



## **UPLAND CITY COUNCIL**

### **AGENDA**

**April 8, 2019**

**City Council Chamber**

**DEBBIE STONE, MAYOR  
JANICE ELLIOTT, MAYOR PRO TEM  
RICKY FELIX, COUNCILMEMBER  
RUDY ZUNIGA, COUNCILMEMBER  
BILL VELTO, COUNCILMEMBER**

**JEANNETTE VAGNOZZI, CITY MANAGER  
JAMES L. MARKMAN, CITY ATTORNEY**

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#### **DISRUPTION OF MEETINGS**

Individuals who demonstrate disruptive conduct during City Council meetings that prevent the City Council from conducting its meeting in an orderly manner are guilty of a misdemeanor as stated in PC403, disrupting a public meeting, and are subject to removal from the chamber or arrest.

- 1. CALL TO ORDER AND ROLL CALL**
- 2. ADDITIONS-DELETIONS TO AGENDA**
- 3. ORAL COMMUNICATIONS**

This is a time for any citizen to comment on item listed on the closed session agenda only. Anyone wishing to address the legislative body is requested to submit a speaker card to the City Clerk at or prior to speaking. The speakers are requested to keep their comments to no more than three (3) minutes. The use of visual aids will be included in the time limit.

- 4. CLOSED SESSION None**

**\*\*\*\*\***

**7:00 PM**

**5. INVOCATION**

Pastor Wesley Menke, Grace Lutheran Church

**6. PLEDGE OF ALLEGIANCE**

**7. PRESENTATIONS**

Presentation of Life Saving Awards to Officer Alexander Monroy, Officer Gabriel Santana, Fire Captain Scott Fisher, Fire Engineer Andrew Weber, Firefighter Paramedic Austin Muro, and Civilian David Janusz

Presentation of Certificates of Completion to the Upland Community Emergency Response Team (CERT)

**8. CITY ATTORNEY**

**9. ORAL COMMUNICATIONS**

This is a time for any citizen to comment on any item listed on the agenda only. Anyone wishing to address the legislative body is requested to submit a speaker card to the City Clerk at or prior to speaking. The speakers are requested to keep their comments to no more than three (3) minutes. Speakers will be given five (5) minutes during public hearings. The use of visual aids will be included in the time limit.

**10. COUNCIL COMMUNICATIONS**

**11. CONSENT CALENDAR**

All matters listed under the Consent Calendar are considered to be routine and will be enacted by one roll call vote. There will be no separate discussion of these items unless members of the legislative body request specific items be removed from the Consent Calendar for separate action.

**A. APPROVAL OF WARRANT AND PAYROLL REGISTERS MARCH 2019**

Approve the March Warrant Registers and Direct Disbursements (check numbers 24368-24800) totaling \$4,696,033.49 and Payroll Registers totaling \$1,172,015.86 (check Numbers 160544-160576 and EFTs 12067-12556). (Staff Person: Londa Bock-Helms)

**B. APPROVAL OF MINUTES**

Approve the Regular Meeting Minutes of March 25, 2019. (Staff Person: Keri Johnson)

**C. AMENDMENT NO. 4 TO PROFESSIONAL SERVICES AGREEMENT WITH URBAN GRAFFITI ENTERPRISE FOR CONTINUED GRAFFITI REMOVAL AND ABATEMENT SERVICES**

Approve Amendment No. 4 to the Professional Services Agreement between the City of Upland and Urban Graffiti Enterprise, Inc. to continue uninterrupted graffiti removal and abatement services on a citywide basis; and authorize the City Manager or designee to execute said Amendment. (Staff Person: Robert Dalquest)

**D. CONSIDERATION OF A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF UPLAND RECOGNIZING THE IMPORTANCE OF THE 2020 U.S. CENSUS**

Adopt a Resolution recognizing the importance of the 2020 U.S. Census. (Staff Person: Robert Dalquest)

**12. PUBLIC HEARINGS**

**13. COUNCIL COMMITTEE REPORTS**

**14. BUSINESS ITEMS**

- A. RESOLUTION APPROVING AN AMENDED AND RESTATED DEPOSIT AND REIMBURSEMENT AGREEMENT AND APPROVING THE EMPLOYMENT OF CERTAIN FINANCING PROFESSIONALS IN CONNECTION WITH PROPOSED SPECIAL TAX BONDS FOR IMPROVEMENT AREA NO. 1 OF COMMUNITY FACILITIES DISTRICT NO. 2015-1 (SYCAMORE HILLS)

That the City Council, for itself and acting as legislative body of Community Facilities District No. 2015-1 (Sycamore Hills) of the City of Upland (the "District"), adopt a resolution to approving and authorizing an Amended and Restated Deposit and Reimbursement Agreement and approving the employment of certain financing professionals in connection with proposed special tax bonds for Improvement Area No. 1 of the District. (Staff Person: Robert Dalquest)

- B. AGREEMENT WITH LIBRARY SYSTEMS & SERVICES, LLC FOR CONTINUED OPERATION OF THE UPLAND PUBLIC LIBRARY

Approve an agreement with Library Systems and Services, LLC (LS&S) for continued operation of the Upland Public Library, for a period of five (5) years, and direct the City Manager to sign the agreement. (Staff Person: Jeannette Vagnozzi)

**15. ORAL COMMUNICATIONS**

This is a time for any citizen to comment on any item not listed on the agenda. Anyone wishing to address the legislative body is requested to submit a speaker card to the City Clerk at or prior to speaking. The speakers are requested to keep their comments to no more than three (3) minutes. The use of visual aids will be included in the time limit. Public comments and questions for the purpose of hearing current matters of concern in our community and to provide citizens a method for the public to hear those concerns in an open venue is encouraged. However, under the provisions of the Brown Act, the City Council is prohibited from discussion of items not listed on the agenda, and therefore, the City Council, City Manager, or City Attorney will take communications under advisement for consideration and appropriate response or discussion at a later time.

**16. CITY MANAGER**

**17. ADJOURNMENT**

The next regularly scheduled City Council meeting is Monday, April 22, 2019.

**NOTE:** If you challenge the public hearing(s) or the related environmental determinations in court, you may be limited to raising only those issues you or someone else raised at the public hearing described in this notice, or in written correspondence delivered to the City of Upland, at, or prior to, the public hearing.

All Agenda items and back-up materials are available for public review at the Upland Public Library, downstairs reference desk at 450 North Euclid Avenue, the City Clerk's Office at 460 North Euclid Avenue and the City website at [www.ci.upland.ca.us](http://www.ci.upland.ca.us), subject to staff's ability to post

the documents before the meeting.

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, 931-4120. Notification 48 hours prior to the meeting will enable the City to make reasonable arrangements to ensure accessibility to this meeting. [28 CFR 35.102-35.104 ADA Title II]

**POSTING STATEMENT:** On April 3, 2019 a true and correct copy of this agenda was posted on the bulletin boards at 450 N. Euclid Avenue (Upland Public Library) and 460 N. Euclid Avenue (Upland City Hall).

**MINUTES OF THE REGULAR MEETING OF THE  
UPLAND CITY COUNCIL  
MARCH 25, 2019**

**OPENING**

The regular meeting of the Upland City Council was called to order by Mayor Debbie Stone at 6:00 p.m. in the Council Chamber of the Upland City Hall.

**1. ROLL CALL**

Present: Mayor Debbie Stone, Council Members Janice Elliott, Ricky Felix, Bill Velto, and Rudy Zuniga

Staff: City Manager Jeannette Vagnozzi, City Attorney James L. Markman, and City Clerk Keri Johnson

**2. ADDITIONS/DELETIONS TO AGENDA** None

**3. ORAL COMMUNICATIONS**

Karen May, expressed support for city employees and offered assistance to facilitate a labor agreement.

**4. CLOSED SESSION**

At 6:03 p.m. Mayor Stone announced the City Council would recess to Closed Session pursuant to Government Code Section

**A. GOVERNMENT CODE SECTION 54957.6 - CONFERENCE WITH LABOR NEGOTIATORS**

Agency designated representatives: Legal Counsel Edward Zappia and City Manager Jeannette Vagnozzi

Employee organizations: Upland Mid-Management Association, Upland City Employees Association, Upland Police Officers Association, and Upland Police Management Association

The City Council reconvened in open session at 7:06 p.m.

**5. INVOCATION** Bishop Hal Evans, Church of Jesus Christ of Latter-Day Saints

**6. PLEDGE OF ALLEGIANCE** Councilmember Velto

**7. PRESENTATIONS**

Police Chief Goodman presented Officer Kyle Cunnings with his badge.

Dr. Ariane Marie-Mitchell accepted a proclamation on behalf of Children's Network, declaring April 2019 as Child Abuse Prevention Month

One Legacy Ambassador Daniel Luevanos accepted a proclamation declaring April 2019 as DMV/Donate Life California Month.

**8. CITY ATTORNEY**

City Attorney Markman announced there was nothing to report from Closed Session.

**9. ORAL COMMUNICATIONS**

James Breitling, urged the Council to implement a food waste collection program in the downtown and to educate businesses on recycling.

The following individuals spoke in support of the Friends of the Upland Animal shelter continuing to provide pet adoption services for the City. They expressed the importance of community partnerships, increased adoption rates, positive pet adoption experiences, foster programs, dedicated volunteers, successful fundraising, and the importance of stability and longevity in order to sustain the operations:

Jack Hermann, Upland  
Steve Bierbaum, Upland  
Claus Helsted, Rancho Cucamonga  
Jennifer Ashley, Upland  
Sherrie Darrow, Claremont  
Faith S. Weinberg Levine  
Andy Peterson

Shelley Foglesong, Upland  
Ann Davis, Upland  
Brenda R. Seager, Alta Loma  
Karen Hermann, Upland  
Judy Lovering, Upland  
David Wade  
Osvaldo Leonard Diaz, Upland

**10. COUNCIL COMMUNICATIONS**

Councilmembers announced various activities throughout the community, including providing an update on the meetings they attended.

**11. CONSENT CALENDAR**

Motion by Councilmember Elliott to approve the remainder of the Consent Calendar, seconded by Councilmember Velto, and carried unanimously.

**A. APPROVAL OF MINUTES**

Approve the Regular Meeting Minutes of March 11, 2019 and the Special Meeting Minutes of March 17, 2019.

**B. TREASURER'S REPORTS JANUARY AND FEBRUARY 2019**

Receive and file the January and February 2019 Treasurer's Reports.

**C. TEMPORARY CONSTRUCTION EASEMENT, CITY PROPERTY LOCATED ON THE WEST SIDE OF CAMPUS AVENUE NORTH OF THE I-10 (APN 1047-221-48)**

Approved a Right of Way Contract with San Bernardino County Transportation Authority for a temporary construction easement on City owned property to facilitate construction of the I-10 Freeway Improvements; accepted the offer of \$15,900 as just compensation and an additional \$3,180 as an incentive to enter into the agreement timely, for a total amount \$19,080.

**12. PUBLIC HEARINGS**                      None

**13. COUNCIL COMMITTEE REPORTS**

A. PUBLIC WORKS COMMITTEE MEETING, MARCH 12, 2019

Public Works Director Hoerning provided a recap of the meeting, which is on file in the City Clerk's Office. This was for information only and no action was required.

