clerk – Check Dates)
3. Update on Economic Development Plan
4. Review of Fees and Rates
5. Consideration of Speaker Cards
6. Annual Review of Pledge of Civility and Code of Conduct
7. Discuss Council Attendance/Costs to Attend Various Events

IX. ADJOURNMENT

Adjourn the Regular City Council Meeting and Call to Order a Study Session of the City Council

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



COMMITTEE/BOARD APPLICATION FORM

Name of Committee or Board on

which you would like to serve: PARK & RECREATION ADVISORY COMMITTEE

Name: Leroy Miller

Address: 1361 W. Cottonwood, Banning CA 92220

Telephone Numbers: Home 951-922-0994 Office 951-750-9233

If employed, where you work and position _____

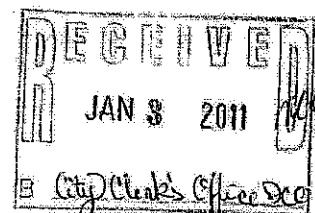
Length of residence in Banning 46 years

Are you a registered voter in Banning? Yes ☒ No ☐

Requested below is information that will be used by the City Council as a screening process to determine membership on City committees. Ample space is provided; please do not submit supplemental materials.

Provide a Biographical sketch, including education, work experience, civic involvement and other background relevant to duties of the position you seek:

Business owner, 10 years of public service with
the California Department of Forestry, on the
Board of directors for Banning Youth Baseball
Organization, President of Banning youth
baseball three years,



What types of major issues does should this committee or board deal with?

Creating more activities for the youth in the city of Banning, to update current equipment in the parks, to bring new parks and equipment into the city of Banning

Please identify specific problems facing the committee or board on which you would like to serve and explain how you feel they might be resolved:

Lack of participation in city recreation programs could be solved by reaching out to different cultural groups and church groups to promote a wide variety of programs. Bringing in new equipment and parks into the city can be solved by putting them into the development plans by the developer and by grants from the county and state.

Your name will be considered by the City Council upon receipt of your application.

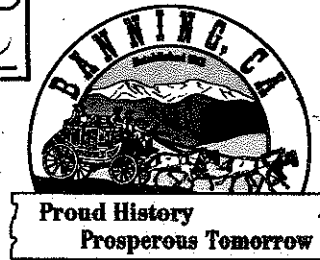
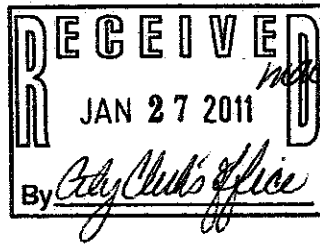
Please return to: City Clerk's Office/ City of Banning
99 E. Ramsey Street
P. O. Box 998
Banning, CA 92220

RETURN BY: Jan. 3, 2011
by 5:00 p.m.

Thank you for your willingness to serve your local government.

Date: 1-3-11

Signed: Larry Miller



COMMITTEE/BOARD APPLICATION FORM

Name of Committee or Board on

which you would like to serve: PARK & RECREATION ADVISORY COMMITTEE

Name: Shawn Wells

Address: 3565 Red Bluff Ln, Banning, CA 92220

Telephone Numbers: Home (951)-203-7650 Office (909) 383-1072

If employed, where you work and position Caltrans - District 8 - San Bernardino
Land Surveyor / GIS Analyst

Length of residence in Banning ~ 19 Years

Are you a registered voter in Banning? Yes ☒ No ☐

Requested below is information that will be used by the City Council as a screening process to determine membership on City committees. Ample space is provided; please do not submit supplemental materials.

Provide a Biographical sketch, including education, work experience, civic involvement and other background relevant to duties of the position you seek:

Graduated from Elk Grove Sr High School, and attended Cosumnes River College and CSU Sacramento. We moved to Southern California when I hired on with Caltrans in 1991. In 1997, we chose to make our home, and raise our children in Banning, for its small town qualities and charm. For the past 10 years I've been working in the GIS Unit, creating and maintaining databases, and cartographic maps. I enjoy all types of outdoor activities, and I would like to help make Banning a destination for other outdoor enthusiasts.

What types of major issues does should this committee or board deal with?

Improving the quality of life in this city by providing recreational sites and services to residents of all ages.

Please identify specific problems facing the committee or board on which you would like to serve and explain how you feel they might be resolved:

There is a lack of activity based recreational choices for residents. I would like to see more: bike lanes, tennis courts, and multi use trails (hiking, mountain biking, and equestrian) established.

Your name will be considered by the City Council upon receipt of your application.

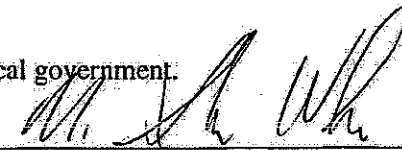
Please return to: City Clerk's Office/ City of Banning
99 E. Ramsey Street
P. O. Box 998
Banning, CA 92220

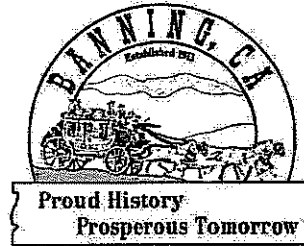
RETURN BY: Jan. 31, 2011
by 5:00 p.m.

Thank you for your willingness to serve your local government.

Date: 1-24-11

Signed:





COMMITTEE/BOARD APPLICATION FORM

Name of Committee or Board on

which you would like to serve: PARK & RECREATION ADVISORY COMMITTEE

Name: Frank Steven Inett

Address: 5025 DARHURST AVE Banning

Telephone Numbers: Home 951-769-1120 Cell 951-544-4586 Office

If employed, where you work and position Retired

Length of residence in Banning 8 years

Are you a registered voter in Banning? Yes ☒ No ☐

Requested below is information that will be used by the City Council as a screening process to determine membership on City committees. Ample space is provided; please do not submit supplemental materials.

Provide a Biographical sketch, including education, work experience, civic involvement and other background relevant to duties of the position you seek:

Married 52 years. 45 years in Riverside County. Retired
30 years in grocery industry, retired 15 years United Way
of Inland Valley, 2 daughters, 4 grandchildren, former
member of Riverside Park & Rec Commission, member
Elks Lodge #1839 (Beaumont/Banning), former President
Board of Directors MFI (abuse treatment center) former member
Second Harvest Food Bank, former vice-chair advisory
Committee on wages & salaries for Riverside city council,
former member California State Parks Board, former board
member of Visterra Credit Union (formerly Riverside employee
Credit Union.

What types of major issues does should this committee or board deal with?

The planner growth or lack thereof, in the city of Banning & how it relates to this department. Budget is the biggest issue in state & local government. We must face reality and develop our plans wisely for city and departmental goals.

Please identify specific problems facing the committee or board on which you would like to serve and explain how you feel they might be resolved: Issues & Concerns

#1 Keeping city pool operational all summer #2 Make sure senior center is able to function consistently within existing budget #3 expand existing events i.e. concerts in Park, farmers market etc. Possible solutions consider possible sponsorships & private party & group rentals by local & state wide businesses: Look at how non-profit charities raise money & investigate if we can adopt their procedures. Pool membership with a certain # of free days might be an option.

Please return to:

City Clerk's Office/ City of Banning
99 E. Ramsey Street
P. O. Box 998
Banning, CA 92220

RETURN BY: Jan. 31, 2011
by 5:00 p.m.

Thank you for your willingness to serve your local government.

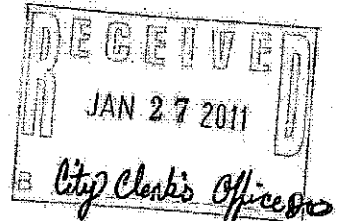
Date:

1-27-11

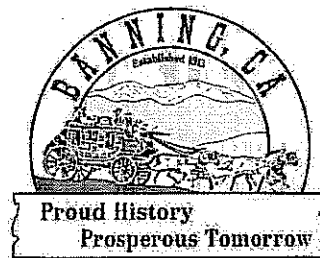
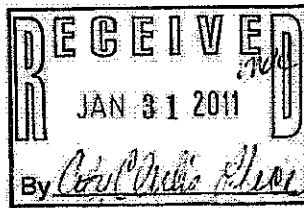
Signed:

Frank J. Matt

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COMMITTEE/BOARD APPLICATION FORM

Name of Committee or Board on

which you would like to serve: PARK & RECREATION ADVISORY COMMITTEE

Name: Veronica Topete

Address: 1181 N. Durward Ave Banning, CA 92220

Telephone Numbers: Home (951) 849-5366 Office (951) 488-4829

If employed, where you work and position Federal Government Social Security Administration

Length of residence in Banning 37 years

Are you a registered voter in Banning? Yes ☒ No ☐

Requested below is information that will be used by the City Council as a screening process to determine membership on City committees. Ample space is provided; please do not submit supplemental materials.

Provide a Biographical sketch, including education, work experience, civic involvement and other background relevant to duties of the position you seek:

13 years working with County of Riverside.
Federal Employee Social Security Admin. 21 months
Board of Director For Banning Police Activities League
Board of Director Mexican American Scholarship Assoc.
Booster Club Officer at Central and Combs School
Volunteer in Central, Combs, and Nicolet Schools.
Volunteer with Boys + Girls activities.
President of W.E. Care. for County of Riverside 6 years.

What types of major issues does should this committee or board deal with?

Attracting revenue for all parks. Offering events for community. Making all parks safe and clean. Presenting/make recommendations for the City Council to review.

Please identify specific problems facing the committee or board on which you would like to serve and explain how you feel they might be resolved:

① The little league for baseball at Lions Park has been neglected. I would like to present a report on issues and complaints that need to be addressed and work with the little league to make it better.

② Due to funding this summer kids are going to be left w/o a safe place to be during day. Collaborate with City, BPAL, Native American Challenge to offer a free cost

Your name will be considered by the City Council upon receipt of your application. Summer program.

Please return to: City Clerk's Office/ City of Banning
99 E. Ramsey Street
P. O. Box 998
Banning, CA 92220

RETURN BY: Jan. 31, 2011
by 5:00 p.m.

Thank you for your willingness to serve your local government.

Date: 1/28/11

Signed: Ursula Lopez

MINUTES
CITY COUNCIL
BANNING, CALIFORNIA

01/25/11
JOINT MEETING

A joint meeting of the Banning City Council and the Community Redevelopment Agency was called to order by Mayor Hanna on January 25, 2011 at 4:00 p.m. at the Banning Civic Center Council Chambers, 99 E. Ramsey Street, Banning, California.

COUNCIL MEMBERS/

BOARDMEMBERS PRESENT:

Councilmember Botts
Councilmember Franklin
Councilmember Machisic
Councilmember Robinson
Mayor Hanna

COUNCIL MEMBERS ABSENT:

None

OTHERS PRESENT:

Andrew Takata, City Manager/Executive Director
David J. Aleshire, City Attorney/Agency Counsel
Duane Burk, Public Works Director
Zai Abu Bakar, Community Development Director
Marie A. Calderon, City Clerk/Secretary

CLOSED SESSION

City Attorney said that the City Council will go into closed session pursuant to Government Code Section 54956.9(a) regarding Banning Airport Associates litigation matter. There is a potential litigation matter for the Agency pursuant to Government Code Section 54956.9 and two real property negotiations for the Agency involving the Dodge parcel located at 2301 W. Ramsey and the Westview Terrace Apartment located at 287 W. Westward. With respect to all these matters a status report will be given.

