

**MOORPARK CITY COUNCIL
AGENDA REPORT**

TO: Honorable City Council

FROM: Steven Kueny, City Manager *SK*
Prepared by: Teri Davis, Senior Management Analyst *TD*

DATE: February 10, 2010 (CC Meeting of 2/17/10)

SUBJECT: Consider Professional Services Agreement with Barry K. Hogan Associates

DISCUSSION

As you are aware, Barry K. Hogan retired from the City of Moorpark (City) at the end of December 2009 after more than seven years of service as Community Development Director and Deputy City Manager. Mr. Hogan is familiar with the community and the City organization and has over 30 years of community development and management experience.

The proposed Professional Services Agreement (copy attached) would retain Mr. Hogan in a consultant capacity to work, as described in the proposal attached, on specific projects and assignments for the City. He would be available to assist City staff with community development activities as well as general administration assignments, when needed.

It is projected that he would provide no more than 960 hours (statutory maximum for a retiree under PERS) in a fiscal year. The hourly rate under this agreement is \$82.00 which may be increased annually, based upon the consumer Price Index provided by the Bureau of Labor Statistics, with written approval from the City Manager. Mr. Hogan will also be reimbursed for travel to the City and travel outside of the County of Ventura, as described in the attached agreement.

STAFF RECOMMENDATION

Approve the Professional Services Agreement with Barry K. Hogan Associates subject to final language approval by the City Manager and City Attorney, and authorize the City Manager to sign on behalf of the City.

Attachment: Agreement for Professional Services

**AGREEMENT BETWEEN THE CITY OF MOORPARK
AND BARRY K. HOGAN ASSOCIATES
FOR PROFESSIONAL SERVICES**

THIS AGREEMENT, is made and effective as of ____day of _____, 2010, between the City of Moorpark, a municipal Corporation ("City") and Barry K. Hogan Associates, sole proprietor, hereinafter referred to as ("Consultant"). In consideration of the mutual covenants and conditions set forth herein, the parties agree as follows:

WHEREAS, City has the need for certain project management services; and

WHEREAS, Consultant specializes in providing such services and has the proper work experience, certifications and background to carry out the duties involved; and

WHEREAS, Consultant has submitted to City a Proposal, which is attached hereto as Exhibit 1.

NOW, THEREFORE, in consideration of the mutual covenants, benefits and premises herein stated, the parties hereto agree as follows:

1. TERM

The term of the Agreement shall be from the date of execution to completion of the work identified in the Scope of Services and in conformance with Exhibit 1, unless this Agreement is terminated or suspended pursuant to Article 6 herein.

2. SCOPE OF SERVICES

City does hereby retain Consultant in a contractual capacity to provide services, as set forth in Exhibit 1 of this Agreement.

Compensation for the services to be performed by Consultant shall be in accordance with Exhibit 1. Compensation shall not exceed the rates or total contract value as stated in Exhibit 1, without the written authorization of the City Manager of the City. Payment by City to Consultant shall be in accordance with the provisions of Article 5, of this Agreement. Time shall be billed in increments of one-fourth (1/4) of an hour.

3. PERFORMANCE

Consultant shall at all times faithfully, competently and to the best of their ability, experience, and talent, perform all tasks described herein. Consultant shall employ, at a minimum, generally accepted standards and practices utilized by persons engaged in providing similar services as are required of Consultant hereunder in meeting their obligations under this Agreement.

4. CITY MANAGEMENT

The individual directly responsible for Consultant's overall performance of the Agreement provisions herein above set forth and to serve as principal liaison between City and Consultant shall be Barry K. Hogan, and no other individual may be substituted without the prior written approval of the City Manager.

The City's contact person in charge of administration of this Agreement, and to serve as principal liaison between Consultant and City, shall be the City Manager or his/her designee.

5. PAYMENT

The City agrees to pay Consultant monthly, in accordance with the payment rates and terms and the schedule of payment as set forth in Exhibit 1, attached hereto and incorporated herein by this reference as though set forth in full, based upon actual time spent on the above tasks. This amount shall not exceed fees and expenses as set forth in Exhibit 1 for the total term of the Agreement unless additional payment is approved as provided in this Agreement.