**14. BUSINESS ITEMS**

A. RECONSIDERATION OF ANIMAL SHELTER REQUEST FOR PROPOSALS APPROVED MARCH 11, 2019

City Manager Vagnozzi presented the staff report, which is on file in the City Clerk's Office.

There was discussion on the importance of transparency, the City's purchasing policy, and the current operation of animal adoptions by the Friends of the Upland Animal Shelter.

There being no motion to reconsider the request for proposal process, staff was instructed to move forward with the process as previously approved.

B. HISTORIC DOWNTOWN UPLAND AD HOC COMMITTEE APPOINTMENTS

City Manager Vagnozzi presented the staff report, which is on file in the City Clerk's Office.

City Attorney Markman stated that Mayor Stone and Councilmember Zuniga could participate in this decision, although they own businesses in the downtown area.

Motion by Councilmember Zuniga to appoint Jason Gaudy, Raymond Podesta, Carlos Velastegui, Oscar Quiroz, and Helen L. Bouquet to the Historic Downtown Upland (HDU) Ad Hoc Committee, seconded by Councilmember Velto, and carried unanimously.

**15. ORAL COMMUNICATION (items not on the agenda)**

Allen Nicely, Upland, thanked Chief Goodman for his leadership and further stated dissatisfaction with the Mayor's leadership.

Osvaldo Leonard Diaz, Upland, commented on Asperger syndrome, mental health, and a documentary on cannabis.

Moe Duran, expressed gratitude to the citizens who came out to support City employees.

Rick LeBlanc, Upland Employee Association Board Member, spoke about the importance of employee retention.

Rene Hernandez, Upland, spoke about street maintenance issues in his neighborhood and requested that staff contact him to resolve the issues.

Natasha Walton, Upland, encouraged the community to attend an upcoming court hearing regarding Memorial Park land.

Lois Sicking, Upland, apologized to the City Manager regarding her comments at the previous City Council meeting and spoke in opposition of a proposed cell tower in McCarthy Park.

David Wade, thanked community groups for their efforts and felt their activities encourage others to get involved.

April McCormick, thanked city employees and Chief Goodman for their efforts and urged the Council to appoint a department head as Interim City Manager.

**16. CITY MANAGER**

City Manager Vagnozzi announced the next Open Government Workshop.

**17. ADJOURNMENT**

At 9:00 p.m., Mayor Stone adjourned in memory of Eric Kent, local business owner and operator of a local Farmers Market. The next regularly scheduled City Council meeting is Monday, April 8, 2019.

**SUBMITTED BY**



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Keri Johnson, City Clerk

**APPROVED**

April 8, 2019

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## STAFF REPORT

**ITEM NO. 11.C.**

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**DATE:** April 8, 2019  
**TO:** MAYOR AND CITY COUNCIL  
**FROM:** JEANNETTE VAGNOZZI, CITY MANAGER  
**PREPARED BY:** ROBERT D. DALQUEST, DEVELOPMENT SERVICES DIRECTOR  
LIZ CHAVEZ, DEVELOPMENT SERVICES MANAGER  
**SUBJECT:** AMENDMENT NO. 4 TO PROFESSIONAL SERVICES AGREEMENT  
WITH URBAN GRAFFITI ENTERPRISE FOR CONTINUED GRAFFITI  
REMOVAL AND ABATEMENT SERVICES

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### RECOMMENDED ACTION

It is recommended that the City Council approve Amendment No. 4 to the Professional Services Agreement between the City of Upland ("City") and Urban Graffiti Enterprise, Inc. (UGE) to continue uninterrupted graffiti removal and abatement services on a citywide basis; and authorize the City Manager or designee to execute said Amendment.

### GOAL STATEMENT

The proposed action supports the City's goal to proactively eliminate graffiti from public view and halting neighborhood decay.

### BACKGROUND

On July 1, 2015, the City entered into a six month professional services agreement with UGE ("Consultant") to be extended an additional six months, if the Consultant performed its duties to the satisfaction of City staff. Those tasked included:

1. Expeditiously removing graffiti from the public view seven days a week, 24 hours a day
2. Color match paint and finish in surrounding areas repaired of graffiti to City staff satisfaction
3. Routinely provide GPS digital images of the graffiti incident and repairs to City staff
4. Monitoring of City's graffiti hotline twice daily
5. Daily monitoring of citizen's request for services from Parks and Maintenance Departments

6. Develop a smart phone application to report graffiti
7. Tracking and logging graffiti incidents
8. Proper billing and invoicing

UGE performed said tasks to the satisfaction of City and was granted subsequent extensions fulfilling the three (3) multi-year term of the contract. Their contract expired on June 30, 2018 at a flat rate of \$5,200 per month for a 36-month period of graffiti abatement services citywide. Prior to the expiration of the graffiti abatement contract, City staff conducted a Request for Proposal (RFP) consistent with City procurement policies. However, during this process in June 2018, City staff was notified by the California Department of Industrial Relations (DIR) that "graffiti abatement services," if performed by a Consultant, was considered a State Prevailing Wage activity and required the City to comply with DIR's Public Works Contract registration requirements (PWC-100) as required by Labor Code sec. 1773.3 and ensure that labor costs for graffiti abatement services conducted by the City through its Consultant are paid in accordance with the State's Prevailing Wage rates.

## **ISSUES/ANALYSIS**

Due to Upland's use of contracted services for graffiti abatement services, it appeared that this activity would fall under DIR's directive. City staff reviewed the State Prevailing Wage report and was unable to locate a specified trade encompassing the various duties required by "graffiti abatement services" performed in Upland. When City staff communicated this matter to DIR, DIR indicated that the prevailing wage rate of "painter" should apply or suggested to request a special determination from DIR if City staff believed otherwise. During this round of communication with DIR, City staff reviewed DIR's citation for determining the applicability of the prevailing wage requirements in Upland's graffiti abatement program. DIR cited an Alameda County Superior Court ruling denying "writ of mandate" in the matter of Graffiti Protective Coatings, Inc. v. Baker with respect to a graffiti abatement program contracted by the County of Alameda (Case No. HG16823594). However, upon City staff review of the case found that the fact pattern with respect to Alameda County's graffiti abatement program was materially and significantly different than Upland's graffiti program. Therefore, and because of the dissimilarity, City staff does not believe that the Alameda County Superior Court matter could be used to make a determination with respect to Upland's graffiti program. Under this pretense, City staff disagreed with DIR's determination that Upland's graffiti abatement program met the definition and scope of DIR's directive relative to prevailing wage requirements.

Further complicating this matter is the fact that federal regulations governing the type of graffiti abatement performed in Upland (partially funded with the use of federal Community Development Block Grant ("CDBG" funds) is considered a public service activity and exempt from the prevailing wage requirement. Accordingly, the City has followed the federal regulations detailed in 24CFR 507.201 of the U.S. Department of Housing and Urban Development ("HUD") CDBG funded programs. As a result of the federal funding source, Upland is required to follow all applicable federal regulations and rules in the administration of its CDBG program. With the foregoing in mind, the City of Upland is contractually required by its agreements with HUD to administer its federally funded graffiti abatement program in full compliance with all applicable federal labor standards.

City staff has been in numerous discussions with DIR relative to this issue since mid-year 2018 and has contacted several other jurisdictions with the similar request relative to DIR's graffiti abatement services prevailing wage directive. City staff is continuing to discuss this matter with DIR and anticipates resolving the matter no later than October 2019. Until such time, City staff is recommending executing a six (6) month amendment to UGE contract to prevent a lapse in graffiti abatement services citywide.

## **FISCAL IMPACTS**

Cost of abatement for graffiti will remain at the original UGE contract amount of \$5,200 per month and totaling \$31,200 (for six months) or until another professional services agreement

is executed. Please note, should DIR's directive be confirmed and the City is mandated to pay prevailing wage for graffiti abatement services, the cost of doing graffiti abatement services through a Consultant will increase the overall annual cost by an estimated 30% and graffiti abatement will be considered a true Public Works contract requiring administration of the program through the City's Public Works Department.

**ALTERNATIVES**

Provide alternative direction to staff.

**ATTACHMENTS:**

**Amendment No. 4**

**Amendment to Professional Services Agreement**  
**GRAFFITI REMOVAL/ABATEMENT**  
**Amendment No. 4**

THIS 4<sup>th</sup> AMENDMENT TO PROFESSIONAL SERVICE AGREEMENT is made as of the 8<sup>th</sup> day of April 2019, by Urban Graffiti Enterprises, Inc. (hereinafter, "Consultant") and the City of Upland (hereinafter, "City").

WITNESSETH THAT:

WHEREAS, Consultant and City previously entered into an original Professional Service Agreement dated July, 1, 2015, effective July 1, 2015, (the "Agreement"); and

WHEREAS, the Agreement was set to be in effect for six month period according to term ending on December 31, 2015; and

WHEREAS, the Agreement was extended for an additional six months period ending June 30, 2016 via Amendment No. 1; and

WHEREAS, the Agreement was extended for an additional twelve month period ending June 30, 2017 via Amendment No. 2; and

WHEREAS, the Agreement was extended for an additional twelve month period ending June 30, 2018 via Amendment No. 3; and

WHEREAS, the Agreement was extended via a Letter Agreement three (3) times on June 12, 2018, September 20, 2018 and December 7, 2018 allowing staff time to resolve a Department of Industrial Relations (DIR) issue relative to prevailing wages; and

WHEREAS, staff is still requiring time to resolve said issue with DIR and is requesting an additional six (6) month extension of said Agreement; and

WHEREAS, the parties wish to extend the Agreement to include an additional six (6) month period ending October 31, 2019, and

WHEREAS, it now becomes necessary to amend said Agreement and both parties are desirous of such amendment.

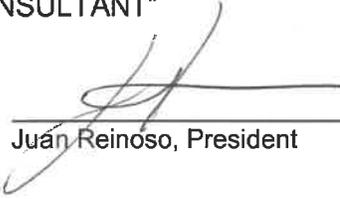
NOW, THEREFORE, in consideration of the mutual undertakings herein, the parties hereby further agree to amend the Agreement as follows:

1. Section 1 – "Terms" – This Agreement will extend beginning April 19, 2019 to October 31, 2019.
2. Exhibit "A" continues to include the task to be performed.
3. Exhibit "B" continues to include payment rates and schedule.
4. All remaining provisions of the Agreement shall remain the same.

IN WITNESS WHEREOF, the City and Consultant have approved this Amendment No. 4 to Professional Services Agreement effective the day and year first above written.

“CONSULTANT”

By:

  
\_\_\_\_\_  
Juan Reinoso, President

“CITY”

By:

\_\_\_\_\_  
Jeannette Vagnozzi, City Manager

## EXHIBIT A

### TASKS TO BE PERFORMED

Contractor shall perform the services expeditiously and as needed by the City, seven (7) days per week, twenty-four hours per day, throughout the term of the Agreement. Once notified, Contractor has forty-eight (48) hours to remove graffiti.

Contractor shall be required to match paint color and finish with surrounding surface area to City Representative's satisfaction. Before and after digital with GPS capability photographs of graffiti will be required as requested, especially in the following circumstances:

- Extensive areas (large amount of square footage) of graffiti
- Small areas such as light poles if the tag is the same as an adjacent larger area
- Tags that are seen repeatedly
- Hate speech, profanity or threats against City entities

The city has established a graffiti reporting hotline as part of its abatement program. Throughout the term of the Agreement, Contractor shall access the City's "Graffiti Hotline" at (909) 931-4127 a minimum of two (2) times per day (at approximately 7:00 a.m. and 1:00 p.m.) in order to determine the services needed by the City.