Mayor Hanna opened the item for public comments. There were none.

Meeting went into closed session at 4:02 p.m. and returned to regular session at 4:53 p.m.

ADJOURNMENT

By common consent the meeting adjourned at 5:10 p.m.

Marie A. Calderon, City Clerk/
Agency Secretary

2nd. Read.

ORDINANCE NO. 1434

**AN ORDINANCE OF THE CITY COUNCIL OF THE
CITY OF BANNING, CALIFORNIA ADOPTING AN
INITIAL STUDY/NEGATIVE DECLARATION AND
APPROVING ZONING TEXT AMENDMENT NO. 10-
97505 TO ADOPT DEVELOPMENT STANDARDS
AND GUIDELINES FOR TATTOO AND BODY
PIERCING PARLORS, HOOKAH AND SMOKING
LOUNGES, FORTUNE TELLING, MOBILE
VENDING, AND CODE CLEAN-UP**

WHEREAS, the proposed Zoning Text Amendment No. 10-97505 was duly initiated by the City of Banning; and

WHEREAS, the Municipal Code provides for "Zoning Ordinance" amendments consistent with the goals and policies of the General Plan; and

WHEREAS, in response to public inquiries, staff has identified that no provision is made in the adopted "Zoning Ordinance" for tattoo and body piercing parlors, hookah and smoking lounges, fortune telling and occult arts, and mobile vending land uses; and

WHEREAS, it is necessary to regulate the subject uses to prevent community-wide adverse impacts, increased crime, decreased property values and the deterioration of neighborhoods that can be brought about by the concentration of the subject uses and their location near sensitive uses and to ensure compatibility of such uses with surrounding land uses and properties and to avoid any impacts associated with such uses. Also, a code clean-up is included; and

WHEREAS, on November 12, 2010, the City published a public hearing notice for Zoning Text Amendment No. 10-97505 in the Press Enterprise newspaper in compliance with state law and Chapter 17.68 of the Banning Zoning Ordinance; and

WHEREAS, on December 1, 2010, the Planning Commission held a noticed public hearing at which time interested persons had an opportunity to testify in support of, or opposition to Zoning Text Amendment No. 10-97505 and at which time the Planning Commission considered the proposed Zoning Text Amendment and recommended City Council approval; and

WHEREAS, on January 25, 2011, the City Council held a noticed public hearing at which time interested persons had an opportunity to testify in support of, or opposition to Zone Text Amendment No. 10-97505; and

WHEREAS, at said public hearing on January 25, 2011, the City Council considered and heard public testimony and comments regarding Zoning Text Amendment No. 10-97505; and

WHEREAS, at this public hearing, the City Council has analyzed this proposed project and has determined that a Negative Declaration is required per the California Environmental Quality Act ("CEQA") under Section 15070(a) regarding negative declarations, Section 15268 regarding ministerial projects, and Section 15378 regarding the definition of "project" of the CEQA Guidelines, which provide that the adoption of an ordinance by a city is considered a project which requires the preparation of an Initial Study. However, the Project (the adoption of an ordinance amending the City of Banning "Zoning Ordinance") does not have negative impacts on the environment; a Negative Declaration is proposed for adoption; and

WHEREAS, the City Council has carefully considered all pertinent documents and the staff report offered in this case as presented at the public hearing held on January 25, 2011.

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

SECTION 1: ENVIRONMENTAL FINDING.

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 Community Development Department as provided in the Staff Report dated January 25, 2011, 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):**
The City Council has analyzed this proposed project and has determined that a Negative Declaration is required per the California Environmental Quality Act ("CEQA") under Section 15070(a) regarding negative declarations, Section 15268 regarding ministerial projects, and Section 15378 regarding the definition of "project" of the CEQA Guidelines, which provide that the adoption of an ordinance by a city is considered a project which requires the preparation of an Initial Study. However, the Project (the adoption of an ordinance amending the City of Banning "Zoning Ordinance") does not have negative impacts on the environment. A Negative Declaration is proposed for adoption.
2. **Multiple Species Habitat Conservation Plan (MSHCP):**
The amendment to the "Zoning Ordinance" does not relate to any one physical project and is not subject to the MSHCP. Further, projects subject to this resolution will trigger individual project analysis and documentation related to the requirements of MSHCP including mitigation through payment of the MSHCP Mitigation Fee.

SECTION 2: REQUIRED FINDINGS.

1. The proposed Amendment is consistent with the goals and policies of the General Plan.

Findings of Fact:

The Zone Text Amendment 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 text amendments 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 amendment to the Municipal Code to provide development standards and guidelines for tattoo and body piercing parlors, hookah and smoking lounges, fortune-telling, and mobile vending land uses will ensure a functional pattern of land uses by imposing limits on the location of the subject uses in relation to other uses; and, ensure that the quality of life, health, safety, and welfare of the community is not compromised by designating specified zones and regulations for the subject uses. As to each Zoning Text Amendment adopted in Section 3 below, the following findings are specifically made and adopted:

- a. *With Respect to Tattoo and Body Piercing Parlors.* It is in the best interest of the public health, safety and welfare that the City conditionally permit tattoo and body piercing parlors and regulate the proximity of such establishments away from residential and family-oriented uses and school/daycare uses because the practice of tattoo and body piercing presents certain public health and safety risks, in particular the potential spread of blood born disease such as hepatitis. Additionally, the image of tattoo parlors may not be compatible with other uses designed to encourage a family-oriented environment.
- b. *With Respect to Smoking Lounges.* It is in the best interest of the public health, safety and welfare that the City conditionally permit smoking lounges and to regulate the proximity of such establishments away from residential and family-oriented uses and school/daycare uses and because the establishment of smoking lounges produces secondary smoke which can negatively affect workers, passers-by and neighbors, particularly minors, the elderly, sick and disabled. Moreover, smoking lounges may serve as a marketing vehicle for tobacco, which can also have detrimental effects on minors by encouraging them to smoke.
- c. *With Respect to Fortune-Tellers.* It is in the best interest of the public health, safety and welfare that the City conditionally permit fortune-tellers and to regulate the proximity of such establishments away from residential and family-oriented uses and school/daycare uses because, consistent with the City's image as primarily a single-family community, fortune telling and other uses may not be compatible with single-family residential neighborhoods and those commercial zones that allow single-family dwellings such as the Downtown Commercial zone.

d. *With Respect to Mobile Vending.* It is in the best interest of the public health, safety and welfare that the City regulate the practice of mobile vending (as defined herein) because the unrestricted sale and distribution of food, beverages, merchandise or services from mobile vendors or pedestrians within or upon public streets, sidewalks and rights-of-way, public property or in the vicinity of school buildings, under certain circumstances, constitutes a danger to public safety because of the risk of injury to pedestrians that are exposed to hazards from other vehicular traffic in the vicinity. Also, the unauthorized use of public property for private commercial activity constitutes a misuse of public property and tax money and that similar activity on private property when not in conformity with health, safety, zoning and land use regulations is contrary to the public welfare including:

- i) the sale of unhealthy and unregulated food products raises concerns about health and food safety;
- ii) the potential sale of other products not legal for sale to minors (cigarettes, alcohol and other drugs, etc.);
- iii) the unsafe conditions resulting from children darting in and out of cars and crossing streets to reach mobile vendors; and
- iv) the conduct of some of the mobile vendors raising concerns that school children might be subject to inappropriate verbal comments and other forms of harassment.

2. The proposed Amendment is internally consistent with the Zoning Ordinance.

Findings of Fact:

The Zone Text Amendment is internally consistent with the existing provisions of the "Zoning Ordinance". City staff has checked all sections of the "Zoning Ordinance" to ensure that there are no references to tattoo and body piercing parlors, hookah and smoking lounges, fortune telling, and mobile vending land uses and confirmed that with the amendment the "Zoning Ordinance" is internally consistent.

3. The City Council has independently reviewed and considered the requirements of the California Environmental Quality Act.

Findings of Fact:

CEQA: The City Council has analyzed this proposed project and has determined that it is not exempt from the California Environmental Quality Act ("CEQA") under Sections 15070(a) regarding negative declarations, 15268 regarding ministerial projects, and 15378 regarding the definition of "project" of the CEQA Guidelines; and, a Negative Declaration is hereby adopted.

SECTION 3: ZONING ORDINANCE AMENDMENT.

Add the following definitions to code section 17.04.070:

Smoking Lounge means any establishment or location that is dedicated, in whole or in part, to the smoking or use of tobacco cigarettes, cigars, chewing tobacco, and dipping tobacco, or other tobacco substances which under state law may only be legally sold to persons age 18 and older; 'smoking lounges' include, without limitation, establishments referred to as cigar bars or lounges, hookah cafes, tobacco clubs or tobacco bars. A 'smoking lounge' does not include grocery or convenience store establishments that sell tobacco products where (i) such tobacco products are not the establishment's primary merchandise, and (ii) the establishment has no area dedicated to the smoking or use of tobacco products.

Tattoo Parlor means any business or premises dedicated to the act or process of marking or coloring the skin of any person by the insertion of pigment under or in the skin or by the production of scars. The term 'tattoo parlor' does not include businesses that offer permanent make-up as a service that is secondary to other business services.

Body Piercing Parlor means any business or premises dedicated to the piercing, puncture or perforation of human skin or tissue, or the insertion of jewelry or other objects into or under the skin or tissue, for decorative, non-medical purposes; the term 'body piercing parlor' does not include businesses that offer ear-only piercing as a service that is secondary to other business services, or acupuncture clinics.

Fortune-Telling means the telling of fortunes, forecasting of future events or furnishing of any information not otherwise obtainable by the ordinary process of knowledge, by means of any occult or psychic power, faculty or force, including, but not limited to clairvoyance, clairaudience, cartomancy, psychometry, phrenology, spirits, tea leaves, or other such reading, mediumship, seership, prophecy, augury, astrology, palmistry, necromancy, mindreading, telepathy, or other craft, art, science, cards, talisman, charm, potion, magnetism, magnetized article, or substance, crystal gazing, oriental mysteries or magic, of any kind or nature.

Mobile Vending Vehicle - shall mean any vehicle, as that term is defined in the California Vehicle Code, which is equipped or primarily used for retail sales of fruits, vegetables or produce, and/or prepared, pre-packaged, or unprepared, unpackaged food of any kind on any public street, alley or highway or private street or alley within the City limits. The inventory of these vehicles is not necessarily limited to edible items and may

include non-food sundries. A human powered cart for such vending also qualifies as a mobile vending vehicle.

Add the following code section:

17.12.020 Permitted, conditional and prohibited uses.

**Table 17.12.020
Permitted, Conditional and Prohibited Commercial and Industrial Uses**

	DC	GC	HSC	PO	I	AI	BP	IMR
Services								
Tattoo and Body Piercing Parlors	X	C	C	C	C	C	X	X
Hookah and Smoking Lounges	X	C	C	C	C	C	C	X
Fortune-Telling	X	C	C	C	C	C	C	X
Mobile Vending	T	T	T	T	T	T	T	T

Add the following code section:

17.12.050 Use Specific Standards

**Table 17.12.050
Use Specific Development Standards**

	DC	GC	HSC	PO	I	AI	BP	IMR
Q. Tattoo and Body Piercing Parlors		*	*	*	*	*		

Q. Tattoo and Body Piercing Parlors.

As indicated in Table 17.12.020, a Conditional Use Permit is required for tattoo and/or body piercing businesses. The following standards shall apply:

1. The business shall not be located within 1,000 feet of any other tattoo and/or body piercing parlor as measured from any point from the outer boundaries of the property containing the business.
2. The business shall not be located within 500 feet of any adult-oriented business as measured from any point from the outer boundaries of the property containing the business.
3. The business shall not be located within 500 feet of any business selling alcoholic

beverages, as measured from any point from the outer boundaries of the property containing the business.