Consultant shall not be compensated for any services rendered in connection with its performance of this Agreement, which are in addition to those set forth herein, unless such additional services are authorized in advance and in writing by the City Manager. Consultant shall be compensated for any additional services in the amounts and in the manner as agreed to by City Manager and Consultant at the time City's written authorization is given to Consultant for the performance of said services.

Consultant will submit invoices monthly for actual services performed. Invoices shall be submitted on or about the first business day of each month, or as soon thereafter as practical, for services provided in the previous month. Payment shall be made within thirty (30) days of receipt of each invoice as to all non-disputed fees. If the City disputes any of Consultant's fees it shall give written notice to Consultant within (30) days of receipt of any disputed fees set forth on the invoice. No charge shall be made for time expended in providing this information to the City.

6. TERMINATION OR SUSPENSION WITHOUT CAUSE

The City may at any time, for any reason, with or without cause, suspend or terminate this Agreement, or any portion hereof, by serving upon the Consultant at least ten (10) days prior written notice. Upon receipt of said notice, the Consultant shall immediately cease all work under this Agreement, unless the notice provides otherwise. If the City suspends or terminates a portion of this Agreement such suspension or termination shall not make void or invalidate the remainder of this Agreement.

The Consultant may terminate this Agreement only by providing City with written notice no less than thirty (30) days in advance of such termination. In the event of such termination or suspension, Consultant shall be compensated for such services up to the date of termination or suspension. Such compensation for work in progress shall be

prorated as to the percentage of progress completed at the date of termination or suspension. Upon termination of the Agreement pursuant to this Section, the Consultant will submit an invoice to the City pursuant to Article 5 herein.

7. DEFAULT OF CONSULTANT

The Consultant's failure to comply with the provisions of this Agreement shall constitute a default. In the event that Consultant is in default for cause under the terms of this Agreement, City shall have no obligation or duty to continue compensating Consultant for any work performed after the date of default and can terminate this Agreement immediately by written notice to the Consultant. If such failure by the Consultant to make progress in the performance of work hereunder arises out of causes beyond the Consultant's control, and without fault or negligence of the Consultant, it shall not be considered a default.

If the City Manager or the City Manager's designee determines that the Consultant is in default in the performance of any of the terms or conditions of this Agreement, he shall cause to be served upon the Consultant a written notice of the default. The Consultant shall have ten (10) days after service upon it of said notice in which to cure the default by rendering a satisfactory performance. In the event that the Consultant fails to cure its default within such period of time, the City shall have the right, notwithstanding any other provision of this Agreement, to terminate this Agreement without further notice and without prejudice to any other remedy to which it may be entitled at law, in equity or under this Agreement.

8. OWNERSHIP OF DOCUMENTS

Consultant shall maintain complete and accurate records with respect to sales, costs, expenses, receipts, and other such information required by City that relate to the performance of services under this Agreement. Consultant shall maintain adequate records of services provided in sufficient detail to permit an evaluation of services. All such records shall be maintained in accordance with generally accepted accounting Principals and shall be clearly identified and readily accessible. Consultant shall provide free access to the representatives of City or its designees at reasonable times to such books and records; shall give the City the right to examine and audit said books and records; shall permit City to make transcripts therefrom as necessary; and shall allow inspection of all work, data, documents, proceedings, and activities related to this Agreement. Notification of audit shall be provided at least thirty (30) days before any such audit is conducted. Such records, together with supporting documents, shall be maintained for a period of two (2) years after receipt of final payment.

Upon completion of, or in the event of termination or suspension of this Agreement, all original documents, designs, drawings, maps, models, computer files, surveys, notes, and other documents prepared in the course of providing the services to be performed pursuant to this Agreement shall become the sole property of the City and may be used, reused, or otherwise disposed of by the City without the permission of the Consultant. With respect to computer files, Consultant shall download and email all files to the City as files are generated.

9. INDEMNIFICATION AND HOLD HARMLESS

Indemnification. Consultant shall indemnify, defend (with counsel reasonably acceptable to City) and hold harmless City, and any and all of its employees, officials and agents ("the Indemnitees") from and against any liability (including liability for claims, suits, actions, arbitration proceedings, administrative proceedings, regulatory proceedings, losses, expenses or costs of any kind, whether actual, alleged or threatened, including attorneys fees and costs, court costs, interest, defense costs, and expert witness fees), where the same arises out of, are a consequence of, or are in any way attributable to, in whole or in part, the negligence, willful misconduct, errors or omissions, in performance of this Agreement by Consultant or by any individual, or entity for which Consultant is legally liable, including but not limited to officers, agents, employees or subcontractors of Consultant, except such damage as caused by negligence of the City of any of its officers, employees, servants, project coordinators or agents.