Every business day at 2:00 p.m. the Contractor shall obtain from the City's Parks and Maintenance Department a list of citizen requests for services to be carried out by the Contractor. Unless otherwise instructed by the City's Representative, Contractor shall promptly carry out services within 24 hours of request.

The Contractor shall use digital cameras that provide photo numbers, a date and time stamps and GPS. At the end of each month the Contractor shall provide the City billing as well as an excel spreadsheet of all work completed during that month. The spreadsheets shall include several columns of data such as address, method, cost, etc. One of the columns shall be labeled "Photograph Numbers", which will have the corresponding photograph numbers for that location. The Contractor shall provide a labeled CD of the photographs as well as thumbnail color printout of all photos taken that month.

In addition to the above, Contractor shall abide by and perform services as indicated in its proposal dated April 30, 2015 and said proposal is incorporated as part of the contract.

EXHIBIT B

PAYMENT RATES AND SCHEDULE

\$5,200 per month for a maximum of six months for a total of \$31,200. Price includes all labor, materials and other costs.



## STAFF REPORT

**ITEM NO. 11.D.**

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**DATE:** April 8, 2019  
**TO:** MAYOR AND CITY COUNCIL  
**FROM:** JEANNETTE VAGNOZZI, CITY MANAGER  
**PREPARED BY:** ROBERT D. DALQUEST, DEVELOPMENT SERVICES DIRECTOR  
**SUBJECT:** CONSIDERATION OF A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF UPLAND RECOGNIZING THE IMPORTANCE OF THE 2020 U.S. CENSUS

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### RECOMMENDED ACTION

It is recommended that the City Council adopt a Resolution recognizing the importance of the 2020 U.S. Census.

### GOAL STATEMENT

The proposed action supports the City's goal for responsive leadership by supporting the efforts of the State of California, the League of California Cities, and other agencies in the public awareness program to recognize the importance of the upcoming 2020 U.S. Census.

### BACKGROUND

Every 10 years, as mandated by the U.S. Constitution, the federal government undertakes a Census of the U.S. population to determine the allocation of seats held by each state in the House of Representatives, and is used in the process to redraw federal and state legislative district boundaries. In addition, the Census data is used to distribute federal funding to states and local governments. In California, more than seventy (70) federal programs that benefit residents use the Census data and population counts as part of their funding formulas, including the Community Development Block Grant Program, funding for roads, school programs, children's health insurance, Head Start, and foster care.

California cities will play an important role in helping to make the 2020 U.S. Census fair and accurate. Approximately seventy-five percent (75%) of Californians are considered "hard to count", which means they have been historically undercounted in the Census, including minorities, young children, renters and rural residents. The 2010 census undercounted 95,000

(or 0.26%) California residents. Although the overall count was an improvement from the two previous decennial census (2.74% in 1990 and 1.52% in 2000), the rate of undercounted populations remains consistently high, and that has many cities concerned about getting an accurate count in the upcoming census. For these reasons, a complete and accurate census count is essential to the well-being of our state and all Californians. The U.S. Census will begin on April 1, 2020.

## **ISSUES/ANALYSIS**

The California Government Operations Agency (GovOps) is the lead state agency on preparations for the upcoming Census, and has been working closely with the League of California Cities, the California Complete Count Committee, and the Senate and Assembly Select Committees on the 2020 U.S. Census to support cities and their efforts to encourage full participation in the 2020 U.S. Census. Because a complete and accurate count is essential, the League of California Cities created a resource page ([www.cacities.org/2020Census](http://www.cacities.org/2020Census)) to assist its membership with getting information and updates about the 2020 U.S. Census.

The League of California Cities is seeking the support of local jurisdictions through the adoption of a resolution recognizing the importance of the upcoming 2020 U.S. Census. Attached for the City Council's consideration is a resolution from the League formally recognizing the importance of the 2020 U.S. Census.

## **FISCAL IMPACTS**

There is no fiscal impact associated with this action.

## **ALTERNATIVES**

Provide alternative direction to staff.

## **ATTACHMENTS:**

**Resolution recognizing the importance of the 2020 U.S. Census**

RESOLUTION NO.

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF  
UPLAND RECOGNIZING THE IMPORTANCE OF THE 2020  
U.S. CENSUS

Intent of the Parties and Findings

(i) The U.S. Census Bureau is required by Article I, Section 2 of the U.S. Constitution to conduct an accurate count of the population every ten years; and

(ii) The next enumeration will be April 1, 2020 and will be the first to rely heavily on online responses; and

(iii) The primary and perpetual challenge facing the U.S. Census Bureau is the undercount of certain population groups; and

(iv) That challenge is amplified in California, given the size of the state and the diversity of communities; and

(v) California has a large percentage of individuals that are considered traditionally hard to count; and

(vi) These diverse communities and demographic populations are at risk of being missed in the 2020 Census; and

(vii) California receives nearly \$77 billion in federal funding that relies, in part, on census data; and

(viii) A complete and accurate count of California's population is essential; and

(ix) The data collected by the decennial Census determines the number of seats each state has in the U.S. House of Representatives and is used to distribute billions of dollars in federal funds to state and local governments; and

(x) The data is also used in the redistricting of state legislatures, county boards of supervisors and city councils; and

(xi) The decennial census is a massive undertaking that requires cross-sector collaboration and partnership in order to achieve a complete and accurate count; and

(xii) California's leaders have dedicated a historic amount of funding and resources to ensure every Californian is counted once, only once and in the right place; and

(xiii) This includes coordination between tribal, city, county, state governments, community-based organizations, education, and many more; and

(xiv) U.S. Census Bureau is facing several challenges with Census 2020, including constrained fiscal environment, rapidly changing use of technology, declining response rates, increasingly diverse and mobile population, thus support from partners and stakeholders is critical; and

(xv) California is kicking-off its outreach and engagement efforts in April 2019 for the 2020 Census; and

(xvi) the of the City of Upland in partnership with other local governments, the State, businesses, schools, and community organizations, is committed to robust outreach and communication strategies, focusing on reaching the hardest-to-count individuals.

NOW, THEREFORE, the City Council hereby finds, determines and resolves as follows:

Section 1. The City of Upland recognizes the importance of the 2020 U.S. Census and supports helping to ensure a complete, fair, and accurate count of all Californians.

Section 2. Certification. The City Clerk shall certify to the passage and adoption of this resolution and enter it into the book of original resolutions.

PASSED, APPROVED and ADOPTED this 8th day of April, 2019.

\_\_\_\_\_  
Debbie Stone, Mayor

I, Keri Johnson, City Clerk of the City of Upland, do hereby certify that the foregoing Resolution was adopted at a regular meeting of the City Council held on the 8th day of April, 2019, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAINED:

ATTEST:

\_\_\_\_\_  
Keri Johnson, City Clerk



## STAFF REPORT

**ITEM NO. 14.A.**

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**DATE:** April 8, 2019  
**TO:** MAYOR AND CITY COUNCIL  
**FROM:** JEANNETTE VAGNOZZI, CITY MANAGER  
**PREPARED BY:** ROBERT D. DALQUEST, DEVELOPMENT SERVICES DIRECTOR  
**SUBJECT:** RESOLUTION APPROVING AN AMENDED AND RESTATED DEPOSIT AND REIMBURSEMENT AGREEMENT AND APPROVING THE EMPLOYMENT OF CERTAIN FINANCING PROFESSIONALS IN CONNECTION WITH PROPOSED SPECIAL TAX BONDS FOR IMPROVEMENT AREA NO. 1 OF COMMUNITY FACILITIES DISTRICT NO. 2015-1 (SYCAMORE HILLS)

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### RECOMMENDED ACTION

It is recommended that the City Council, for itself and acting as legislative body of Community Facilities District No. 2015-1 (Sycamore Hills) of the City of Upland (the "District"), adopt a resolution to approving and authorizing an Amended and Restated Deposit and Reimbursement Agreement and approving the employment of certain financing professionals in connection with proposed special tax bonds for Improvement Area No. 1 of the District.

### GOAL STATEMENT

The proposed action will promote the requirements of the City's Land Secured Financing Policy for Special Assessment and Mello-Roos Community Facilities District Financing (the "Land Secured Financing Policy"), and facilitate the issuance of special tax bonds for Improvement Area No. 1 of the District (the "Bonds"). This action was contemplated and authorized by the formation proceedings for the District undertaken by the City Council in 2015 pursuant to the Mello-Roos Community Facilities Act of 1982, as amended (the "Mello-Roos Act"), at the request of Bravepark Property LLC (the "Developer").

### BACKGROUND

In 2015, at the request of and pursuant to a petition filed by the Developer, the City Council conducted proceedings in accordance with the Mello-Roos Act to establish the District in order to finance certain public improvements and development fees used for public improvements

necessary for the development of the property within the District (i.e., parcels known at that time as Assessor's Parcel Numbers 1005-481-01, 1005-481-02, and a portion of 1005-491-04). At that time, the Developer was the sole owner of all of the property in the District. In connection with the commencement of the formation proceedings and pursuant to the Land Secured Financing Policy, the City, for itself and on behalf of the then proposed District, entered into a Deposit and Reimbursement Agreement (the "Original Deposit Agreement") with the Developer.

Pursuant to the Original Deposit Agreement and Section 53314.9 of the Mello-Roos Act, the Developer agreed to advance and deposit funds with the City to cover the City's costs relating to the formation of the District and issuance of bonds by the District; provided that the funds so advanced are eligible to be reimbursed to the Developer from the proceeds of the special taxes levied by the District and the bonds.

On November 23, 2015, the City Council adopted its Resolution No. 6308 establishing the District, which, among other things, designated portions of the District as Improvement Area No. 1 and Improvement Area No. 2 (See **Exhibit "A"**). The respective special taxes for each of Improvement Area No. 1 and Improvement Area No. 2 of the District were duly approved by more than two-thirds of the votes cast by the qualified electors of the respective Improvement Areas pursuant to the Mello-Roos Act at, respectively, an election held for each Improvement Area on November 23, 2015.

The deposits previously made by the Developer pursuant to the Original Deposit Agreement have been fully expended for costs of the City relating to the formation of the District and change proceedings with respect to the Rate and Method of Apportionment of Special Tax for Improvement Area No. 2. No Bonds have yet been issued by the District for either Improvement Area.

On September 20, 2017, Taylor Morrison of California, LLC, a California limited liability company (the "Builder"), purchased all of the real property within Improvement Area No. 1 of the District from the Developer and entered into an Assignment and Assumption Agreement, with the City's prior written consent, of certain rights and obligations of the Developer under the Development Agreement for the property within the District. The Developer and the Builder also are currently in escrow with respect to a pending sale by the Developer to the Builder of all of the real property within Improvement Area No. 2 of the District. The Builder is currently in the process of building and selling residences within Improvement Area No. 1 of the District (known as Westridge at Sycamore Hills).

Recently, the Developer and the Builder jointly have requested the City to cause the District to issue the Bonds for Improvement Area No. 1 of the District. Since the time the District was formed, the development within Improvement Area No. 1 has proceeded and is in a condition such that it is anticipated there presently is sufficient value to support a successful sale of the Bonds to investors.