4. The business shall not be located within 100 feet of any residential use as measured from any point between the outer boundaries of the property containing the business and the nearest property line of a residentially occupied property.
5. The business shall not be located within 600 feet of a school, park or day care center/family day care home as measured from any point between the outer boundaries of the property containing the business to the nearest property line of the school, park or day care center/family day care home.
6. The business shall maintain in a sanitary condition at all times both the facilities and employees of the business. All walls, ceilings, floors, furnishings, and instruments used for tattoo and piercing shall be kept in good repair, and maintained in a clean and sanitary condition. Employees shall be required to wash their hands prior to any contact with customers.
7. Officers of the Police Department, Code Enforcement Division, and the Fire Department shall have the right to enter any tattoo and body piercing businesses during regular business hours to make reasonable inspection to ascertain whether the provisions of this chapter are being complied with, provided reasonable and normal business operations shall not be interfered with by said inspection.
8. The hours of operation shall be no earlier than 7:00 a.m. and no later than 10:00 p.m.

Table 17.12.050
Use Specific Development Standards

	DC	GC	HSC	PO	I	AI	BP	IMR
R. Hookah and Smoking Lounge		*	*	*	*	*	*	

R. Hookah and Smoking Lounge.

As indicated in Table 17.12.020, a Conditional Use Permit is required for hookah and smoking lounge businesses. The following standards shall apply:

1. The business shall not be located within 1,000 feet of any other hookah and smoking lounge as measured from any point from the outer boundaries of the property containing the business.
2. The business shall not be located within 500 feet of any adult-oriented business as measured from any point from the outer boundaries of the property containing the business.

3. The business shall not be located within 100 feet of any residential use as measured from any point between the outer boundaries of the property containing the business and the nearest property line of a residentially occupied property
4. The business shall not be located within 600 feet of a school, park or day care center/family day care home as measured from any point between the outer boundaries of the property containing the business to the nearest property line of the school, park or day care center/family day care home.
5. An outdoor patio shall be required together with any proposed or existing hookah or smoking lounge use.
6. The hours of operation shall be no earlier than 7:00 a.m. and no later than 11:00 p.m.

Table 17.12.050
Use Specific Development Standards

	DC	GC	HSC	PO	I	AI	BP	IMR
S. Fortune-Telling.		*	*	*	*	*	*	

S. Fortune-Telling.

As indicated in Table 17.12.020, a Conditional Use Permit is required for fortune-telling businesses. The following standards shall apply:

1. The business shall not be located within 1,000 feet of any other fortune-telling businesses as measured from any point from the outer boundaries of the property containing the business.
2. The business shall not be located within 500 feet of any adult-oriented business as measured from any point from the outer boundaries of the building lease space containing the business.
3. The business shall not be located within 100 feet of any residential use as measured from any point between the outer boundaries of the property containing the business and the nearest property line of a residentially occupied property.
4. The business shall not be located within 600 feet of a school, park or day care center/family day care home as measured from any point between the outer boundaries of the property containing the business to the nearest property line of the school, park or day care center/family day care home.
5. The hours of operation shall be no earlier than 7:00 a.m. and no later than 10:00 p.m.

Add the following code section:

17

17.108.020

K. Mobile Vending of food, beverages, merchandise or services from a vehicle as defined by the California Vehicle Code including any non-self-propelled or nonmotorized vehicle or similar vending device and a cart propelled by human power.

17.108.070 Requirements and Prohibitions for Mobile Vending

The unrestricted sale and distribution of food, beverages, merchandise or services from mobile vendors within or upon public streets, sidewalks and rights-of-way, public property or in the vicinity of school buildings, under certain circumstances constitutes a detriment to the public health, safety, and welfare because of the increased risk of injury to pedestrians and damage to personal property in the vicinity. Therefore the following requirements and prohibitions shall apply:

A. Mobile Vending Requirements.

1. Technical Staff review shall be required in accordance with Chapter 17.104 of the "Zoning Ordinance".
2. All mobile vendors shall comply with State of California and County of Riverside regulations for food handling including obtaining the respective agency permits.
3. All mobile vendors shall comply with the standards set forth in Section 17.104.060 *Criteria governing review* of the "Zoning Ordinance".

B. Mobile Vending Prohibitions.

1. No food, beverages, merchandise or services shall be sold or distributed or offered for sale or distribution from a mobile vendor upon public property without the authorization of the public entity.
2. No food, beverage, merchandise or services shall be sold or distributed or offered for sale or distribution from a mobile vendor on private property without the express written consent of the owner or lessee of the property and except in conformity with health, safety and zoning regulations contained herein.
3. No food, beverage, merchandise or services shall be sold or distributed or offered for sale or distribution from a mobile vendor within five hundred (500) feet from any public school property, measured in a straight line to the nearest point of the school property between 7:00 a.m. and 4:00 p.m. on regular school days; except in commercial zones, on private property,

with the express written consent of the owner or lessee of the property and in conformity with health, safety and zoning regulations contained herein.

4. No food, beverage, merchandise or services shall be sold or distributed or offered for sale or distribution from a mobile vendor that is not on an improved surface and that is creating an obstruction to vehicles, pedestrians or parking.

Code Clean-up

1. Note 3 "Must include a minimum of fifty percent new product sales" from Table 17.12.020 Permitted, Conditional and Prohibited Commercial and Industrial Uses is repealed in its entirety (Note 3 is attached to Auto, mobile home and motor vehicle sales, and parts sales, new and used).
2. Amend *Single-family dwellings, existing* in Table 17.12.020 Permitted, Conditional and Prohibited Commercial and Industrial Uses to a permitted use as follows:

	DC	GC	HSC	PO	I	AI	BP	IMR
Residential Uses								
Single-family dwellings, existing	P	X	X	X	X	X	X	X

3. Amend *Second Dwelling Unit* in Table 17.08.020 Permitted, Conditional and Prohibited Residential Uses to permitted uses for MDR and HDR zones as follows:

	R/A	R/A/H	RR	RR/H	VLDR	LDR	MDR	HDR	MHP
Residential Uses									
Second Dwelling Unit	P	P	P	P	P	P	P	P	X

4. Title 6 of the Banning Municipal Code (Animals) is hereby amended as follows:

Amend Limit of Animals is Section 6.08.100 as follows:

No person shall keep, house, confine or maintain more than the number specified in the "Zoning Ordinance" of adult dogs or cats in any combination in any place in the city except in licensed commercial establishments.

5. Title 10 of the Banning Municipal Code (Stopping, Standing and Parking) is hereby amended as follows:

Section 10.12.070 Unlawful parking-Peddlers, vendors is repealed in its entirety.

SECTION 4: SEVERABILITY.

If any section, subsection, sentence, clause, or phrase of this ordinance is for any reason held to be invalid or unconstitutional by a decision of any court of competent jurisdiction, such decision will not affect the validity of the remaining portions of this ordinance. The City Council hereby declares that it would have passed this ordinance and each and every section, subsection, sentence, clause, or phrase not declared invalid or unconstitutional without regard to whether any portion of the ordinance would be subsequently declared invalid or unconstitutional.

SECTION 5: EFFECTIVE DATE.

This Ordinance shall take effect thirty (30) days after its 2nd reading in accordance with California law.

PASSED, APPROVED, AND ADOPTED this 8th day of February, 2011.

Barbara Hanna, Mayor

**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 Ordinance No. 1434 was duly introduced at a regular meeting of the City Council of the City of Banning, held on the 25th day of January, 2011, and was duly adopted at a regular meeting of said City Council on the 8th day of February, 2011, by the following vote, to wit:

AYES:

NOES:

ABSEN:

ABSTAIN:

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

2nd Read.

ORDINANCE NO. 1435

**AN ORDINANCE OF THE COUNCIL OF THE CITY OF
BANNING AUTHORIZING THE EXECUTION OF AN
AGREEMENT FOR THE PURCHASE OF RENEWABLE
ENERGY FROM THE LA PAZ SOLAR TOWER PROJECT
THROUGH A POWER SALES AGREEMENT WITH THE
SOUTHERN CALIFORNIA PUBLIC POWER AUTHORITY**

WHEREAS, pursuant to the provisions relating to the joint exercise of powers found in Chapter 5 of Division 7 of Title 1 of the Government Code of the State of California, as amended (the "Joint Powers Act"), the City of Banning (the "City") and certain other public bodies (collectively, the "Members") have entered into a Joint Powers Agreement, as amended (the "Joint Powers Agreement"), which creates the Southern California Public Power Authority ("SCPPA"), a public entity separate and apart from the Members; and

WHEREAS, pursuant to the terms of the Joint Powers Act and the Joint Powers Agreement, SCPPA has the power, for the purpose of promoting, maintaining and operating electric generation and transmission on behalf of its Members, to plan, develop, contract for, finance, acquire, design, undertake, own, construct, operate and administer projects involving systems, methodologies and programs for the acquisition, supply, procurement and delivery of secure, long-term reliable supplies of renewable electric energy and to cause such projects to be planned, developed, contracted for, financed, acquired, designed, constructed, operated, maintained, and administered and to provide by agreement for the performance and carrying out of any such activities; and

WHEREAS, the City has need for a long-term source of renewable energy to satisfy City's renewable portfolio standard requirements and desires to ensure the reliable delivery of solar energy to fulfill a portion of these requirements; and

WHEREAS, SCPPA and certain of its Members, to wit, currently the Cities of Anaheim, Azusa, Banning, Burbank, Glendale, Pasadena and Riverside and the Imperial Irrigation District (collectively, the "Project Participants") have investigated the feasibility of the purchase of solar electric capacity and energy and the acquisition and development of solar energy and related facilities in order to provide a long-term supply of renewable energy to meet a portion of the electrical generation needs of the Project Participants while also helping them meet policy and regulatory goals for increasing the amount of electricity obtained from renewable energy resources; and

WHEREAS, SCPPA and the Project Participants have identified a solar energy facility known as the La Paz Solar Tower Project (the "Project"), that will be owned by EnviroMission (USA), Inc., a Delaware corporation ("EnviroMission") and an affiliate of EnviroMission Limited. The Project is to have a nameplate capacity of 200 MW and is to be located in western La Paz County, Arizona. The Project will include the siting, construction and installation of the solar tower facility containing, among other things, thirty-two 6.25 MW pressure-staged turbine generators. SCPPA desires to acquire a major portion of the electric capacity and energy of the Project from EnviroMission, and each Project Participant desires to obtain electric capacity and associated energy and environmental attributes of the Project from SCPPA pursuant to a La Paz Solar Tower Project Power Sales Agreement between SCPPA and such Project Participant (the "Power Sales Agreement"); and

WHEREAS, SCPPA proposes to enter into a Power Purchase Agreement with EnviroMission (the "Power Purchase Agreement") to provide, among other things, for the purchase by SCPPA of approximately 103 MWs of capacity and associated energy and environmental attributes from the Project. The form of the Power Purchase Agreement is attached as an Appendix to the Power Sales Agreement; and