Indemnification Provisions from Subcontractors. Consultant agrees to obtain executed indemnity agreements with provisions identical to those set forth here in this section from each and every subconsultant, or any other person or entity involved by, for, with, or on behalf of Consultant in the performance of this Agreement. In the event Consultant fails to obtain such indemnity obligations from others as required here, Consultant agrees to be fully responsible according to the terms of this section. Failure of City to monitor compliance with these requirements imposes no additional obligations on City and will in no way act as a waiver of any rights hereunder. This obligation to indemnify and defend City as set forth here is binding on the successors, assigns or heirs of Consultant and shall survive the termination of this Agreement or this section.

City does not and shall not waive any rights that it may have against Consultant by reason of this section, because of the acceptance by City, or the deposit with City, of any insurance policy or certificate required pursuant to this Agreement. The hold harmless and indemnification provisions shall apply regardless of whether or not said insurance policies are determined to be applicable to any losses, liabilities, damages, costs and expenses described in this section.

10. INSURANCE

Consultant shall maintain prior to the beginning of and for the duration of this Agreement insurance coverage as follows:

Consultant certifies that in the performance of this Agreement, Consultant shall not employ any person in any manner so as to become subject to the Workers' Compensation laws of the California Labor Code, and agrees that if Consultant should become subject to the Workers' Compensation provisions of the California Labor Code, Consultant shall forthwith comply with those provisions.

Consultant shall provide City with a Certificate of Insurance showing proof of automobile liability and property damage insurance coverage for \$250,000. Said

Insurance Certificate shall name City as "Additional Insured." Consultant shall not be required to provide any other insurance coverage to City.

11. INDEPENDENT CONSULTANT

Consultant is and shall at all times remain as to the City a wholly independent Consultant. The personnel performing the services under this Agreement on behalf of Consultant shall at all times be under Consultant's exclusive direction and control. Neither City nor any of its officers, employees, or agents shall have control over the conduct of Consultant or any of Consultant's officers, employees, or agents, except as set forth in this Agreement. Consultant shall not at any time or in any manner represent that it or any of its officers, employees, or agents are in any manner officers, employees, or agents of the City. Consultant shall not incur or have the power to incur any debt, obligation, or liability against City, or bind City in any manner.

No employee benefits shall be available to Consultant in connection with the performance of this Agreement. Except for the fees paid to Consultant as provided in the Agreement, City shall not pay salaries, wages, or other compensation to Consultant for performing services hereunder for City. City shall not be liable for compensation or indemnification to Consultant for injury or sickness arising out of performing services hereunder.

12. LEGAL RESPONSIBILITIES

The Consultant shall keep itself informed of State and Federal laws and regulations which in any manner affect those employed by it or in any way affect the performance of its service pursuant to this Agreement. The Consultant shall at all times observe and comply with all such laws and regulations. The City, and its officers and employees, shall not be liable at law or in equity occasioned by failure of the Consultant to comply with this Section.

13. UNDUE INFLUENCE

Consultant declares and warrants that no undue influence or pressure is used against or in concert with any officer or employee of the City in connection with the award, terms or implementation of this Agreement, including any method of coercion, confidential financial arrangement, or financial inducement. No officer or employee of the City will receive compensation, directly or indirectly from Consultant, or any officer, employee or agent of Consultant, in connection with the award of this Agreement or any work to be conducted as a result of this Agreement. Violation of this Section shall be a material breach of this Agreement entitling the City to any and all remedies at law or in equity.

14. NO BENEFIT TO ARISE TO LOCAL EMPLOYEES

No member, officer, or employee of the City, or their designees or agents, and no public official who exercises authority over or responsibilities with respect to the Project during his tenure or for one year thereafter, shall have any interest, direct or indirect, in

any agreement or sub-agreement, or the proceeds thereof, for work to be performed in connection with the Project performed under this Agreement.