The Developer and the Builder desire to enter into the attached Amended and Restated Deposit and Reimbursement Agreement (the "Amended Agreement" - See **Exhibit "C"**) to include the Builder as another party and to set forth the respective allocations and handling, as agreed to between the Developer and the Builder, of the deposit and advance of funds by the Developer and the Builder pursuant to Section 53314.9 of the Mello-Roos Act to cover the City's costs relating to the issuance of Bonds by the District for Improvement Area No. 1.

In addition, the proposed Amended Agreement will make certain clarifying amendments recommended by bond counsel in furtherance of applicable federal tax law and the issuance of tax-exempt bonds by the District and incorporate certain provisions in furtherance of the City's Land Secured Financing Policy.

## **ISSUES/ANALYSIS**

The Mello-Roos Act provides that, at any time either before or after the formation of the District, the City Council may accept advances of funds from any source, including, but not limited to private persons such as the Developer and the Builder, and may provide by resolution for the use of those funds for any purpose authorized under the Mello-Roos Act, including paying any cost incurred by the City in creating the District and incidental expenses of the public improvements financed by the District, including the costs associated with the issuance of bonds. The statute further provides that the City Council may enter into an agreement, by resolution, with the entity advancing the funds for the District to repay all or a portion of the funds advanced, with or without interest. These statutory provisions assure that the City itself does not become liable for costs incurred in connection with the formation of the District or the issuance of Bonds by the District.

It is recommended that the City Council, for the City and as legislative body of the District, approve the Amended Agreement to:

1. Include the Builder as another party and set forth the respective allocations and handling, as agreed to between the Developer and the Builder, of advanced funds to cover the City's costs relating to the issuance of Bonds by the District;
2. Incorporate certain provisions in furtherance of the City's Land Secured Financing Policy; and,
3. Make certain clarifying amendments recommended by bond counsel in furtherance of applicable federal tax law and the issuance of tax-exempt bonds by the District.

The issuance of the Bonds by the District for Improvement Area No. 1 will require that the City retain a municipal (financial) advisor, bond/disclosure counsel, a special tax consultant, an appraiser, and an underwriter. By approval of the attached resolution, the City Council would approve the appointments of Urban Futures, Inc. to serve as municipal (financial) advisor, Richards, Watson & Gershon as bond/disclosure counsel, Willdan Financial Services as special tax consultant, Harris Realty Appraisal as appraiser, and Hilltop Securities Inc. as the underwriter of the Bonds. The fees of the underwriter are contingent upon the successful sale and issuance of the Bonds. The fees of the City's other financing professionals described above equal a total estimated amount of \$151,650.00 and would be covered by funds advanced by the Developer and the Builder under the proposed Amended Agreement.

If the City Council approves the attached resolution (See **Exhibit "B"**), it is expected that a resolution authorizing the issuance of the Bonds and approving the bond and disclosure documents would be brought forward for approval by the City Council, in its capacity as legislative body of the District, at a future meeting.

## **FISCAL IMPACTS**

The proposed Amended Agreement would include the Builder as another party and set forth the respective allocations and handling, as agreed to between the Developer and the Builder, of advanced funds to cover the City's costs in the proceedings for the issuance of the Bonds. Under the Amended Agreement, proceeds of the proposed Bonds are the sole source of funds for repayment of deposits, without interest. If no Bonds are issued, the Developer and the Builder forgo any portion of the deposits that has not been expended or committed at the time the City Council determines to abandon the proceedings for the Bonds. Therefore, there is no fiscal impact to the City's General Fund.

## **ALTERNATIVES**

Provide alternative direction to staff.

**ATTACHMENTS:**

**Exhibit "A": Resolution Approving Amended and Restated Deposit and Reimbursement Agreement and Appointment of the Financing Team**

**Exhibit "B": Map of the District and Improvement Areas 1 & 2**

**Exhibit "C": Amended and Restated Deposit and Reimbursement Agreement**

## RESOLUTION NO.

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF UPLAND, CALIFORNIA, FOR ITSELF AND ACTING AS LEGISLATIVE BODY OF COMMUNITY FACILITIES DISTRICT NO. 2015-1 (SYCAMORE HILLS) OF THE CITY OF UPLAND, APPROVING AND AUTHORIZING AN AMENDED AND RESTATED DEPOSIT AND REIMBURSEMENT AGREEMENT AND APPROVING THE EMPLOYMENT OF CERTAIN FINANCING PROFESSIONALS IN CONNECTION WITH PROPOSED SPECIAL TAX BONDS FOR IMPROVEMENT AREA NO. 1 OF THE DISTRICT

### Intent of the Parties and Findings

(i) In 2015, the City Council (the "City Council") of the City of Upland, California (the "City"), conducted proceedings in accordance with the Mello-Roos Community Facilities Act of 1982, as amended, commencing with Section 53311 of the California Government Code (the "Act"), for the establishment of the Community Facilities District No. 2015-1 (Sycamore Hills) of the City of Upland, County of San Bernardino, State of California (the "District") upon receipt of a petition from Bravepark Property LLC, a Delaware limited liability company (the "Developer"), requesting that the District be established under the Act in order to finance certain public improvements and development fees used for public improvements necessary for the development of the property within the District (i.e., parcels known at that time as Assessor's Parcel Numbers 1005-481-01, 1005-481-02, and a portion of 1005-491-04) (the "Project"); and

(ii) In 2015, in accordance with the City's Amended and Restated Land Secured Financing Policy for Mello-Roos Community Facilities District Financings (as the same may be amended from time to time, the "Land Secured Financing Policy"), the City, for itself and on behalf of the then proposed District, and the Developer previously entered into a Deposit and Reimbursement Agreement (the "Original Deposit Agreement") pursuant to the Mello-Roos Community Facilities Act of 1982 (California Government Code Section 53311 et seq.), as amended (the "Act"), including Section 53314.9 therein; and

(iii) Pursuant to the Original Deposit Agreement and Section 53314.9 of the Act, the Developer agreed to advance and deposit funds with the City to cover the City's costs relating to the formation of the District and issuance of Bonds by or for the District (the "Bonds") to finance certain public improvements and development fees used for public improvements necessary for the development of the Project, provided that the funds so advanced (collectively, the "Deposits") are eligible to be reimbursed to the Developer from the proceeds of the special taxes levied by the District (the "Special Taxes") and the Bonds; and

(iv) On October 12, 2015, the City Council adopted its Resolution No. 6301 (the "Resolution of Intention"), declaring its intention to establish the District; and

(v) On November 23, 2015, the City Council adopted its Resolution No. 6308 (the "Resolution of Formation") establishing the District, which, among other things

and in accordance with the Act, designated portions of the District as Improvement Area No. 1 and Improvement Area No. 2, as depicted on the boundary map for the District recorded in Book 87 of the County of San Bernardino Assessment Maps, at page 2, in the County Recorder's Office as Document No. 2015-0465103, on October 27, 2015, which map is hereby incorporated by reference; and

(vi) Pursuant to Section 53314.9 of the Act, the proposal for the District to repay the Deposits from the Special Taxes and/or the Bonds was included in the Resolution of Intention and the Resolution of Formation; and

(vii) The respective Special Taxes for each of Improvement Area No. 1 and Improvement Area No. 2 (each, an "Improvement Area"; and together, the "Improvement Areas") of the District, as proposed by the Resolution of Intention and approved by City Council by the Resolution of Formation subject to the approval of the eligible voters within each Improvement Area, were duly approved by more than two-thirds of the votes cast by the qualified electors of the respective Improvement Areas pursuant to the Act at, respectively, an election held for each Improvement Area on November 23, 2015; and

(viii) The Deposits heretofore made by the Developer pursuant to the Original Deposit Agreement have been fully expended for costs of the City relating to the formation of the District and change proceedings with respect to the Rate and Method of Apportionment of Special Tax for Improvement Area No. 2, and no Bonds have yet been issued by the District for either Improvement Area; and

(ix) On September 20, 2017, Taylor Morrison of California, LLC, a California limited liability company (the "Builder") purchased all of the real property within Improvement Area No. 1 of the District from the Developer, entered into an Assignment and Assumption Agreement (recorded on September 20, 2017 in the Official Records of the San Bernardino County Recorder as Document No. 2017-0389104) with the City's prior written consent of certain rights and obligations of the Developer under that certain development agreement with respect to the Project (recorded on April 28, 2016 in the Official Records of the San Bernardino County Recorder as Document No. 2016-0163837) (the "Development Agreement"), and is currently in the process of building and selling residences within Improvement Area No. 1; and

(x) Pursuant to a Purchase and Sale Agreement, dated as of April 24, 2018, by and between the Developer and the Builder, the Developer and the Builder are currently in escrow with respect to a pending sale by the Developer to the Builder of all of the real property within Improvement Area No. 2 of the District, and in connection with such pending sale and at the request of the Developer and the Builder, the City Council approved on December 10, 2018 an Assignment and Assumption Agreement (to be recorded upon the close of escrow) of certain rights and obligations of the Developer under the Development Agreement; and

(xi) Recently, the Developer and the Builder jointly have requested the City to cause the District to issue Bonds for Improvement Area No. 1 (the "2019 Improvement Area No. 1 Bonds"); and

(xii) The Developer and/or the Builder in the future may request the City to cause the District to issue Bonds for Improvement Area No. 2; and

(xiii) The Developer and the Builder desire to enter into an Amended and Restated Deposit and Reimbursement Agreement (the "Amended Agreement") to set forth their respective allocations, as heretofore agreed to between the Developer and the Builder, of the advance of funds pursuant to Section 53314.9 of the Act to cover the City's costs relating to the issuance of Bonds by the District for Improvement Area No. 1, and to designate a portion of such advanced funds as ineligible for repayment from proceeds of Bonds issued by the District, any Special Taxes, or any other funds of the City or the District; and

(xiv) The City is willing to enter into the Amended Agreement to set forth the respective allocations of the Developer and the Builder of advanced funds as described in the foregoing recitals, incorporate certain provisions in furtherance of the Land Secured Financing Policy, and make certain clarifying amendments recommended by bond counsel in furtherance of applicable federal tax law and the issuance of tax-exempt bonds by the District; and

(xv) The form of the proposed Amended Agreement is on file with the City Clerk of the City (the "City Clerk").

NOW, THEREFORE, the City Council of the City of Upland, for Itself and Acting as the Legislative Body of the Community Facilities District No. 2015-1 (Sycamore Hills) of the City of Upland, County of San Bernardino, State of California, hereby finds, determines and resolves as follows:

Section 1. Recitals. The above recitals, and each of them, are true and correct.

Section 2. Amended and Restated Deposit and Reimbursement Agreement. The Amended Agreement, proposed to be entered into by and among the City, the District, the Developer, and the Builder, in the form presented and on file in the office of the City Clerk, is hereby approved. Each of the Mayor of the City (or in her absence, the Mayor Pro Tem) and the City Manager of the City (each, an "Authorized Officer"), acting singly, is hereby authorized and directed, for and in the name and on behalf of the City and the District, to execute and deliver the Amended Agreement in substantially said form, with such changes therein as the Authorized Officer executing the same may approve in consultation with the City Attorney and Bond Counsel (such approval to be conclusively evidenced by such Authorized Officer's execution and delivery thereof).