WHEREAS, the Power Purchase Agreement also provides for SCPPA and EnviroMission to enter into an Option Agreement providing SCPPA with options to purchase a percentage ownership interest in the Project equivalent to the percentage of the capacity of the Project purchased by SCPPA under the Power Purchase Agreement. Exhibits to the Option Agreement include the forms of a Participation Agreement (the "Participation Agreement") and a Project Operation and Maintenance Agreement (the "Project O&M Agreement") which are to be entered into by SCPPA with EnviroMission if SCPPA exercises its purchase option. The Participation Agreement and the Project O&M Agreement provide for the management and operation of the Project by SCPPA and EnviroMission as co-owners; and

WHEREAS, in the event that it exercises its option to purchase such ownership interest in the Project, SCPPA would issue bonds to finance the cost of acquisition of such ownership interest; and

WHEREAS, the Power Sales Agreement provides for the purchase by a Project Participant from SCPPA of a designated amount of Project capacity and the associated energy and environmental attributes, whether such purchase be from the capacity and associated energy and environmental attributes of the Project purchased by SCPPA under the Power Purchase Agreement, or, if SCPPA exercises its option to purchase the ownership interest in the Project, from the capacity and associated energy and environmental attributes supplied from SCPPA's ownership interest in the Project. Under the terms of each Power Sales Agreement the designated amount of a Project Participant's Capacity Amount, Output Entitlement Share or Cost Share (as defined therein) may be increased or decreased by up to 50% but only subject to the conditions set forth in the Power Sales Agreement, including the approval by the representative of such Project Participant on the Project Coordinating Committee established pursuant to the Power Sales Agreement (the "Project Coordinating Committee") and the approval of the SCPPA Board of Directors; and

WHEREAS, for its purchase of Project capacity and associated energy and environmental attributes, a Project Participant is to pay to SCPPA on a take or pay basis its share of SCPPA's costs with respect to the Project (including debt service on SCPPA bonds if SCPPA should acquire the ownership interest in the Project), all in accordance with the terms of the Power Sales Agreement; and

WHEREAS, there has been submitted to this Council the form of the Power Sales Agreement by and between SCPPA and the City of Banning for the purchase of 2 MWs of Project capacity and associated energy (subject to adjustment in accordance with the terms of the Power Sales Agreement), including as an Appendix thereto, the form of the Power Purchase Agreement with the form of Option Agreement attached as Appendix J to the Power Purchase Agreement and the forms of the Participation Agreement and Project O&M Agreement attached as Exhibits to the Option Agreement (the "Banning Power Sales Agreement"); and

WHEREAS, the Council of the City of Banning finds and determines that it is in the best interests of the City and its residents to purchase Project capacity and the associated energy and environmental attributes from SCPPA pursuant to the Banning Power Sales Agreement.

NOW THEREFORE, the City Council of the City of Banning does ordain as follows:

Section I. The Council hereby approves the Banning Power Sales Agreement, including all Appendices and attachments thereto, between the City and SCPPA with respect to the La Paz Solar Tower Project, in substantially the form submitted to the Council.

Section II. The City Manager is hereby authorized to execute and deliver the Banning Power Sales Agreement, with such changes, insertions and omissions as shall be approved by the City Manager (such approval to be conclusively evidenced by such execution), and with approval of the City Attorney as to form. The City Clerk is hereby authorized to attest to such execution.

Section III. The City Manager, or his/her designee, is authorized to execute and deliver any and all other documents and instruments and to do and cause to be done any and all acts and things necessary or advisable for carrying out the responsibilities and transactions under the Banning Power Sales Agreement as contemplated by this Ordinance.

Section IV. If any part of this Ordinance is held to be invalid for any reason, such decision shall not affect the validity of the remaining portion of this Ordinance, and this City Council hereby declares that it would have passed the remainder of this Ordinance, if such invalid portion thereof had been deleted.

Section V. Pursuant to Section 54241 of the Government Code of the State of California, this Ordinance is subject to the provisions for referendum applicable to the City.

Section VI. This City Council shall certify to the enactment of this Ordinance and shall cause this Ordinance to be published in accordance with Section 54242 of the Government Code of the State of California.

Section VII. Unless a petition shall be filed requiring that this Ordinance be submitted to referendum, thirty (30) days from and after its enactment, this Ordinance shall take effect and be in full force, in the manner provided by law.

PASSED, APPROVED AND ADOPTED this 8th day of February, 2011.

Barbara Hanna, Mayor

ATTEST:

Marie A. Calderon, City Clerk

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

David J. Aleshire, City Attorney
Aleshire and Wydner, LLP

CERTIFICATION:

I, Marie A. Calderon, City Clerk of the City of Banning, California, do hereby certify that Ordinance No. 1435 was duly introduced at a regular meeting of the City Council of the City of Banning, held on the 25th day of January, 2011, and was duly adopted at a regular meeting of said City Council on the 8th day of February, 2011, by the following vote, to wit:

AYES:

NOES:

ABSENT:

ABSTAIN:

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

**CITY COUNCIL AGENDA
CONSENT ITEM**

DATE: February 8, 2011

TO: City Council

FROM: Kahono Oei, City Engineer

SUBJECT: Resolution No. 2011-08, "Authorizing Staff to Submit a Grant Application for Rubberized Asphalt Concrete (RAC) for Street Improvements along Wilson Street, from Stargaze Way to West of Sunset Avenue"

RECOMMENDATION:

- I. Adopt Resolution No. 2011-08, "Authorizing Staff to Submit a Grant Application for Rubberized Asphalt Concrete (RAC) for Street Improvements along Wilson Street, from Stargaze Way to West of Sunset Avenue."
- II. Authorize the City Manager to execute the application, enclosed herewith as Exhibit "A", and all related grant documents, with the California Department of Resources Recycling and Recovery (Cal Recycle).

JUSTIFICATION: Adoption of Resolution No. 2011-08 is essential in order to meet the Cal Recycle's grant application submittal requirements to obtain funds for the rehabilitation of Wilson Street, from Stargaze Way to west of Sunset Avenue, with RAC.

BACKGROUND: Wilson Street, between Stargaze Way and west of Sunset Avenue, has numerous cracks and needs to be rehabilitated to improve the roadway. The potential scope of work for the proposed project consists of grinding/cold planing of existing asphalt; 1-1/2" of RAC overlay; adjusting manholes, sewer cleanouts, and water valve covers to grade; construction of sidewalks, curbs, gutters, and handicap ramps; striping; and cleaning; in accordance with the City of Banning, Standard Specifications.

In the fall of 2008, street improvements consisting of 1-1/2" of RAC overlay were performed on Wilson Street, between 8th Street and Stargaze Way. A \$150,000.00 RAC grant was obtained from Cal Recycle by Engineering Division staff in March of 2007.

The California Department of Resources Recycling and Recovery (Cal Recycle), formerly known as the California Integrated Waste Management Board (CIWMB), has set aside grant funding for projects that utilize rubberized asphalt concrete (RAC), which is comprised of crumb rubber made from 100% California generated waste tires. Cal Recycle receives an annual appropriation from the California Tire Recycling Management Fund (Tire Fund) to administer the Tire Recycling Act (Act) (Senate Bill 937, Vuich, Statutes of 1990, Chapter 35) and related legislation. As part of the Act, Cal Recycle is offering the Targeted Rubberized Asphalt Concrete (TRAC) Incentive Grant Program to encourage the use of waste tire rubber to pave

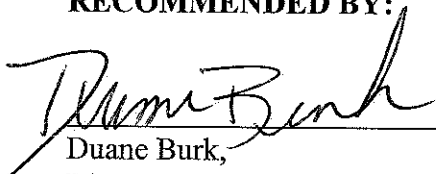
roadways with RAC and thereby reduce landfill disposal and stockpiling of California waste tires. Public Resources Code Section 42872.5 allows for the awarding of grants to public entities for funding of public works projects that use RAC.

The TRAC Incentive grants are awarded competitively, and the program was established to cover the additional costs of using RAC, such as the differential cost of using RAC vs. conventional asphalt concrete and the material testing costs associated with constructing the project with RAC. Cal Recycle has a total TRAC Incentive grant fund of about \$3.5 million for the Fiscal Year 2010-2011.


Through the submittal of this grant application to Cal Recycle, the City would demonstrate a good faith effort in promoting the use of recycled material, which is mandated as a requirement under Assembly Bill 939.

FISCAL DATA: The Public Works Department is requesting \$250,000.00 in TRAC Incentive Grant Program funds to improve Wilson Street, from Stargaze Way to west of Sunset Avenue and the application is attached as Exhibit "A." Please note that if staff is successful in obtaining the full grant, funding sources for this project will be determined when the City Council is requested to approve the grant agreement.

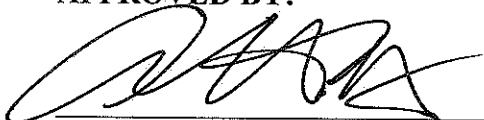
RECOMMENDED BY:


Duane Burk,
Director of Public Works

REVIEWED BY:


June Overholt,
Administrative Services Director/
Deputy City Manager

APPROVED BY:


Andy Takata,
City Manager

RESOLUTION NO. 2011-08

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BANNING, CALIFORNIA, AUTHORIZING STAFF TO SUBMIT A GRANT APPLICATION FOR RUBBERIZED ASPHALT CONCRETE (RAC) FOR STREET IMPROVEMENTS ALONG WILSON STREET, FROM STARGAZE WAY TO WEST OF SUNSET AVENUE

WHEREAS, Senate Bill 937 authorizes the California Department of Resources Recycling and Recovery (Cal Recycle) to use funds from the California Tire Recycling Management Fund to administer the Tire Recycling Act (Act); and

WHEREAS, as part of the Act, Cal Recycle is offering the Targeted Rubberized Asphalt Concrete (TRAC) Incentive Grant Program to encourage the use of waste tire rubber to pave roadways with Rubberized Asphalt Concrete (RAC); and

WHEREAS, in March of 2007, the Public Works Department obtained a TRAC grant of \$150,000.00 to pave Wilson Street, from 8th Street to Stargaze Way; and

WHEREAS, the Public Works Department is requesting \$250,000.00 in TRAC Incentive Grant Program funds, the maximum grant amount available for any California urban jurisdiction for FY 2010/2011, to continue paving Wilson Street, from Stargaze Way to west of Sunset Avenue; and

WHEREAS, Cal Recycle requires that the City Council of the City of Banning certify and authorize the grant submittal and signature by its duly authorized representative (the City Manager) by resolution and then submit the TRAC Incentive grant application; and

WHEREAS, by submitting this grant application to Cal Recycle, the City would demonstrate a good faith effort in promoting the use of recycled material, which is mandated as a requirement under Assembly Bill 939.

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

Section I. The City of Banning, Public Works Department's grant application submittal for the FY 2010/2011 TRAC Incentive Grant Program, administered by Cal Recycle, is approved and authorization is hereby granted for the City Manager to execute the grant application and all related Cal Recycle grant documents and staff is directed to submit said application, as attached herein as Exhibit "A."

PASSED, APPROVED, AND ADOPTED this 8th day of February, 2011.