15. CONFLICT OF INTEREST

Consultant covenants that neither they nor any officer or principal of their firm have any interests, nor shall they acquire any interest, directly or indirectly, which will conflict in any manner or degree with the performance of their services hereunder. Consultant further covenants that in the performance of this Agreement, they shall employ no person having such interest as an officer, employee, agent, or subconsultant. Consultant further covenants that Consultant has not contracted with nor is performing any services directly or indirectly, with the developer(s) and/or property owner(s) and/or firm(s) and/or partnership(s) and/or public agency(ies) owning property and/or processing an entitlement application for property in the City or its Area of Interest, now or within the past one (1) year, and further covenants and agrees that Consultant and/or Consultant's subconsultants shall provide no service or enter into any contract with any developer(s) and/or property owner(s) and/or firm(s) and/or partnership(s) and/or public agency(ies) owning property and/or processing an entitlement application for property in the City or its Area of Interest, while under contract with the City and for a one-year time period following termination of this Agreement.

Consultant shall not engage in the performance of an act which may later subject directly or indirectly to the control, inspection, review, or audit of any officer or employee of the City.

16. NOTICE

Any notice to be given pursuant to this Agreement shall be in writing, and all such notices and any other document to be delivered shall be delivered by personal service or by deposit in the United States mail, certified or registered, return receipt requested, with postage prepaid, and addressed to the party for whom intended as follows:

To: City Manager
City of Moorpark
799 Moorpark Avenue
Moorpark, California 93021

To: Barry K. Hogan Associates
Barry K. Hogan, Principal
3050 10th Avenue
Sacramento, California 95817

Either party may, from time to time, by written notice to the other, designate a different address or contact person, which shall be substituted for the one above specified. Notices, payments and other documents shall be deemed delivered upon receipt by personal service or as of the third (3rd) day after deposit in the United States mail.

17. ASSIGNMENT

Consultant shall not assign this Agreement or any of the rights, duties or obligations hereunder. It is understood and acknowledged by the parties that Consultant is uniquely qualified to perform the services provided for in this Agreement.

18. LICENSES

At all times during the term of this Agreement, Consultant shall have in full force and effect, all licenses required of it by law for the performance of the services in this Agreement.

19. VENUE AND GOVERNING LAW

This Agreement is made, entered into, and executed in Ventura County, California, and any action filed in any court or for arbitration for the interpretation, enforcement or other action of the terms, conditions or covenants referred to herein shall be filed in the applicable court in Ventura County, California. The City and Consultant understand and agree that the laws of the State of California shall govern the rights, obligations, duties, and liabilities of the parties to this Agreement and also govern the interpretation of this Agreement.

20. COST RECOVERY

In the event any action, suit or proceeding is brought for the enforcement of, or the declaration of any right or obligation pursuant to this Agreement or as a result of any alleged breach of any provision of this Agreement, the prevailing party shall be entitled to recover its costs and expenses, including reasonable attorney's fees, from the losing party, and any judgment or decree rendered in such a proceeding shall include an award thereof.

21. ARBITRATION

Cases involving a dispute between City and Consultant may be decided by an arbitrator if both sides agree in writing, with costs proportional to the judgment of the arbitrator.

22. ENTIRE AGREEMENT

This Agreement contains the entire understanding between the parties relating to the obligations of the parties described in this Agreement. All prior or contemporaneous agreements, understandings, representations, and statements, oral or written, are merged into this Agreement and shall be of no further force or effect. Each party is entering into this Agreement based solely upon the representations set forth herein and upon each party's own independent investigation of any and all facts such party deems material.

23. CAPTIONS OR HEADINGS

The captions and headings of the various Articles, Paragraphs, and Exhibits of this Agreement are for convenience and identification only and shall not be deemed to limit or define the content of the respective Articles, Paragraphs, and Exhibits hereof.

24. AMENDMENTS

Any amendment, modification, or variation from the terms of this Agreement shall be in writing and shall be effective only upon approval by the City Manager.

25. PRECEDENCE

In the event of conflict, the requirements of this Agreement shall take precedence over those contained in the Consultant's Proposal.

26. INTERPRETATION OF AGREEMENT

Should interpretation of this Agreement, or any portion thereof, be necessary, it is deemed that this Agreement was prepared by the parties jointly and equally, and shall not be interpreted against either party on the ground that the party prepared the Agreement or caused it to be prepared.