Section 3. Appointments of Financing Team. The appointments of Urban Futures, Inc., as municipal advisor; Richards, Watson & Gershon, A Professional Corporation, as bond counsel and disclosure counsel; Willdan Financial Services, as special tax consultant; Harris Realty Appraisal, as appraiser; and Hilltop Securities Inc., as underwriter, in connection with the proposed issuance of the 2019 Improvement Area No. 1 Bonds are hereby approved and affirmed.

Section 4. Other Acts. The Mayor, the Mayor Pro Tem, the City Manager, the Development Services Director, the Finance Officer, and other officers of the City are hereby authorized and directed, jointly and severally, to do any and all things that they may deem necessary or advisable in order to effectuate the purposes of this Resolution and the Amended Agreement, and any such actions previously taken by such officers are hereby ratified and confirmed.

Section 5. Effectiveness. This Resolution shall take effect immediately upon its adoption.

Section 6. Certification. The City Clerk shall certify to the passage and adoption of this resolution and enter it into the book of original resolutions.

PASSED, APPROVED and ADOPTED this 8th day of April, 2019.

\_\_\_\_\_  
Debbie Stone, Mayor

I, Keri Johnson, City Clerk of the City of Upland, do hereby certify that the foregoing Resolution was adopted at a regular meeting of the City Council held on the 8th day of April, 2019, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAINED:

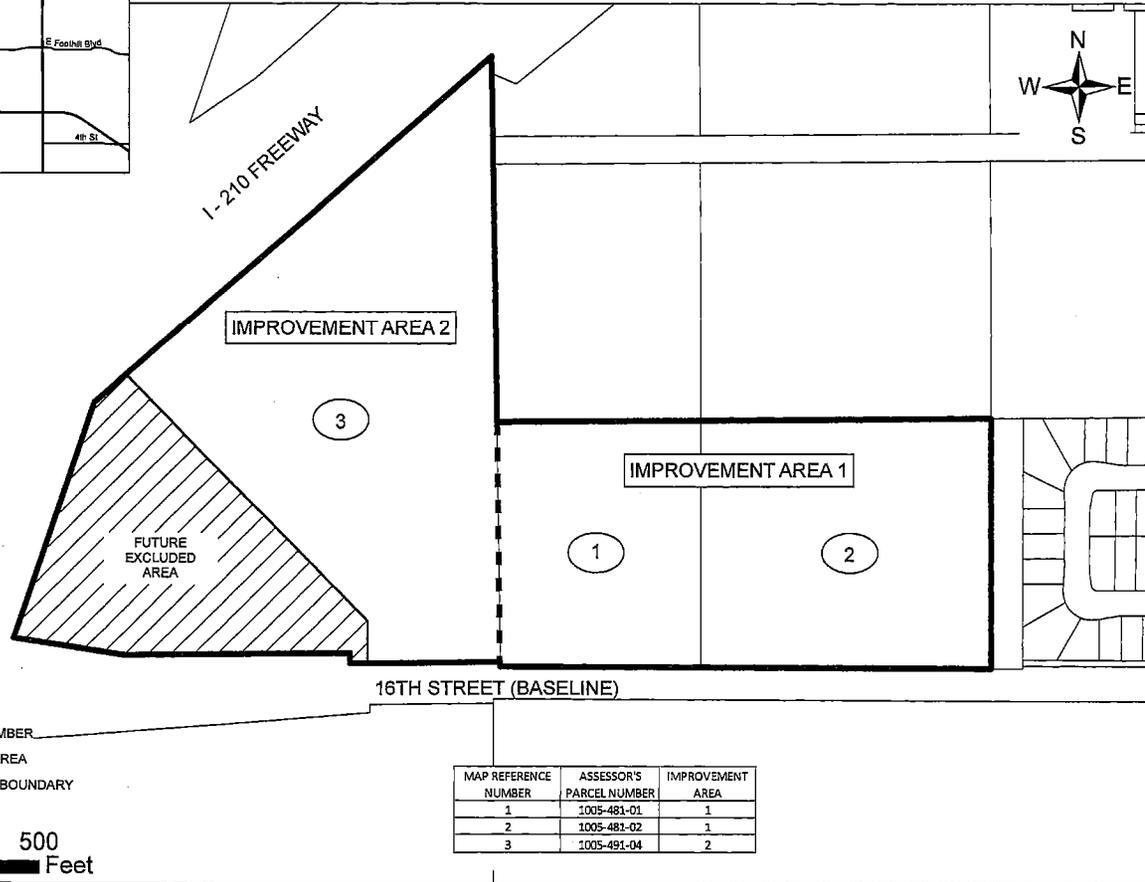
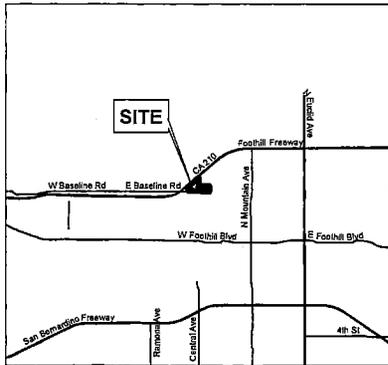
ATTEST:

\_\_\_\_\_  
Keri Johnson, City Clerk

## PROPOSED BOUNDARIES OF COMMUNITY FACILITIES DISTRICT NO. 2015-1 (SYCAMORE HILLS)

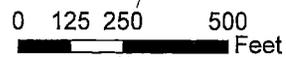
CITY OF UPLAND  
COUNTY OF SAN BERNARDINO  
STATE OF CALIFORNIA

VICINITY MAP



**Legend**

- DISTRICT BOUNDARY
- MAP REFERENCE NUMBER
- FUTURE EXCLUDED AREA
- IMPROVEMENT AREA BOUNDARY



MAP REFERENCE NUMBER	ASSESSOR'S PARCEL NUMBER	IMPROVEMENT AREA
1	1005-481-01	1
2	1005-481-02	1
3	1005-491-04	2

Filed in the office of the City Clerk of City of Upland this 12 day of October, 2015.

*[Signature]*  
City Clerk  
City of Upland

I hereby certify that the within map showing the proposed boundaries of Community Facilities District No. 2015-1 (Sycamore Hills) of the City of Upland, County of San Bernardino, State of California, was approved by the City Council of City of Upland at a regular meeting thereof, held on this 12 day of October, 2015, by its Resolution No. 6301.

*[Signature]*  
City Clerk  
City of Upland

Reference is hereby made to the Assessor Maps of the County of San Bernardino for an exact description of the lines and dimensions of each lot and parcel,

**San Bernardino County Recorder's Certificate**

This map has been filed under Document Number 2015-0465103 this 27<sup>th</sup> day of OCTOBER, 2015, at 4:01 P.M., in Book 87 of Assessment Maps at page 3, at the request of CITY OF UPLAND in the amount of \$ 10,600.

Bob Dutton  
Assessor-Recorder-Clerk  
County of San Bernardino

By: *[Signature]*  
Deputy Recorder

Recorded in Official Records  
County of San Bernardino  
Book: 2015-0465103  
10/27/2015 4:01 PM



**AMENDED AND RESTATED DEPOSIT AND REIMBURSEMENT AGREEMENT**

**City of Upland  
Community Facilities District No. 2015-1**

**THIS AMENDED AND RESTATED DEPOSIT AND REIMBURSEMENT AGREEMENT** (this “Amended Agreement”), dated as of \_\_\_\_\_, 2019, is by and among the **CITY OF UPLAND**, a California municipal corporation (the “City”), **COMMUNITY FACILITIES DISTRICT NO. 2015-1 (SYCAMORE HILLS) OF THE CITY OF UPLAND, COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA** (the “CFD”), **BRAVEPARK PROPERTY LLC**, a Delaware limited liability company (the “Developer”), and **TAYLOR MORRISON OF CALIFORNIA, LLC**, a California limited liability company (the “Builder”).

**RECITALS**

**WHEREAS**, in 2015, the City, for itself and on behalf of the then proposed CFD, and the Developer previously entered into a Deposit and Reimbursement Agreement (the “Original Deposit Agreement”), pursuant to the Mello-Roos Community Facilities Act of 1982 (California Government Code Section 53311 et seq.), as amended (the “Act”), including Section 53314.9 therein; and

**WHEREAS**, the Original Deposit Agreement was entered into in connection with the Developer’s proposed development of certain real property, comprised of parcels known at that time as Assessor’s Parcel Numbers 1005-481-01, 1005-481-02, and a portion of 1005-491-04 (the “Project”), and pursuant to an application submitted by the Developer to the City requesting that the City consider the formation of the CFD, the levy of special taxes (the “Special Taxes”), and the issuance of bonds by or for the CFD (the “Bonds”) under the Act in order to finance certain public improvements and development fees used for public improvements; and

**WHEREAS**, the City was and is, as applicable, willing to pursue the formation of the CFD, levy of Special Taxes, and the issuance of Bonds by or for the CFD and the proposed expenditure of the proceeds thereof, provided that the Developer and/or the Builder provide an advance and deposit of funds with the City to cover the City’s costs relating to the formation of the CFD and issuance of Bonds; and

**WHEREAS**, pursuant to the Original Deposit Agreement and Section 53314.9 of the Act, the Developer agreed to advance and deposit funds with the City to cover the City’s costs relating to the formation of the CFD and issuance of Bonds by or for the CFD, provided that the funds so advanced (collectively, the “Deposits”) are eligible to be reimbursed to the Developer from the proceeds of the Special Taxes levied by the CFD and the Bonds; and

**WHEREAS**, the proposal for the CFD to repay the Deposits from the Special Taxes and/or the Bonds was included in Resolution No. 6301, adopted by the City Council of the City (the “City Council”) on October 12, 2015 (the “Resolution of Intention”) and Resolution No. 6308, adopted by the City Council on November 23, 2015 (the “Resolution of Formation”); and

**WHEREAS**, the respective Special Taxes for each of Improvement Area No. 1 and Improvement Area No. 2 (each, an “Improvement Area”; and together, the “Improvement Areas”) of the CFD, as proposed by the Resolution of Intention and approved by the City Council by the Resolution of Formation subject to the approval of the eligible voters within each Improvement Area, were duly approved by more than two-thirds of the votes cast by the qualified electors of the respective Improvement Areas pursuant to the Act at, respectively, an election held for each Improvement Area on November 23, 2015; and

**WHEREAS**, the Deposits heretofore made by the Developer pursuant to the Original Deposit Agreement have been fully expended for costs of the City relating to the formation of the CFD and change proceedings with respect to the Rate and Method of Apportionment of Special Tax for Improvement Area No. 2, and no Bonds have yet been issued by the CFD for either Improvement Area; and

**WHEREAS**, on September 20, 2017 the Builder purchased all of the real property within Improvement Area No. 1 of the CFD from the Developer, entered into an Assignment and Assumption Agreement (recorded on September 20, 2017 in the Official Records of the San Bernardino County Recorder as Document No. 2017-0389104) with the City’s prior written consent of certain rights and obligations of the Developer under that certain development agreement with respect to the Project (recorded on April 28, 2016 in the Official Records of the San Bernardino County Recorder as Document No. 2016-0163837) (the “Development Agreement”), and is currently in the process of building and selling residences within Improvement Area No. 1; and

**WHEREAS**, recently, the Developer and the Builder jointly have requested the City to cause the CFD to issue Bonds for Improvement Area No. 1; and

**WHEREAS**, the Developer and the Builder desire to enter into this Amended Agreement to set forth their respective allocations, as heretofore agreed to between the Developer and the Builder, of the advance of funds pursuant to Section 53314.9 of the Act to cover the City’s costs relating to the issuance of Bonds by the CFD for Improvement Area No. 1, and to designate a portion of such advanced funds as ineligible for repayment from proceeds of Bonds issued by the CFD, any Special Taxes, or any other funds of the City or the CFD; and

**WHEREAS**, pursuant to a Purchase and Sale Agreement, dated as of April 24, 2018, by and between the Developer and the Builder, the Developer and the Builder are currently in escrow with respect to a pending sale by the Developer to the Builder of all of the real property within Improvement Area No. 2 of the CFD, and in connection with such pending sale and at the request of the Developer and the Builder, the City Council approved on December 10, 2018 an Assignment and Assumption Agreement (to be recorded upon the close of escrow) of certain rights and obligations of the Developer under the Development Agreement; and

**WHEREAS**, the City is willing to enter into this Amended Agreement to set forth the respective allocations of the Developer and the Builder of advanced funds as described in the foregoing Recitals, incorporate certain provisions in furtherance of the City’s Amended and Restated Land Secured Financing Policy for Mello-Roos Community Facilities District Financings as approved by the City Council on October 22, 2018 (the “Land Secured Financing

Policy”), and make certain clarifying amendments recommended by bond counsel in furtherance of applicable federal tax law and the issuance of tax-exempt bonds by the CFD.