Barbara Hanna, Mayor

**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 for the City of Banning, California, do hereby certify that the foregoing Resolution No. 2011-08 was duly adopted by the City Council of the City of Banning at a regular meeting hereof held on the 8th day of February, 2011, by the following vote, to wit:

AYES:

NOES:

ABSENT:

ABSTAIN:

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

EXHIBIT "A"

**TARGETED RUBBERIZED ASPHALT CONCRETE
(TRAC) INCENTIVE GRANT PROGRAM APPLICATION**

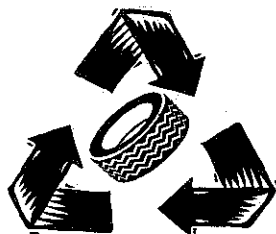
Department of Resources Recycling and Recovery (CalRecycle)

RUBBERIZED ASPHALT CONCRETE GRANT PROGRAM

Targeted Rubberized Asphalt Concrete Incentive Grant
Rubberized Asphalt Concrete Chip Seal Grant

APPLICATION

Fiscal Year (FY) 2010/11



Mailed Applications must be postmarked no later than **February 16, 2011**. Hand delivered Applications must be received and date stamped by CalRecycle Staff no later than 3:00 p.m. on **February 16, 2011**. Late Applications will be disqualified. Applications e-mailed or faxed will not be accepted.

Please follow instructions in the Application Guidelines and Instructions when completing this Application.

The Application Guidelines and Instructions are critical to properly completing and submitting this Application.

Applications become the property of the CalRecycle and are subject to disclosure under the Public Records Act.

Do not submit confidential information.

Applications sent by U.S. Postal Service or a commercial delivery service should be sent in a manner that allows for tracking by the sender and that provides an addressed and dated receipt. Failure to do so is at the risk of the applicant and if delivery is delayed or the application is lost by the Post Office or delivery service, the burden is on the applicant to demonstrate timely mailing or delivery of the application.

Rubberized Asphalt Concrete Grant Program FY 2010/11

Complete and submit all sections. See the Application Guidelines and Instructions for definitions.

INDICATE FOR WHICH RAC CATEGORY YOU ARE APPLYING:					
<ul style="list-style-type: none"> • <i>An applicant can only apply for one category under Targeted (1-3)</i> • <i>Please note, if you have had three RAC grants and/or four Chip Seal grants you are not eligible to apply for one or both of those respective grants.</i> • <i>See Application Guidelines & Instructions for Category & Eligibility requirements.</i> 					
<input type="checkbox"/> Category 1 - Targeted		<input checked="" type="checkbox"/> Category 2 - Targeted		<input type="checkbox"/> Category 3 - Targeted	
AN APPLICANT CAN ALSO APPLY FOR A CHIP SEAL PROJECT. IF APPLICABLE, INDICATE FOR WHICH CHIP SEAL CATEGORY YOU ARE APPLYING:					
<ul style="list-style-type: none"> • <i>an applicant can apply for only one category (4-5)</i> • <i>See Application Guidelines & Instructions for Category and Eligibility requirements.</i> 					
<input type="checkbox"/> Category 4 - Chip Seal			<input type="checkbox"/> Category 5 - Chip Seal		
APPLICANT / ORGANIZATION INFORMATION			REQUESTED GRANT AMOUNT: <i>(ROUND AMOUNTS TO THE NEAREST WHOLE DOLLAR)</i>		
APPLICANT / ORGANIZATION NAME: City of Banning, Public Works			Categories 1-3		\$250,000.00
			Categories 4-5		\$
MAILING ADDRESS: 99 E. Ramsey Street					
CITY: Banning			COUNTY: Riverside		ZIP CODE: 92220
PRIMARY CONTACT NAME: Ann Marie Loconte, P.E.		SIGNATURE AUTHORITY NAME: (AS AUTHORIZED IN RESOLUTION, SEE APP. GUIDELINES & INSTRUCTIONS FOR MORE INFO.) Andy Takata		AUTHORIZED DESIGNEE NAME: (IF APPLICABLE, SEE APP. GUIDELINES & INSTRUCTIONS FOR MORE INFO.)	
TITLE: Associate Civil Engineer		TITLE: City Manager		TITLE:	
PHONE NUMBER: 951.922.3130	FAX NUMBER: 951.922.3141	PHONE NUMBER: 951.922.3101	FAX NUMBER: 951.922.3174	PHONE NUMBER:	FAX NUMBER:
EMAIL ADDRESS: AMLOCONTE@CI.BANNING.CA.US		EMAIL ADDRESS:		EMAIL ADDRESS:	
INDICATE WHICH TYPE OF ENTITY YOU ARE (CHECK ONLY ONE):					
<input checked="" type="checkbox"/> CITY <input type="checkbox"/> COUNTY <input type="checkbox"/> CITY & COUNTY <input type="checkbox"/> QUALIFYING CALIFORNIA INDIAN TRIBE					
LEGISLATIVE DISTRICT NUMBERS: (TO FIND YOUR DISTRICT, USE MAILING ADDRESS ABOVE AND GO TO www.calrecycle.ca.gov/Profiles/Juris/) ASSEMBLY: SENATE: 65 37				FEDERAL TAX IDENTIFICATION NUMBER: 956000674	

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RAC OR CHIP SEAL PROJECT HISTORY (Note: If no history indicate "none".)

NUMBER	CALRECYCLE GRANT NUMBER	PROJECT DATE	PROJECT LOCATION
1.	TRI 13-06-3	FALL OF 2008	WILSON STREET, FROM STARGAZE WAY TO WEST OF SUNSET AVENUE
2.			
3.			
4.			
5.			

ENVIRONMENTAL JUSTICE CERTIFICATION

CalRecycle Grantees must in the performance of the Grant Agreement conduct their programs, policies, and activities that substantially affect human health or the environment in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority populations and low-income populations of the State. (Govt. Code §65040.12(e))

Must check box☒

Applicant will comply with the principles of Environmental Justice as described above.

CALIFORNIA CRUMB RUBBER CERTIFICATION**Must check box**☒

Applicant certifies that all crumb rubber used in the aforementioned project(s) will be derived from one hundred percent (100%) California waste tires.

RESOLUTION REQUIREMENT

- Submit either a current approved Resolution, valid up to 5 years, or Letter of Commitment, valid up for 1 year, with your application or the following acknowledgement
(If applicable, submit a current Letter of Designation (LOD) for signature designee)

Check one box

Note: See Application Guidelines & Instructions for Resolution, Letter of Commitment and Letter of Designation (LOD) information and examples

☒

A current approved Resolution and, if applicable, LOD designating additional signature authority are enclosed in the application.

☐

We acknowledge that our approved Resolution must be received by the CalRecycle no later than **March 18, 2011**, or that the application will not be considered for award.

ENVIRONMENTALLY PREFERABLE PURCHASES AND PRACTICES POLICY

Environmentally preferable purchasing protects human health and environmental well-being by reducing the procurement of goods and services that result in larger volumes of waste and pollutants. The Legislature declares that the responsibility of environmentally preferable purchasing shall be that of any agency that does procuring on behalf of the state (Chan, Statutes of 2002, Chapter 575), and this extends to grantees using state funds.

"Environmentally preferable purchasing (EPP)" as defined in PCC section 12400 means "the procurement or acquisition of goods and services that have a lesser or reduced effect on human health and the environment when compared with competing goods or services that serve the same purpose. This comparison shall take into consideration, to the extent feasible, raw materials acquisition, production, manufacturing, packaging, distribution, reuse, operation, maintenance, disposal, energy efficiency,

product performance, durability, safety, the needs of the purchaser, and cost." In other words, EPP considers, among other things, the environment, performance and cost."

Acknowledgement that your organization has an Environmentally Preferable Purchasing & Practices Policy

Must check one *Note: See Application Guidelines & Instructions for example and Notification*

X

Yes, our entire organization¹ has an Environmentally Preferable Purchases and Practices Policy.

Date adopted: **Ordinance 1329, October 11, 2005**

☐

No, our organization does not have an Environmentally Preferable Purchases and Practices Policy. We acknowledge that our organization must adopt one by **March 18, 2011** and notify CalRecycle of such adoption by the secondary deadline of **March 18, 2011**, or our application will be disqualified.

¹ "Entire organization" refers to the entire city, county or non-profit applicant, not an individual office or subunit of the larger entity.

Rubberized Asphalt Concrete & Chip Seal Projects

Please list project information. (Note: Attach additional sheet(s) if necessary.)

PROJECT INFORMATION	
LOCATION (E.G., CITY/TOWN, INTERSECTION): BANNING, WILSON STREET IN THE CITY OF BANNING	
LIMITS (E.G., POST MILE OR POINT A TO POINT B): WILSON STREET, FROM STARGAZE WAY TO WEST OF SUNSET AVENUE	
TONS OF RAC OR RUBBERIZED BINDER USED: 6,500 TONS OF RAC	SQUARE YARDAGE OF CHIP SEAL:
AMOUNT OF CRUMB RUBBER (PER TON) OF RAC OR BINDER 19.4 LBS CRM/ TON OF RAC	PROPOSED CONSTRUCTION START DATE: SEPTEMBER, 2011
TYPE OF RAC: <input checked="" type="checkbox"/> ASPHALT-RUBBER <input type="checkbox"/> TERMINAL BLEND <input type="checkbox"/> CHIP SEAL	
PROJECT INFORMATION	
LOCATION (E.G., CITY/TOWN, INTERSECTION):	
LIMITS (E.G., POST MILE OR POINT A TO POINT B):	
TONS OF RAC OR RUBBERIZED BINDER USED:	SQUARE YARDAGE OF CHIP SEAL:
AMOUNT OF CRUMB RUBBER (PER TON) OF RAC OR BINDER	PROPOSED CONSTRUCTION START DATE:
TYPE OF RAC: <input type="checkbox"/> ASPHALT-RUBBER <input type="checkbox"/> TERMINAL BLEND <input type="checkbox"/> CHIP SEAL	
PROJECT INFORMATION	
LOCATION (E.G., CITY/TOWN, INTERSECTION):	
LIMITS (E.G., POST MILE OR POINT A TO POINT B):	
TONS OF RAC OR RUBBERIZED BINDER USED:	SQUARE YARDAGE OF CHIP SEAL:
AMOUNT OF CRUMB RUBBER (PER TON) OF RAC OR BINDER	PROPOSED CONSTRUCTION START DATE:
TYPE OF RAC: <input type="checkbox"/> ASPHALT-RUBBER <input type="checkbox"/> TERMINAL BLEND <input type="checkbox"/> CHIP SEAL	
PROJECT INFORMATION	
LOCATION (E.G., CITY/TOWN, INTERSECTION):	
LIMITS (E.G., POST MILE OR POINT A TO POINT B):	
TONS OF RAC OR RUBBERIZED BINDER USED:	SQUARE YARDAGE OF CHIP SEAL:
AMOUNT OF CRUMB RUBBER (PER TON) OF RAC OR BINDER	PROPOSED CONSTRUCTION START DATE:
TYPE OF RAC: <input type="checkbox"/> ASPHALT-RUBBER <input type="checkbox"/> TERMINAL BLEND <input type="checkbox"/> CHIP SEAL	
PROJECT INFORMATION	
LOCATION (E.G., CITY/TOWN, INTERSECTION):	
LIMITS (E.G., POST MILE OR POINT A TO POINT B):	
TONS OF RAC OR RUBBERIZED BINDER USED:	SQUARE YARDAGE OF CHIP SEAL:
AMOUNT OF CRUMB RUBBER (PER TON) OF RAC OR BINDER	PROPOSED CONSTRUCTION START DATE:
TYPE OF RAC: <input type="checkbox"/> ASPHALT-RUBBER <input type="checkbox"/> TERMINAL BLEND <input type="checkbox"/> CHIP SEAL	

Rubberized Asphalt Concrete Projects

Please list total material and cost information for categories 1-3 only.