27. WAIVER

No waiver of any provision of this Agreement shall be deemed, or shall constitute, a waiver of any other provision, whether or not similar, nor shall any such waiver constitute a continuing or subsequent waiver of the same provision. No waiver shall be binding unless executed in writing by the party making the waiver.

28. AUTHORITY TO EXECUTE

The person or persons executing this Agreement on behalf of the Consultant warrants and represents that he/she has the authority to execute this Agreement on behalf of the Consultant and has the authority to bind Consultant to the performance of obligations hereunder.

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IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed the day and year first above written.

CITY OF MOORPARK

BARRY K. HOGAN ASSOCIATES

By: _____
Steven Kueny, City Manager

By: _____
Barry K. Hogan, Principal

Attest:

Deborah S. Traffenstedt, City Clerk

EXHIBIT 1

ADMINISTRATIVE AND MANAGEMENT SERVICES

A. Services

The services to be provided by CONSULTANT may include assisting CITY staff with the general plan update and amendments, High Street Streetscape plans and implementation, Civic Center plan review, North Hills Parkway design and project management, economic development, and general administrative and management assignments.

B. Assignments

Assignments shall be provided to CONSULTANT in writing by City Manager or his/her designee.

C. Monthly Status Reports

CONSULTANT shall provide CITY a Monthly Status Report listing all of the active assignments to date, the scope and nature of each assignment, the scope and nature of the services to be provided for each assignment, the work performed during the billing period and the status of the assignment to date.

D. Compensation

1. Hourly Rate: \$82.00 [To be increased annually on February 1st based upon the Consumer Price Index (CPI) using the information provide by the U.S. Department of Labor, Bureau of Labor Statistics, for all urban consumers within the Los Angeles/Riverside/Orange County metropolitan area during the prior year. The calculation shall be made using the month of October over the prior October. In the event there is a decrease the hourly rate shall remain at its then current amount until such time as the next subsequent annual indexing which results in an increase.]
2. Maximum hours per fiscal year: 960
3. Reimbursable Costs: Actual cost of preapproved items
4. Travel within the County: None
5. Travel outside the County: Use of his/her personal vehicle to attend meetings or other purposes in fulfillment of the Agreement shall be paid on a per mile basis consistent with applicable published IRS rates for the Los Angeles/Ventura area. Travel distance shall be

measured from Moorpark, or the CONSULTANT'S residence, whichever is less. Requests for payments of these costs shall be made in the same manner as compensation for services under this Agreement.

6. Travel to the City: For meetings or work with the CITY or its agents that require CONSULTANT'S in person attendance a minimum charge of Two Hundred Dollars (\$200.00) is required. This includes travel to and from the City and one night's hotel stay and per diem. For meetings or work which exceed a single work day and require an additional overnight stays, an additional One Hundred Dollars (\$100.00) will be charged for each additional day. [The estimate of cost for travel is based upon gasoline at a rate of \$3.10/gallon for California. The minimum travel charge shall be increased semi-annually. The calculation shall be made using the months of January and July over the prior July and January beginning in 2010. In the event there is a decrease the gasoline rate shall remain at its then current amount until such time as the next subsequent semi-annual indexing which results in an increase.]
7. Meetings: When possible, CITY and CONSULTANT will use Skype internet phone/video services, or other no fee acceptable alternate, for meetings that do not require CONSULTANT'S in person attendance.

E. General Provisions

1. Nature of Services: It is understood that CONSULTANT'S services are being provided to CITY using the best knowledge, experience and expertise of CONSULTANT to expedite project assignments and delivery in an efficient and effective manner. However, CONSULTANT shall not be responsible for the accuracy, performance, or actions of CITY, or other consultants, contractors, utilities, other public agencies or any other person(s). CONSULTANT shall serve in an advisory capacity to CITY.
2. Facilities and Clerical Assistance: CITY shall provide a work space and related office equipment for CONSULTANT as deemed appropriate and clerical assistance for access and management of CITY records related to services provided by CONSULTANT at City's Premises.
3. Cell Phone: CONSULTANT at his/her sole expense shall maintain a cell phone with voice mail and paging capabilities and with a phone number within the 805 area code.