**AGREEMENT:**

**NOW, THEREFORE,** for and in consideration of the foregoing and the mutual promises and covenants herein contained, and for other consideration the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

**Section 1.     The Deposit; Additional Advances.**

(a) Pursuant to the Original Deposit Agreement, the Developer (i) in 2015 advanced to and deposited \$90,000 with the City, which amount was used by the City to pay the City’s Initial Costs (as defined in Section 2(a) below) in conducting proceedings for the formation of the CFD; and (ii) in 2018 advanced to and deposited \$55,000 with the City, which amount was used by the City to pay the City’s Initial Costs in conducting change proceedings requested by the Developer with respect to the Rate and Method of Apportionment for Improvement Area No. 2 of the CFD.

(b) As heretofore agreed to between the Developer and the Builder, the Developer and the Builder have allocated a deposit for the City’s estimated Initial Costs in conducting proceedings for the issuance of Bonds for Improvement Area No. 1 of the CFD as follows: \$10,000 by the Builder (the “Builder IA1 Bonds Deposit”), and \$141,650 by the Developer, which amounts the City has heretofore received from the Developer, on behalf of the Builder and itself, respectively, and which amounts shall be used by the City to pay, or reserve for payment or reimbursement to the City of, the City’s Initial Costs in conducting proceedings for the issuance of Bonds for Improvement Area No. 1 of the CFD.

(c) The Developer hereby agrees to advance any additional amounts (each, an “Additional Deposit”) necessary to pay any Initial Costs incurred by the City, in excess of the amounts of the advances and deposits described in Section 1(a) and Section 1(b) above (each individually and together, as the context may require, the “Initial Deposit”), promptly upon written demand by the City Manager or the Finance Officer of the City. The Initial Deposit and any Additional Deposit shall be referred to as the “Deposits” and may be commingled with other funds of the City for purposes of investment and safekeeping, but the City shall at all times maintain records as to the expenditures of the Deposits. Notwithstanding the foregoing, the City Manager may direct City staff and consultants to cease all work related to the formation of the CFD and the issuance of the Bonds until the Additional Deposit so demanded has been received by the City.

**Section 2.     Use of Funds.** The Deposits shall be administered as follows:

(a) City’s Discretion to Draw Upon Deposits to Pay Initial Costs. Subject to any applicable purposes specified in Section 1 above and except as provided in Section 2(f) below with respect to the Builder IA1 Bonds Deposit, the City may draw upon the Deposits from time to time to pay for any costs incurred for any authorized purpose in connection with the formation of the CFD and the issuance of the Bonds, including, without limitation, (i) the fees

and expenses of any consultants to the City engaged in connection with the formation of the CFD and the issuance of the Bonds, including an engineer, special tax consultant, financial advisor, bond counsel, disclosure counsel and any other consultant reasonably deemed necessary or advisable by the City, (ii) the costs of appraisals, market absorption and/or feasibility studies and other reports reasonably deemed necessary or advisable by the City in connection with the formation of the CFD and issuance of the Bonds, (iii) the costs of publication of notices, preparation and mailing of ballots and other costs related to any hearing, election or other action or proceeding undertaken in connection with the formation of the CFD and issuance of the Bonds, (iv) reasonable charges for City staff time incurred in connection with the formation of the CFD and the issuance of the Bonds by the CFD, including a reasonable allocation of City overhead expense related thereto, and (v) any and all other actual costs and expenses incurred by the City in connection with the formation of the CFD and the issuance of the Bonds (collectively, the “Initial Costs”).

(b) Discretionary Payment by City of Initial Costs from City Funds; Handling of Deposits. In lieu of drawing upon the Deposits as provided in Section 2(a) above, the City may in its sole discretion determine to pay all of the Initial Costs from its own monies and hold the Deposits as collateral for reimbursing itself for such Initial Costs until Bonds are issued or a determination is made in the form of a resolution adopted by the City Council as described in Section 2(d) below to terminate proceedings under the Act with respect to the issuance of the Bonds. If the City elects to proceed under this subsection (b) and Bonds are issued, the City shall (i) reimburse itself directly from proceeds of the Bonds for such Initial Costs as the City has paid from its own monies, and (ii) return to the Developer the entire amount of the Deposits (excluding the Builder IA1 Bonds Deposit, which is subject to Section 2(f) below) within ten (10) business days after the date of issuance and delivery of the Bonds. If the City elects to proceed under this subsection (b) and Bonds are not issued, the City shall reimburse itself from the Deposits for such Initial Costs as the City has paid from its own monies, and return any unused portion of the Deposits (excluding the Builder IA1 Bonds Deposit, which is subject to Section 2(f) below) to the Developer in accordance with Section 2(d) below.

(c) Issuance of Bonds; Handling of Deposits. Subject to Section 2(b) above and Section 2(e) below, as applicable, if Bonds are issued under the Act by or for the CFD that are secured by Special Taxes levied upon land within the CFD, the City shall provide for repayment to the Developer, without interest, all amounts charged against the Deposits (excluding the Builder IA1 Bonds Deposit, which is subject to Section 2(f) below) to be made solely from the proceeds of the Bonds and only to the extent otherwise permitted under the Act. On or within ten (10) business days after the date of issuance and delivery of the Bonds, the City shall return the then unexpended portion of the Deposits (excluding the Builder IA1 Bonds Deposit, which is subject to Section 2(f) below) to the Developer, without interest, less an amount equal to any Initial Costs incurred by the City that are subject to payment under Section 2(a) or reimbursement to the City under Section 2(b) above but have not yet been so paid or reimbursed.

(d) Termination of Proceedings to Issue Bonds; Handling of Deposits. If Bonds are not issued, the City shall, within ten (10) business days after the adoption of the resolution stating the intent of the City to terminate proceedings under the Act with respect to the issuance of the Bonds, return the then unexpended portion of the Deposits (excluding the Builder

IA1 Bonds Deposit, which is subject to Section 2(f) below) to the Developer, without interest, less an amount equal to any Initial Costs incurred by the City that are subject to payment under Section 2(a) or reimbursement to the City under Section 2(b) above but have not yet been so paid or reimbursed.

(e) City's Option to Pay Initial Costs from Bond Proceeds; Handling of Deposits. Without limiting the foregoing, any or all of the Initial Costs may at the City's option in its sole discretion be paid directly to the respective payees from proceeds of the Bonds upon the issuance and delivery thereof, with the unexpended Deposits (or unexpended portions thereof, as applicable) to be administered in accordance with the second sentence of Section 2(c) above.

(f) Builder IA1 Bonds Deposit. The City shall draw upon the Builder IA1 Bonds Deposit from time to time solely to pay for Initial Costs consisting of legal costs incurred by the City in connection with this Amended Agreement and prior to any draw on any other Deposits for such Initial Costs. On or within ten (10) business days after this Amended Agreement has been duly approved and executed by each of the City, the CFD, the Developer, and the Builder, the City shall return the then unexpended portion of the Builder IA1 Bonds Deposit to the Builder, without interest, less an amount equal to any such Initial Costs incurred by the City that are subject to payment under Section 2(a) or reimbursement to the City under Section 2(b) above but have not yet been so paid or reimbursed. Notwithstanding any provision of this Amended Agreement to the contrary and pursuant to the Developer's request, the Builder IA1 Bonds Deposit shall not be eligible for repayment to the Builder or the Developer from proceeds of Bonds issued by the CFD, any Special Taxes, or any other funds of the City or the CFD.

### **Section 3. Other Developer and Builder Costs.**

(a) Consultant Costs. Except as provided in Section 2(f) above with respect to the Builder IA1 Bonds Deposit and the Land Secured Financing Policy and subject to that certain Acquisition Agreement, dated as of November 1, 2015, by and between the Developer and the City as it may hereafter be amended or supplemented pursuant to the terms thereof (the "Acquisition Agreement"), nothing contained herein shall prohibit payment or repayment of other costs and expenses of the Developer, or its assignee, incurred in connection with the acquisition and construction of the public improvements and issuance of the Bonds from the proceeds of the Bonds, including but not limited to fees and expenses of legal counsel and/or special tax consultant to the Developer or its assignee. Any such payment or repayment may be made in connection with the acquisition of the public improvements by the City and shall be made, subject to the approval of the City's bond counsel, solely from the proceeds of the Bonds and only to the extent otherwise permitted under the Act and the Land Secured Financing Policy and otherwise provided for, at the reasonable discretion of the City, in the proceedings for the issuance of the Bonds.

(b) Facilities Costs. The City acknowledges that the Developer may seek payment for the cost of certain facilities that will be completed prior to issuance of the Bonds. The City expects to acquire such facilities from the Developer pursuant to the terms and conditions of the Acquisition Agreement. Those facilities (the "Public Facilities") may include,

but are not limited to water, sewer, storm drain, streets, street lighting, traffic signals and associated grading and public development costs and/or fees. The Public Facilities will be placed in service upon their dedication to the City for maintenance, which has not yet occurred.

(c) Labor Code Provisions. Pursuant to Section 1781 of the California Labor Code (“Labor Code”), the City and the CFD hereby state that the construction by the Developer or the Builder, as applicable, of any public improvements required by the Conditions of Approval (as defined hereinbelow) is “public work” (as defined in, and within the meaning of, Section 1720 of the Labor Code) to which Section 1771 of the Labor Code applies. While acknowledging but without expressing any concurrence with the position stated in the foregoing sentence, each of the Developer and the Builder (if and only to the extent the Builder acquires the property in Improvement Area No. 2 from the Developer) hereby agrees that it shall (i) cause the construction of such public improvements to be performed as “public work” to which the City and the CFD assert Section 1771 of the Labor Code applies, and (ii) in furtherance of Section 1781(a)(2)(C) of the Labor Code, comply with all payment bonding requirements of the City with respect to such public improvements, including but not limited to the provision by the Developer or the Builder, as applicable, to the City of a payment bond with respect to each subject construction contract (A) securing with respect to such contract the payment of claims of laborers (including but not limited to the payment of prevailing wages as required by this Section 3(c)), material suppliers, and other persons as provided by law, (B) conforming with the requirements of Sections 9550 and 9554 of the Civil Code of the State of California, and (C) naming the City and the CFD as obligees unto which the Developer or the Builder (as applicable), as principal, and the surety are bound. In the event a contractor to whom the Developer or the Builder awards a subject construction contract provides a payment bond meeting the foregoing requirements and also naming the Developer or the Builder, as applicable, as an additional obligee unto which the contractor, as principal, and the surety are bound, such contractor’s payment bond shall be deemed as the provision by the Developer or the Builder, as applicable, of a payment bond hereunder. Without limiting the foregoing, the Developer agrees to cause any person or entity to whom the Developer sells the property within Improvement Area No. 2 (if not the Builder) to comply with this Section 3(c).