MATERIAL COST INFORMATION				ESTIMATED TESTING COST INFORMATION			
<input checked="" type="checkbox"/> HISTORICAL COST <input type="checkbox"/> BID COST CONVENTIONAL AC: \$55 / TON ASPHALT RUBBER: \$115 / TON				<input checked="" type="checkbox"/> HISTORICAL COST <input type="checkbox"/> BID COST \$15,000.00			
TOTAL CALCULATION FOR REQUESTED PROJECTS - REQUESTED GRANT AMOUNT <i>(Note: See Application Guidelines & Instructions for calculation example)</i>							
AMOUNT OF RAC (in tons)	X	DIFFERENTIAL COST OF RAC (RAC cost minus AC cost) \$/ton	X	DIFFERENTIAL FACTOR 100% = 1.0 70% = 0.7 40% = 0.4		ESTIMATED	= TOTAL (must match req. grant amount)
6,500	X	\$ 60.00	X	0.7		\$273,000	= \$ 250,000

Chip Seal Projects

Please list total material and cost information for category 4 and 5 only.

NEW USER CALCULATION					
<i>(Note: See Application Guidelines & Instructions for calculation example)</i>					
AMOUNT OF RAC CHIP SEAL USED IN PROJECT(S) (IN YD ²)	X	REIMBURSEMENT RATE (\$1.00 or \$0.50 per yd ²)		=	TOTAL
	X	\$1.00 or \$0.50		=	\$

GRANT PROVISIONS ACCEPTANCE

Check box

X

By checking this box, Applicant acknowledges that submittal of this application constitutes acceptance of all Grant Agreement provisions as contained in the Terms and Conditions and Procedures and Requirements. To download these documents see: (<http://www.calrecycle.ca.gov/Tires/Grants/RAC/>)

APPLICATION CERTIFICATION

Certification: I declare, under penalty of perjury under the laws of the State of California, that I have read all information in the Application Guidelines and Instructions and that all information submitted for CalRecycle's consideration for award of grant funds is true and correct to the best of my knowledge.

X

Signature Authority - as authorized in Resolution; or
 Authorized Designee - as authorized in submitted Letter of Designation

Date

Andy Takata
 Type or Print Name

City Manager
 Title

APPLICATION CHECKLIST

This application checklist is provided for your convenience and is not intended to be all inclusive. Prior to submitting your application, check the Q&A website at <http://www.calrecycle.ca.gov/Tires/Grants/RAC/FY201011/Apply/QandA.htm> for additional information. You are responsible for completing and submitting all required documentation.

Grant Application Form (CalRecycle 243-RAC)

- ☐ All applicable information and documents are provided; applicable boxes are checked.
- ☐ Application Certification is signed by the:
 - 1) Signature Authority as authorized in Resolution, or
 - 2) Authorized Designee.

Authorized Designee may sign only if the Letter of Designation has been submitted to CalRecycle.

Environmental Justice Certification

- ☐ Box is checked

California Crumb Rubber Certification

- ☐ Box is checked

Resolution Requirement

See Application Guidelines & Instructions for Resolution, Letter of Commitment, and Letter of Designation (LOD) information and examples

- ☐ Current approved Resolution submitted; box is checked, or
- ☐ If applicable, approved Resolution not submitted with Application but will be submitted to CalRecycle for receipt by **March 18, 2011**; box is checked.
- ☐ If applicable, Letter of Designation (LOD) is included with Application.

A LOD is not required to be submitted with the Application; however, it must be submitted prior to Designee's exercise of his/her authority.

Environmentally Preferable Purchases and Practices Policy

- ☐ Box is checked
- Note: See Application Guidelines & Instructions for information and notification.*

Grant Provision Acceptance

- ☐ Box is checked

Application Format & Submittal

- ☐ Copies: One original, with wet signature (blue ink preferred), and one copy
- ☐ Paper: 8½ X 11, double-sided, single spaced, printed on 100% post consumer fiber, and numbered consecutively
- ☐ Stapled, not bound: upper left-hand corner
- ☐ Font: 12 pt. Times New Roman or comparable font
- ☐ Addressed to the appropriate mailing address of CalRecycle

CITY COUNCIL / BANNING UTILITY AUTHORITY AGENDA

DATE: February 8, 2011

TO: City Council/Banning Utility Authority

FROM: Duane Burk, Director of Public Works

SUBJECT: Resolution No. 2011-03UA, "Approving the Maintenance and Services Agreement with Merlin Johnson Construction, Inc. for the Banning Canyon Storm Damage Repair"

RECOMMENDATION: Adopt Resolution No. 2011-03UA:

1. Approving the Agreement with Merlin Johnson Construction, Inc. of Mentone, California, in the amount "Not to Exceed" \$125,000.00 for the Banning Canyon Storm Damage Repair.
2. Appropriate \$125,000.00 from the Water Operations reserves and authorize the Administrative Services Director to make the necessary budget adjustments for this project.


JUSTIFICATION: Protection of City-owned water wells from flooding and erosion caused by severe rainfall is necessary. The roadways and percolation ponds needed to be repaired in order to enable staff to travel safely to the water facilities in the canyon and were necessary in order ensure that the percolation ponds could capture the run off of the storm water still flowing down the canyon floor.

BACKGROUND: On December 19th and 20th of 2010, the Banning Water Canyon received large amounts of rainfall causing excessive flooding to roadways, ponds and City-owned water wells. Due to the rainfall and damage, residents were stranded and the City was left without access to the percolation ponds along with Wells No. 1, 2, and 3.


In order to protect Bluff Road and infrastructure downstream of the canyon, restore access, and to make storm related repairs, Merlin Johnson Construction, Inc., a local reputable pipeline contractor, was solicited to provide necessary protection measures and restoration of facilities as needed. Staff authorized services consistent with the City Policy as set forth in Ordinance No. 1266, Section 18A-8.5 for emergency facilities repair and respectively requests City Council's approval of this agreement, attached as Exhibit "A" and appropriation in an amount "Not to Exceed" \$125,000.00. This project will be included on the list for emergency storm related damaged projects requesting reimbursement from the state and federal governmental agencies.

FISCAL DATA: An appropriation in the amount of \$125,000.00 from the Water Division Operations reserve funds to the Water Operations Division, Water Distribution System Expense, Account No. 660-6300-471.45-08 is necessary in order to fund project.

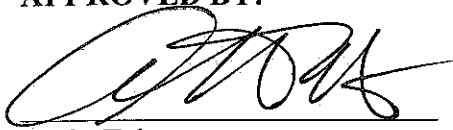
RECOMMENDED BY:


Duane Burk
Director of Public Works

REVIEWED BY:


June Overholt
Administrative Services Director/
Deputy City Manager

APPROVED BY:


Andy Takata
City Manager

RESOLUTION NO. 2011-03 UA

RESOLUTION OF THE BANNING UTILITY AUTHORITY OF THE CITY OF BANNING, CALIFORNIA, APPROVING THE MAINTENANCE AND SERVICES AGREEMENT WITH MERLIN JOHNSON CONSTRUCTION, INC., FOR THE BANNING CANYON STORM DAMAGE REPAIR

WHEREAS, the City of Banning owns and operates its own water distribution system throughout the City and in the Banning Water Canyon; and

WHEREAS, on December 19th and 20th of 2010 the Banning Water Canyon received 4.12 inches of rain causing severe flooding and erosion to roadways, ponds and City-owned wells; and

WHEREAS, Merlin Johnson Construction, Inc., a local reputable pipeline contractor was called to start the necessary repairs to access the Banning Water Canyon; and

WHEREAS, staff respectfully requests the approval of the Agreement with Merlin Jonson Construction, Inc., in an amount "Not to Exceed" \$125,000.00 for the completion of repairs cause by the flooding and erosion during the storms in December 2010; and

WHEREAS, the funds for the repairs will require an appropriation \$125,000.00 from the Water Division Operations reserves, since this is an unexpected expense to the current FY 10-11 Budget.

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

Section 1. Approval of Agreement

The Banning Utility Authority approves the Agreement with Merlin Johnson Construction, Inc. in the amount of \$125,000.00 to include additional services and compensation for the emergency repairs to the Banning Water Canyon.

Section 2. Appropriation of Funds

The Administrative Services Director is authorized to make necessary appropriations in the amount of \$125,000.00 from the Water Fund Balance to Account No. 661-6300-471.45-08 (Water Distribution System Expense).

PASSED, ADOPTED AND APPROVED this 8th day of February, 2011.

Barbara Hanna, Chairman
Banning Utility Authority

ATTEST:

Marie A. Calderon, Secretary

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

David J. Aleshire, Authority Counsel
Aleshire & Wynder, LLP

CERTIFICATION:

I, Marie Calderon, Secretary to the Utility Authority of the City of Banning, California, do hereby certify that the foregoing Resolution No. 2011-03 UA was adopted by the Banning Utility Authority of the City of Banning at its joint meeting thereof held on the 8th day of February, 2011.

AYES:

NOES:

ABSENT:

ABSTAIN:

Marie A. Calderon, Secretary
Banning Utility Authority
City of Banning, California

EXHIBIT “A”

CONTRACT SERVICES AGREEMENT

CONTRACT SERVICES AGREEMENT

By and Between

**THE CITY OF BANNING,
A MUNICIPAL CORPORATION**

and

MERLIN JOHNSON CONSTRUCTION, INC.

**AGREEMENT FOR CONTRACT SERVICES
BETWEEN
THE CITY OF BANNING, CALIFORNIA
AND
MERLIN JOHNSON CONSTRUCTION, INC.**

THIS AGREEMENT FOR CONTRACT SERVICES (herein "Agreement") is made and entered into this 21st day of December, 2010 by and between the City of Banning, a municipal corporation ("City") and MERLIN JOHNSON CONSTRUCTION, INC., ("Consultant" or "Contractor"). City and Contractor are sometimes hereinafter individually referred to as "Party" and hereinafter collectively referred to as the "Parties.". (The term Contractor includes professionals performing in a consulting capacity.)

RECITALS

A. City has sought, by issuance of a Request for Proposals or Invitation for Bids, the performance of the services defined and described particularly in Section 1 of this Agreement.

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

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

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

OPERATIVE PROVISIONS

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

ARTICLE 1. SERVICES OF CONTRACTOR

1.1 Scope of Services.

In compliance with all terms and conditions of this Agreement, the Contractor shall provide those services specified in the "Scope of Services" attached hereto as Exhibit "A" and incorporated herein by this reference, which services may be referred to herein as the "services" or "work" hereunder. As a material inducement to the City entering into this Agreement, Contractor represents and warrants that it has the qualifications, experience, and facilities necessary to properly perform the services required under this Agreement in a thorough, competent, and professional manner, and is experienced in performing the work and services

contemplated herein. Contractor shall at all times faithfully, competently and to the best of its ability, experience and talent, perform all services described herein. Contractor covenants that it shall follow the highest professional standards in performing the work and services required hereunder and that all materials will be of good quality, fit for the purpose intended. For purposes of this Agreement, the phrase "highest professional standards" shall mean those standards of practice recognized by one or more first-class firms performing similar work under similar circumstances.

1.2 Contractor's Proposal.

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

1.3 Compliance with Law.

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

1.4 Licenses, Permits, Fees and Assessments.

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

1.5 Familiarity with Work.

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

1.6 Care of Work.

The Contractor shall adopt reasonable methods during the life of the Agreement to furnish continuous protection to the work, and the equipment, materials, papers, documents, plans, studies and/or other components thereof to prevent losses or damages, and shall be

responsible for all such damages, to persons or property, until acceptance of the work by City, except such losses or damages as may be caused by City's own negligence.

1.7 Warranty.

Contractor warrants all Work under the Agreement (which for purposes of this Section shall be deemed to include unauthorized work which has not been removed and any non-conforming materials incorporated into the Work) to be of good quality and free from any defective or faulty material and workmanship. Contractor agrees that for a period of one year (or the period of time specified elsewhere in the Agreement or in any guarantee or warranty provided by any manufacturer or supplier of equipment or materials incorporated into the Work, whichever is later) after the date of final acceptance, Contractor shall within ten (10) days after being notified in writing by the City of any defect in the Work or non-conformance of the Work to the Agreement, commence and prosecute with due diligence all Work necessary to fulfill the terms of the warranty at his sole cost and expense. Contractor shall act sooner as requested by the City in response to an emergency. In addition, Contractor shall, at its sole cost and expense, repair and replace any portions of the Work (or work of other contractors) damaged by its defective Work or which becomes damaged in the course of repairing or replacing defective Work. For any Work so corrected, Contractor's obligation hereunder to correct defective Work shall be reinstated for an additional one year period, commencing with the date of acceptance of such corrected Work. Contractor shall perform such tests as the City may require to verify that any corrective actions, including, without limitation, redesign, repairs, and replacements comply with the requirements of the Agreement. All costs associated with such corrective actions and testing, including the removal, replacement, and reinstitution of equipment and materials necessary to gain access, shall be the sole responsibility of the Contractor. All warranties and guarantees of subcontractors, suppliers and manufacturers with respect to any portion of the Work, whether express or implied, are deemed to be obtained by Contractor for the benefit of the City, regardless of whether or not such warranties and guarantees have been transferred or assigned to the City by separate agreement and Contractor agrees to enforce such warranties and guarantees, if necessary, on behalf of the City. In the event that Contractor fails to perform its obligations under this Section, or under any other warranty or guaranty under this Agreement, to the reasonable satisfaction of the City, the City shall have the right to correct and replace any defective or non-conforming Work and any work damaged by such work or the replacement or correction thereof at Contractor's sole expense. Contractor shall be obligated to fully reimburse the City for any expenses incurred hereunder upon demand. This provision may be waived in Exhibit "B" if the services hereunder do not include construction of any improvements or the supplying of equipment or materials.

1.8 Prevailing Wages.

Contractor is aware of the requirements of California Labor Code Section 1720, et seq., and 1770, et seq., as well as California Code of Regulations, Title 8, Section 1600, et seq., ("Prevailing Wage Laws"), which require the payment of prevailing wage rates and the performance of other requirements on "Public Works" and "Maintenance" projects. If the Services are being performed as part of an applicable "Public Works" or "Maintenance" project, as defined by the Prevailing Wage Laws, and if the total compensation is \$1,000 or more, Contractor agrees to fully comply with such Prevailing Wage Laws. City shall provide Contractor with a copy of the prevailing rates of per diem wages in effect at the commencement of this Agreement. Contractor shall make copies of the prevailing rates of per diem wages for

each craft, classification or type of worker needed to execute the Services available to interested parties upon request, and shall post copies at the Contractor's principal place of business and at the project site. Contractor shall defend, indemnify and hold the City, its elected officials, officers, employees and agents free and harmless from any claim or liability arising out of any failure or alleged failure to comply with the Prevailing Wage Laws.

1.9 Further Responsibilities of Parties.

Both parties agree to use reasonable care and diligence to perform their respective obligations under this Agreement. Both parties agree to act in good faith to execute all instruments, prepare all documents and take all actions as may be reasonably necessary to carry out the purposes of this Agreement. Unless hereafter specified, neither party shall be responsible for the service of the other.

1.10 Additional Services.

City shall have the right at any time during the performance of the services, without invalidating this Agreement, to order extra work beyond that specified in the Scope of Services or make changes by altering, adding to or deducting from said work. No such extra work may be undertaken unless a written order is first given by the Contract Officer to the Contractor, incorporating therein any adjustment in (i) the Agreement Sum, and/or (ii) the time to perform this Agreement, which said adjustments are subject to the written approval of the Contractor. Any increase in compensation of up to five percent (5%) of the Agreement Sum or \$25,000, whichever is less; or in the time to perform of up to one hundred eighty (180) days may be approved by the Contract Officer. Any greater increases, taken either separately or cumulatively must be approved by the City. It is expressly understood by Contractor that the provisions of this Section shall not apply to services specifically set forth in the Scope of Services or reasonably contemplated therein. Contractor hereby acknowledges that it accepts the risk that the services to be provided pursuant to the Scope of Services may be more costly or time consuming than Contractor anticipates and that Contractor shall not be entitled to additional compensation therefore.

1.11 Special Requirements.

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

ARTICLE 2. COMPENSATION AND METHOD OF PAYMENT.

2.1 Contract Sum.

Subject to any limitations set forth in this Agreement, City agrees to pay Contractor the amounts specified in the "Schedule of Compensation" attached hereto as Exhibit "C" and incorporated herein by this reference. The total compensation, including reimbursement for actual expenses, shall not exceed **One Hundred Twenty Five Thousand Dollars and No/100 (\$125,000.00)** (the "Contract"), unless additional compensation is approved pursuant to Section 1.10.

2.2 Method of Compensation.

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

2.3 Reimbursable Expenses.

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

2.4 Invoices.

Each month Contractor shall furnish to City an original invoice for all work performed and expenses incurred during the preceding month in a form approved by City's Director of Finance. The invoice shall detail charges for all necessary and actual expenses by the following categories: labor (by sub-category), travel, materials, equipment, supplies, and sub-contractor contracts. Sub-contractor charges shall also be detailed by such categories.

City shall independently review each invoice submitted by the Contractor to determine whether the work performed and expenses incurred are in compliance with the provisions of this Agreement. Except as to any charges for work performed or expenses incurred by Contractor which are disputed by City, or as provided in Section 7.3. City will use its best efforts to cause Contractor to be paid within forty-five (45) days of receipt of Contractor's correct and undisputed invoice. In the event any charges or expenses are disputed by City, the original invoice shall be returned by City to Contractor for correction and resubmission.

2.5 Waiver.

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

ARTICLE 3. PERFORMANCE SCHEDULE

3.1 Time of Essence.

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

3.2 Schedule of Performance.

Contractor shall commence the services pursuant to this Agreement upon receipt of a written notice to proceed and shall perform all services within the time period(s) established in the "Schedule of Performance" attached hereto as Exhibit "D" and incorporated herein by this reference. When requested by the Contractor, extensions to the time period(s) specified in the Schedule of Performance may be approved in writing by the Contract Officer but not exceeding one hundred eighty (180) days cumulatively.

3.3 Force Majeure.

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

3.4 Inspection and Final Acceptance.

City may inspect and accept or reject any of Contractor's work under this Agreement, either during performance or when completed. City shall reject or finally accept Contractor's work within forth five (45) days after submitted to City. City shall accept work by a timely written acceptance, otherwise work shall be deemed to have been rejected. City's acceptance shall be conclusive as to such work except with respect to latent defects, fraud and such gross mistakes as amount to fraud. Acceptance of any work by City shall not constitute a waiver of any of the provisions of this Agreement including, but not limited to, Section X, pertaining to indemnification and insurance, respectively.

3.5 Term.

Unless earlier terminated in accordance with Article 8 of this Agreement, this Agreement shall continue in full force and effect until completion of the services but not exceeding one (1) years from the date hereof, except as otherwise provided in the Schedule of Performance (Exhibit "D").

ARTICLE 4. COORDINATION OF WORK

4.1 Representatives and Personnel of Contractor.

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

<u>Merlin Johnson</u>	<u>President/Owner</u>
(Name)	(Title)

<u>Diane Johnson</u>	<u>Vice President</u>
(Name)	(Title)

It is expressly understood that the experience, knowledge, capability and reputation of the foregoing principals were a substantial inducement for City to enter into this Agreement. Therefore, the foregoing principals shall be responsible during the term of this Agreement for directing all activities of Contractor and devoting sufficient time to personally supervise the services hereunder. All personnel of Contractor, and any authorized agents, shall at all times be under the exclusive direction and control of the Principals. For purposes of this Agreement, the foregoing Principals may not be replaced nor may their responsibilities be substantially reduced by Contractor without the express written approval of City. Additionally, Contractor shall make every reasonable effort to maintain the stability and continuity of Contractor's staff and subcontractors, if any, assigned to perform the services required under this Agreement. Contractor shall notify City of any changes in Contractor's staff and subcontractors, if any, assigned to perform the services required under this Agreement, prior to and during any such performance.

4.2 Status of Contractor.

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

4.3 Contract Officer.

The Contract Officer shall be such person as may be designated by the City Manager of City. It shall be the Contractor's responsibility to assure that the Contract Officer is kept informed of the progress of the performance of the services and the Contractor shall refer any decisions which must be made by City to the Contract Officer. Unless otherwise specified herein, any approval of City required hereunder shall mean the approval of the Contract Officer.

The Contract Officer shall have authority, if specified in writing by the City Manager, to sign all documents on behalf of the City required hereunder to carry out the terms of this Agreement.

4.4 Independent Contractor.

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

4.5 Prohibition Against Subcontracting or Assignment.

The experience, knowledge, capability and reputation of Contractor, its principals and employees were a substantial inducement for the Agency to enter into this Agreement. Therefore, Contractor shall not contract with any other entity to perform in whole or in part the services required hereunder without the express written approval of the Agency. In addition, neither this Agreement nor any interest herein may be transferred, assigned, conveyed, hypothecated or encumbered voluntarily or by operation of law, whether for the benefit of creditors or otherwise, without the prior written approval of Agency. Transfers restricted hereunder shall include the transfer to any person or group of persons acting in concert of more than twenty five percent (25%) of the present ownership and/or control of Contractor, taking all transfers into account on a cumulative basis. In the event of any such unapproved transfer, including any bankruptcy proceeding, this Agreement shall be void. No approved transfer shall release the Contractor or any surety of Contractor of any liability hereunder without the express consent of Agency.

ARTICLE 5. INSURANCE, INDEMNIFICATION AND BONDS

5.1 Insurance Coverages.

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

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

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

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

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

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

5.2 General Insurance Requirements.

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

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

CANCELLATION:

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

[to be initialed]

Agent Initials

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

Any deductibles or self-insured retentions must be declared to and approved by City. At the option of City, either the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects City or its respective elected or appointed officers, officials, employees and volunteers or the Contractor shall procure a bond guaranteeing payment of losses and related investigations, claim administration, defense expenses and claims. The Contractor agrees that the requirement to provide insurance shall not be construed as limiting in any way the extent to which the Contractor may be held responsible for the payment of damages to any persons or property resulting from the Contractor's activities or the activities of any person or persons for which the Contractor is otherwise responsible nor shall it limit the Contractor's indemnification liabilities as provided in Section 5.3. .