As used in this Amended Agreement, “Conditions of Approval” means, with respect to any portion of the property within Improvement Area No. 2 of the CFD, the conditions of approval of all land use entitlements approved by the City or any other governmental agency and the conditions of the Development Agreement or any subdivision improvement agreement, which conditions must be satisfied in order to develop such property.

Notwithstanding the foregoing, the City, the CFD, the Developer and the Builder agree that (x) this Amended Agreement is not intended to be a public works contract; (y) the subject public improvements are of local and not state-wide concern, and (z) the foregoing shall not in any way imply or be construed to mean that this Amended Agreement or the subject public improvements constitute a public work for any purpose other than to assure compliance with the Labor Code.

**Section 4. Agreement Not Debt or Liability of City.** The Original Deposit Agreement and, as of the dated date hereof, this Amended Agreement shall constitute a debt and liability of the CFD upon its formation. The City shall not be obligated to advance any of its

own funds to pay Initial Costs or any other costs incurred in connection with the issuance of the Bonds. No member of the City Council of the City and no officer, employee or agent of the City shall to any extent be personally liable hereunder.

**Section 5. No Obligation to Form CFD or Issue Bonds.** Each of the Developer and the Builder acknowledges and agrees that formation of the CFD and the issuance of the Bonds shall be in the sole discretion of the City. No provision of the Original Deposit Agreement or, on or subsequent to the dated date hereof, this Amended Agreement shall be construed as an agreement, promise or warranty of the City to form the CFD or issue the Bonds. The provisions of this Amended Agreement shall in no way obligate the City to expend any of its own funds in connection with the CFD.

**Section 6. Accounting.** The Finance Officer of the City shall provide the Developer or, as to the Builder IA1 Bonds Deposit, the Builder with a written accounting of moneys expended under this Amended Agreement, within ten (10) business days of the receipt by the Finance Officer of the City of a written request therefor submitted by an authorized officer of the Developer or the Builder, as applicable. No more than one accounting will be provided in any calendar month, and the cost of providing the accounting shall be charged to, or reimbursed to the City from, the Deposits or proceeds of the Bonds.

**Section 7. Indemnification.** Each of the Developer and the Builder hereby agrees to indemnify, defend (with counsel acceptable to the City), protect and hold harmless the City and the CFD and their respective elective or appointive boards, council members, officers, employees, and agents (the “Indemnified Parties”) from any and all claims, rights, grievances, demands, damages, debts, liabilities, obligations, costs, expenses, causes of action, or damages of any kind or nature, including attorneys’ fees, whether known or unknown, existing or potential, anticipated or unanticipated, or which may hereafter be sustained, arising out of or related to any acts or omissions taken by the Developer’s or the Builder’s respective officers, employees, contractors, and agents with respect to the Original Deposit Agreement and this Amended Agreement, the formation of the CFD, or the issuance of the Bonds, unless and only to the extent the same are caused by the active negligence or willful misconduct of the City, the CFD, or their respective elective or appointive boards, council members, officers, employees, or agents. This hold harmless agreement shall apply to all liability regardless of whether any insurance policies are applicable or insurance proceeds are available to the Developer or the Builder, as applicable. Any such policy limits do not act as a limitation upon the amount of indemnification to be provided by the Developer or the Builder, as applicable.

Each of the Developer and the Builder shall also assume the defense of (with counsel acceptable to the City), indemnify and save harmless the Indemnified Parties from and against any and all actions, damages, claims, rights, grievances, demands, debts, liabilities, obligations, costs, losses or expense of every type or description, including attorneys’ fees, whether known or unknown, existing or potential, anticipated or unanticipated, or which may hereafter be sustained, to which they may be subject by reason of the failure or any alleged failure of the Developer or the Builder, respectively, or its respective successors-in interest to comply with any applicable laws or regulation or standards for the payment of prevailing wages for the construction of any public improvements required by the Conditions of Approval

(including all claims that may be made against the City or the CFD by contractors, subcontractors, or third party claimants pursuant to California Labor Code Section 1781).

The obligations and liabilities of the Developer and the Builder to the Indemnified Parties pursuant to this Section 7 are wholly individual and not joint and several. That is, neither the Developer nor the Builder shall have any obligations or liabilities to the Indemnified Parties as the result of the other party's sole acts, omissions or failures that are covered under this Section 7.

**Section 8. Release.** Except in the event and to the extent of the City's, the CFD's, or their respective elective or appointive boards, council members, officers, employees, and agents, active negligence or willful misconduct, each of the Developer and the Builder hereby fully and irrevocably releases, waives, acquits and discharges the City, the CFD, and their respective elective or appointive boards, council members, officers, employees, and agents of and from any and all actions, damages, claims, rights, grievances, demands, debts, liabilities, obligations, costs, losses or expense of every type or description, including attorney's fees, whether known or unknown, existing or potential, anticipated or unanticipated, or which may hereafter be sustained, arising out of, related to, or having any connection with the Original Deposit Agreement and this Amended Agreement, the formation of the CFD, or the issuance of the Bonds.

In furtherance of the foregoing, the Developer expressly waives, releases, and relinquishes all rights and benefits under California Civil Code Section 1542, including but not limited to any rights to challenge the enforceability of the indemnity set forth in Section 7 above, or any part thereof, and agrees that it is valid and enforceable under all applicable laws. Relative to the foregoing waiver and release, the Developer acknowledges the protections of Civil Code Section 1542, which reads as follows:

“A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.”

By initialing below, the Developer knowingly and voluntarily waives the provisions of Section 1542 or any similar law solely in connection with the waivers and releases contained in this section.

\_\_\_\_\_  
Initials of Authorized  
Developer Representative

In furtherance of the foregoing, the Builder expressly waives, releases, and relinquishes all rights and benefits under California Civil Code Section 1542, including but not limited to any rights to challenge the enforceability of the indemnity set forth in Section 7 above, or any part thereof, and agrees that it is valid and enforceable under all applicable laws. Relative to the foregoing waiver and release, the Builder acknowledges the protections of Civil Code Section 1542, which reads as follows:

“A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.”

By initialing below, the Builder knowingly and voluntarily waives the provisions of Section 1542 or any similar law solely in connection with the waivers and releases contained in this section.

\_\_\_\_\_  
Initials of Authorized  
Builder Representative

\_\_\_\_\_  
Initials of Authorized  
Builder Representative

**Section 9. Attorney’s Fees.** Anything else in this Amended Agreement notwithstanding, if any party brings an action to enforce the terms hereof or declare its rights hereunder, the prevailing party in any such action shall be entitled to its reasonable attorneys’ fees to be paid by the losing party as fixed by the court.

**Section 10. Other Agreements.** The obligations of the Developer and the Builder hereunder shall be that of a party hereto. Nothing herein shall be construed as affecting the City’s, the CFD’s, the Developer’s or the Builder’s rights, or duties to perform their respective obligations, under other agreements, use regulations or subdivision requirements relating to the Project. This Amended Agreement shall not confer any additional rights, or waive any rights given, by any party hereto under any development or other agreement to which they are a party.

**Section 11. Titles and Captions.** Titles and captions are for convenience of reference only and do not define, describe or limit the scope or the intent of this Amended Agreement or of any of its terms. References to section numbers are to sections in this Amended Agreement, unless expressly stated otherwise.

**Section 12. Interpretation.** As used in this Amended Agreement, masculine, feminine or neuter gender and the singular or plural number shall each be deemed to include the others where and when the context so dictates. The word “including” shall be construed as if followed by the words “without limitation.” This Amended Agreement shall be interpreted as though prepared jointly by all parties.

**Section 13. No Waiver.** A waiver by any party of a breach of any of the covenants, conditions or agreements under this Amended Agreement to be performed by any other party shall not be construed as a waiver of any succeeding breach of the same or other covenants, agreements, restrictions or conditions of this Amended Agreement.

**Section 14. Modifications.** Any alteration, change or modification of or to this Amended Agreement, in order to become effective, shall be made in writing and in each instance signed on behalf of each party.

**Section 15. Legal Advice.** Each party represents and warrants to the other the following: they have carefully read this Amended Agreement, and in signing this Amended Agreement, they do so with full knowledge of any right which they may have; they have received independent legal advice from their respective legal counsel as to the matters set forth in this Amended Agreement, or have knowingly chosen not to consult legal counsel as to the matters set forth in this Amended Agreement; and, they have freely signed this Amended Agreement without any reliance upon any agreement, promise, statement or representation by or on behalf of any other party, or their respective agents, employees, or attorneys, except as specifically set forth in this Amended Agreement, and without duress or coercion, whether economic or otherwise.

**Section 16. Cooperation.** Each party agrees to cooperate with the other parties in this transaction and, in that regard, to sign any and all documents which may be reasonably necessary, helpful, or appropriate to carry out the purposes and intent of this Amended Agreement including, but not limited to, releases or additional agreements.

**Section 17. Amendment and Restatement of Original Deposit Agreement.** As of the date of this Amended Agreement first written above, this Amended Agreement amends, restates, and supersedes the Original Deposit Agreement in its entirety.

**Section 18. California Law.** This Amended Agreement shall be governed and construed in accordance with the laws of the State of California. The parties shall be entitled to seek any remedy available at law and in equity.

**Section 19. Severability.** If any party of this Amended Agreement is held to be illegal or unenforceable by the court of competent jurisdiction, the remainder of this Amended Agreement shall be given effect to the fullest extent reasonably possible.

**Section 20. Successors and Assigns.** This Amended Agreement shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto.

**Section 21. Counterparts.** This Amended Agreement may be executed in counterparts, each of which shall be deemed an original and all of which shall constitute but one and the same instrument.

[Signatures on following page]

IN WITNESS WHEREOF, the parties have caused this Amended Agreement to be executed as of the date first written above.

**CITY:**

**CITY OF UPLAND**, a California municipal corporation

By: \_\_\_\_\_  
Jeannette Vagnozzi, City Manager

Attest:

\_\_\_\_\_  
Keri Johnson, City Clerk

**DEVELOPER:**

**BRAVEPARK PROPERTY LLC**, a Delaware limited liability company

By: \_\_\_\_\_  
Name: Steven Vining  
Its: Operating Member Representative

**CFD:**

**COMMUNITY FACILITIES DISTRICT NO. 2015-1 (SYCAMORE HILLS) OF THE CITY OF UPLAND, COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA**, a California community facilities district established under the Mello-Roos Community Facilities Act of 1982

By: \_\_\_\_\_  
Debbie Stone  
Mayor of the City of Upland

Attest:

\_\_\_\_\_  
Keri Johnson  
City Clerk of the City of Upland

**BUILDER:**

**TAYLOR MORRISON OF CALIFORNIA, LLC**, a California limited liability company

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_



## STAFF REPORT

**ITEM NO. 14.B.**

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**DATE:** April 8, 2019  
**TO:** MAYOR AND CITY COUNCIL  
**FROM:** JEANNETTE VAGNOZZI, CITY MANAGER  
**PREPARED BY:** JEANNETTE VAGNOZZI, CITY MANAGER  
**SUBJECT:** AGREEMENT WITH LIBRARY SYSTEMS & SERVICES, LLC FOR CONTINUED OPERATION OF THE UPLAND PUBLIC LIBRARY

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### **RECOMMENDED ACTION**

It is recommended that the City Council approve an agreement with Library Systems and Services, LLC (LS&S) for continued operation of the Upland Public Library, for a period of five (5) years, and direct the City Manager to sign the agreement.