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

5.3 Indemnification.

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

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

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

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

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

5.4 Performance Bond.

Concurrently with execution of this Agreement, and if required in Exhibit "B", Contractor shall deliver to City performance bond in the sum of the amount of this Agreement, in the form provided by the City Clerk, which secures the faithful performance of this Agreement. The bond shall contain the original notarized signature of an authorized officer of the surety and affixed thereto shall be a certified and current copy of his power of attorney. The bond shall be unconditional and remain in force during the entire term of the Agreement and shall be null and void only if the Contractor promptly and faithfully performs all terms and conditions of this Agreement.

5.5 Sufficiency of Insurer or Surety.

Insurance or bonds required by this Agreement shall be satisfactory only if issued by companies qualified to do business in California, rated "A" or better in the most recent edition of Best Rating Guide, The Key Rating Guide or in the Federal Register, and only if they are of a financial category Class VII or better, unless such requirements are waived by the Risk Manager of the City due to unique circumstances. If this Agreement continues for more than 3 years

duration, or in the event the Risk Manager of City ("Risk Manager") determines that the work or services to be performed under this Agreement creates an increased or decreased risk of loss to the City, the Contractor agrees that the minimum limits of the insurance policies and the performance bond required by Section 5.4 may be changed accordingly upon receipt of written notice from the Risk Manager; provided that the Contractor shall have the right to appeal a determination of increased coverage by the Risk Manager to the City Council of City within 10 days of receipt of notice from the Risk Manager.

ARTICLE 6. RECORDS, REPORTS, AND RELEASE OF INFORMATION

6.1 Records.

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

6.2 Reports.

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

6.3 Ownership of Documents.

All drawings, specifications, maps, designs, photographs, studies, surveys, data, notes, computer files, reports, records, documents and other materials (the "documents and materials") prepared by Contractor, its employees, subcontractors and agents in the performance of this Agreement shall be the property of City and shall be delivered to City upon request of the Contract Officer or upon the termination of this Agreement, and Contractor shall have no claim for further employment or additional compensation as a result of the exercise by City of its full rights of ownership use, reuse, or assignment of the documents and materials hereunder. Any use, reuse or assignment of such completed documents for other projects and/or use of

uncompleted documents without specific written authorization by the Contractor will be at the City's sole risk and without liability to Contractor, and Contractor's guarantee and warranties shall not extend to such use, revise or assignment. Contractor may retain copies of such documents for its own use. Contractor shall have an unrestricted right to use the concepts embodied therein. All subcontractors shall provide for assignment to City of any documents or materials prepared by them, and in the event Contractor fails to secure such assignment, Contractor shall indemnify City for all damages resulting therefrom.

6.4 Confidentiality and Release of Information.

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

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

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

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

ARTICLE 7. ENFORCEMENT OF AGREEMENT AND TERMINATION

7.1 California Law.

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

7.2 Disputes; Default.

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

7.3 Retention of Funds.

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

7.4 Waiver.

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

7.5 Rights and Remedies are Cumulative.

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

7.6 Legal Action.

In addition to any other rights or remedies, either party may take legal action, in law or in equity, to cure, correct or remedy any default, to recover damages for any default, to compel specific performance of this Agreement, to obtain declaratory or injunctive relief, or to obtain any other remedy consistent with the purposes of this Agreement.

7.7 Liquidated Damages.

Since the determination of actual damages for any delay in performance of this Agreement would be extremely difficult or impractical to determine in the event of a breach of this Agreement, the Contractor and its sureties shall be liable for and shall pay to the City the sum of Not Applicable (\$ 0.00) as liquidated damages for each working day of delay in the performance of any service required hereunder, as specified in the Schedule of Performance (Exhibit "D"). The City may withhold from any monies payable on account of services performed by the Contractor any accrued liquidated damages.

7.8 Termination Prior to Expiration of Term.

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

7.9 Termination for Default of Contractor.

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

7.10 Attorneys' Fees.

If either party to this Agreement is required to initiate or defend or made a party to any action or proceeding in any way connected with this Agreement, the prevailing party in such action or proceeding, in addition to any other relief which may be granted, whether legal or equitable, shall be entitled to reasonable attorney's fees. Attorney's fees shall include attorney's fees on any appeal, and in addition a party entitled to attorney's fees shall be entitled to all other reasonable costs for investigating such action, taking depositions and discovery and all other necessary costs the court allows which are incurred in such litigation. All such fees shall be deemed to have accrued on commencement of such action and shall be enforceable whether or not such action is prosecuted to judgment.

ARTICLE 8. CITY OFFICERS AND EMPLOYEES: NON-DISCRIMINATION

8.1 Non-liability of Agency Officers and Employees.

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

8.2 Conflict of Interest.

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

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

8.3 Covenant Against Discrimination.

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

8.4 Unauthorized Aliens.

Contractor hereby promises and agrees to comply with all of the provisions of the Federal Immigration and Nationality Act, 8 U.S.C.A. §§ 1101, et seq., as amended, and in connection therewith, shall not employ unauthorized aliens as defined therein. Should Contractor so employ such unauthorized aliens for the performance of work and/or services covered by this Agreement, and should the any liability or sanctions be imposed against City for such use of unauthorized aliens, Contractor hereby agrees to and shall reimburse City for the cost of all such liabilities or sanctions imposed, together with any and all costs, including attorneys' fees, incurred by City.

ARTICLE 9. MISCELLANEOUS PROVISIONS

9.1 Notices.

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

9.2 Interpretation.

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

9.3 Counterparts.

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

9.4 Integration; Amendment.

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

9.5 Severability.

In the event that any one or more of the phrases, sentences, clauses, paragraphs, or sections contained in this Agreement shall be declared invalid or unenforceable by a valid judgment or decree of a court of competent jurisdiction, such invalidity or unenforceability shall not affect any of the remaining phrases, sentences, clauses, paragraphs, or sections of this

Agreement which are hereby declared as severable and shall be interpreted to carry out the intent of the parties hereunder unless the invalid provision is so material that its invalidity deprives either party of the basic benefit of their bargain or renders this Agreement meaningless.

9.6 Corporate Authority.

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

[SIGNATURES ON FOLLOWING PAGE]

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

CITY:

CITY OF BANNING, a municipal corporation

Andy Takata, City Manager

ATTEST:

City Clerk

APPROVED AS TO FORM:

ALESHIRE & WYNDER, LLP

David Aleshire, City Attorney

CONTRACTOR:

Merlin Johnson Construction, Inc.

By: _____
Name: Merlin Johnson
Title: President

By: _____
Name: Diane Johnson
Title: Secretary-Treasurer

Address: 1215 Sapphire St.

Mentone, CA 92359

Two signatures are required if a corporation.

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

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

STATE OF CALIFORNIA

COUNTY OF _____

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

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

WITNESS my hand and official seal.

Signature: _____

OPTIONAL

Though the data below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent reattachment of this form

CAPACITY CLAIMED BY SIGNER

☐
☐

INDIVIDUAL
CORPORATE OFFICER

TITLE(S)

☐
☐
☐
☐
☐

PARTNER(S) ☐ LIMITED
GENERAL
ATTORNEY-IN-FACT
TRUSTEE(S)
GUARDIAN/CONSERVATOR
OTHER _____

DESCRIPTION OF ATTACHED DOCUMENT

TITLE OR TYPE OF DOCUMENT

NUMBER OF PAGES

DATE OF DOCUMENT

SIGNER IS REPRESENTING:

(NAME OF PERSON(S) OR ENTITY(IES))

SIGNER(S) OTHER THAN NAMED ABOVE

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

STATE OF CALIFORNIA

COUNTY OF _____

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

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

WITNESS my hand and official seal.

Signature: _____

OPTIONAL

Though the data below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent reattachment of this form

CAPACITY CLAIMED BY SIGNER

☐
☐

INDIVIDUAL
CORPORATE OFFICER

TITLE(S)

☐
☐
☐
☐
☐

PARTNER(S) ☐ LIMITED
GENERAL

ATTORNEY-IN-FACT
TRUSTEE(S)
GUARDIAN/CONSERVATOR
OTHER _____

DESCRIPTION OF ATTACHED DOCUMENT

TITLE OR TYPE OF DOCUMENT

NUMBER OF PAGES

DATE OF DOCUMENT

SIGNER IS REPRESENTING:

(NAME OF PERSON(S) OR ENTITY(IES))

SIGNER(S) OTHER THAN NAMED ABOVE

EXHIBIT "A"
SCOPE OF SERVICES

- I. Contractor will perform the following Services:**
- A. Storm damage Repairs in Banning Water Canyon caused by flooding from severe Rainfall during the month of December 2010. The repairs include restore access to the Water Canyon by repairing roadways into the canyon, water wells and to clearing percolation ponds of erosion and debris caused by storm damage.
- II. As part of the Services, Contractor will prepare and deliver the following tangible work products to the City:**
- A. Invoices reflecting time, material and equipment
- III. In addition to the requirements of Section 6.2, during performance of the Services, Contractor will keep the City appraised of the status of performance by delivering the following status reports:**
- A. Oral Status Reports
- B. Proposal of for completion of all repairs caused by Storm Damage.
- IV. All work product is subject to review and acceptance by the City, and must be revised by the Contractor without additional charge to the City until found satisfactory and accepted by City.**
- V. Contractor will utilize the following personnel to accomplish the Services:**
- A. Merlin Johnson
- B. Diane Johnson

EXHIBIT "B"
SPECIAL REQUIREMENTS
(Superseding Contract Boilerplate)

The following Sections are hereby deleted in their entirety:

- A. Section 5.4 Performance Bond
- B. Section 7.3 Retention of Funds
- C. Section 7.7 Liquidated Damages
- D. Notarization Waived

EXHIBIT "C"
COMPENSATION

I. Contractor shall perform the tasks as described in Exhibit A. A sub-budget has been established for a Not-to Exceed Amount of \$125,000.00 to complete the necessary repairs in the Canyon:

	RATE	SUB-BUDGET
A. Task A	<u>See Attached</u> <u>Schedule</u>	<u>\$125,000.00</u>

II. A retention of ten percent (10%) shall be held from each payment as a contract retention to be paid as a part of the final payment upon satisfactory completion of services.

III. Within the budgeted amounts for each Task, and with the approval of the Contract Officer, funds may be shifted from one Task sub budget to another so long as the Contract Sum is not exceeded per Section 2.1, unless Additional Services are approved per Section 1.10.

VI. The City will compensate Contractor for the Services performed upon submission of a valid invoice. Each invoice is to include:

- A. Line items for all personnel describing the work performed, the number of hours worked, and the hourly rate.**
- B. Line items for all materials and equipment properly charged to the Services.**
- C. Line items for all other approved reimbursable expenses claimed, with supporting documentation.**
- D. Line items for all approved subcontractor labor, supplies, equipment, materials, and travel properly charged to the Services.**

V. The total compensation for the Services shall not exceed \$125,000.00, as provided in Section 2.1 of this Agreement.

VI. The Contractor's billing rates for all personnel are attached as Exhibit C-1.

EXHIBIT "D"
SCHEDULE OF PERFORMANCE

- I. Contractor shall perform all services timely in accordance with the following schedule:

	<u>Days to Perform</u>	<u>Deadline Date</u>
A. Task A	<u>125 Days</u>	<u>February 28,</u> <u>2011</u>

- II. Contractor shall deliver the following tangible work products to the City by the following dates.

- A. Invoices reflecting time, material and equipment of the emergency repair work.

- III. The Contract Officer may approve extensions for performance of the services in accordance with Section 3.2.