### **GOAL STATEMENT**

The proposed action will support the City's goal to provide quality City services in a fiscally responsible manner.

### **BACKGROUND**

On February 25, 2019, the City Council provided direction to staff to negotiate a new agreement with Library Systems & Services, LLC (LS&S) for continued operation of the City's public library for a period of five years. The agreement maintains the same basic terms and is attached in a lined-out format so the changes can be easily identified.

### **ISSUES/ANALYSIS**

The 2014 LS&S agreement was approved, by the City Council, as a means of cost savings during a period of difficult financial conditions and a very challenging economy. Staff, along with the Library Board, has found that LS&S provides quality services to the Upland community at a cost that is significantly less than if the City were operating the library. No other firms, nationwide, were found to offer such library services.

The following is a summary of changes incorporated in the proposed agreement:

- A new five year term beginning August 1, 2019 and extending through July 31, 2024.
- The option to renegotiate the terms of the agreement should the City experience two consecutive terms of economic downturn. This allows for cost-savings measures to be implemented at the Library as they would be across other City services in the event of economic downturn or recession.
- Freezing the materials budget at current allocation. Previously, an escalator was incorporated to increase the materials annually. Due to the group purchasing rates through LS&S, the current budget is adequate. The library staff is supportive of this action as well.

### **FISCAL IMPACTS**

The proposed agreement includes an operating budget of \$1,234,479 and materials budget of \$165,572. The operating budget will increase by 2.5% annually; however, the materials budget will remain the same. The annual costs will be incorporated into the respective annual budgets.

### **ALTERNATIVES**

Provide alternative direction to staff

### **ATTACHMENTS:**

**LS&S Agreement (red-lined)**

**LS&S Agreement**

AGREEMENT  
FOR PROFESSIONAL CONSULTANT SERVICES

**THIS AGREEMENT** is made and effective as of                     , 2019 between the City of Upland, a municipal corporation ("City") and Library Systems & Services, LLC, a Maryland limited liability company ("Consultant"). In consideration of the mutual covenants and conditions set forth herein, the parties agree as follows:

**1. TERM.**

a. This Agreement shall commence on August 1, 2019, and shall remain and continue in effect until tasks described herein are completed, but in no event later than July 31, 2024 (the "Initial Term"), unless sooner terminated pursuant to the provisions of this Agreement.

b. Either party may terminate this Agreement after twelve (12) calendar months from the date hereof with or without cause by giving the other party six (6) calendar months' written notice of termination

c. At the expiration of the Initial Term, and at the expiration of any subsequent term (if any), Consultant may request City to extend the Agreement for two additional one (1) year terms.

**2. SERVICES.** Consultant shall perform the services and tasks described and set forth in Exhibit A attached hereto and incorporated herein as though set forth in full. Consultant shall complete the tasks according to the schedule of performance which is also set forth in Exhibit A. Consultant may purchase goods for use in the administration and operation of the Library (as defined below). At Consultant's sole discretion, Consultant may select sources of goods. Title to all items purchased by Consultant shall at all times reside in City. If Consultant furnishes any goods to City, Consultant will use good faith efforts to extend the manufacturer's warranty, if any, to City.

**3. PERFORMANCE.** Consultant shall at all times faithfully, competently and to the best of its 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 its obligations under this Agreement. ~~LSSI~~ Consultant warrants that it will perform the Services with at least the care, diligence and expertise generally accepted in the library service industry. **There are no other warranties, express or implied, including warranties of merchantability or fitness for a particular purpose.**

**4. CUSTOMER'S OBLIGATIONS.**

a. City shall make available to Consultant without charge, solely for Consultant's use in performing the services, all properties, facilities, equipment, collections, supplies, records, files and data used or useful in the operation of the Library that are in City's possession, custody or control as of the date hereof. City reserves all ownership rights in such properties and Consultant shall return such properties to City, ordinary wear and tear excepted, at the termination or expiration of this Agreement.

City is responsible for the structure, improvements, maintenance, janitorial services and janitorial supplies, repairs and property insurance at the Library building (except for damage caused by Consultant). This includes the interior and exterior of the structure, all restrooms, electrical, building systems, and the heating and air conditioning system. Consultant shall work with

Consultant staff and City to ensure effective building maintenance by promptly identifying and reporting problems with the facilities.

City is responsible for maintaining the entire Library site, including landscaping and grounds maintenance.

b. City is responsible for providing security services for the Library and surrounding area.

c. City is responsible for payment of utilities at the Library facilities, including electricity, gas, water, waste disposal and recycling, telecommunications and Internet access.

d. City shall be responsible for providing, maintaining and supporting the telecommunications network, servers and computers in the Library, including periodic replacement of aged or obsolete equipment.

e. City shall be responsible for setting all policies that govern the operations of the Library.

f. City shall make available to Consultant without charge adequate space in the Library to develop and implement new revenue generating services, such as services to the business community, retail sales (books, gifts, refreshments, etc.) and other fee-based services, to benefit the community, City and Consultant ("Additional Services"). City will use its best efforts to assist Consultant in the promotion and implementation of these Additional Services. City shall have the final approval of all Additional Services, with such approval to not be unreasonably withheld, conditioned or delayed. Unless otherwise approved by City, the provision of these Additional Services shall not in any way substantially reduce the space or Library services provided prior to the implementation of these Additional Services.

## 5. **PAYMENT.**

a. 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 B, Payment Rates and Schedule, attached hereto and incorporated herein by this reference as though set forth in full (exclusive of any current or future taxes). This amount shall not exceed \$6,699,779 in charges and ~~\$892,057,827,860~~ in library materials for the total Initial Term of the Agreement unless additional payment is approved as provided in this Agreement.

b. If the City realizes a decline in budgeted revenue for two consecutive quarters in the current contract year, Consultant and the City may renegotiate the Total Budget for the remaining months in the current contract year through adjustments to the Materials and Operating Budget.

~~b.c.~~ 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.

The City Manager may approve additional work up to ten percent (10%) of the amount of the Agreement or fifty thousand dollars (\$50,000.00). Any additional work in excess of this amount shall be approved by the City Council.

~~e.d.~~ Consultant shall invoice City prior to each month's service for the monthly amount set forth in Exhibit B. Invoices shall be paid by bank wire transfer or Automated Clearing House (ACH) direct debit to a bank account designated by Consultant on or before the fifth (5th) day of such month (the "Due Date") and shall bear interest at the rate of one and one quarter percent (1¼%) per month if not paid in full by the Due Date. If Consultant has not received payment by the Due Date, it may suspend performance contemplated under this Agreement until full payment has

been received. Consultant shall add to its invoices any current or future taxes (other than Consultant's federal, state or local income tax, business license tax payable to the City, and any personal property tax on property owned by ~~LSSI~~ Consultant levied by the County of San Bernardino) payable by Consultant on account of this Agreement, the services, or City's payments hereunder, except to the extent City furnishes in advance a valid certificate of exemption from such taxes.

**6. EXCLUDED SERVICES.** Notwithstanding any other provision of this Agreement to the contrary, the Consultant shall have no responsibility for and City shall be fully responsible for the following:

- a. Any goods or services, including payroll, that were rendered to City prior to the date hereof.
- b. Unfair labor practices, grievances, or any claims or litigation whatsoever arising out of the hiring and/or firing, layoff, subcontracting, assignment, reassignment or discipline of any Library staff not employed by Consultant at the time of the relevant incident.
- c. Any worker's compensation or other claims arising from injuries sustained prior to the date hereof by any Library staff not employed by Consultant at the time of such injuries.
- d. Any costs of any current or future employee benefits of City employees, including payroll taxes, retirement benefits, voluntary retirement incentives, pension contributions, employee buyouts or other similar programs adopted by City.
- e. Any future increases in wages and salaries mandated by federal, state or local regulations or legislation, which shall be subject to negotiation with the City at the time that regulations or legislation is passed.

**7. DEFAULT OF CONSULTANT.**

- a. 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 and fails to cure the same within thirty (30) days after receipt of written notice thereof, 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.
- b. If the City Manager or his delegate determines that the Consultant is in default in the performance of any of the terms or conditions of this Agreement, it shall serve the Consultant with written notice of the default. The Consultant shall have thirty (30) days after being served 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.** Upon completion of, or in the event of termination of this Agreement, all original documents, designs, drawings, maps, models, computer files containing data generated for the work, surveys, notes, and other documents prepared by Consultant specifically for City in the course of providing the services to be performed pursuant to this Agreement shall at the City's option become the property of the City and may be used, reused or otherwise disposed of by the City without the permission of the Consultant.

**9. INDEMNIFICATION.**

a. The Consultant agrees to defend, indemnify, protect and hold harmless the City, its officers, officials, employees and volunteers from and against any and all claims, demands, losses, defense costs or expenses, including attorney fees and expert witness fees, or liability of any kind or nature which the City, its officers, agents and employees may sustain or incur or which may be imposed upon them for injury to or death of persons, or damage to property, arising out of Consultant's negligent or wrongful acts or omissions arising out of or in any way related to the performance or non-performance of this Agreement, excepting only liability arising out of the negligence of the City.

b. In the event any claim or action is brought against City relating to Consultant's performance or services rendered under this Agreement, Consultant shall render any reasonable assistance and cooperation which City might require.

**10. INSURANCE REQUIREMENTS.** Consultant shall procure and maintain for the duration of this Agreement insurance against claims for injuries to persons or damages to property, which may arise from or in connection with the performance of the work hereunder by the Consultant, its agents, representatives, or employees.

a. **Minimum Scope of Insurance.** Coverage shall be at least as broad as:

- (1) Insurance Services Office Commercial General Liability form No. CG 00 0111 85 or 88.
- (2) Insurance Services Office Business Auto Coverage form CA 00 01 06 92 covering Automobile Liability, code 1 (any auto). If the Consultant owns no automobiles, a non-owned auto endorsement to the General Liability policy described above is acceptable.
- (3) Worker's Compensation insurance as required by the State of California and Employer's Liability Insurance. If the Consultant has no employees while performing under this Agreement, worker's compensation insurance is not required, but Consultant shall execute a declaration that it has no employees.

b. **Minimum Limits of Insurance.** Consultant shall maintain limits no less than:

- (1) General Liability (per occurrence): One million dollars (\$1,000,000) per occurrence for bodily injury, personal injury and property damage; Two million dollars (\$2,000,000) general aggregate; One million dollars (\$1,000,000) Projects and Completed Operations; One million dollars (\$1,000,000) personal/advertising aggregate; One hundred thousand dollars (\$100,000) damages to rented premises; Ten thousand dollars (\$10,000) medical expense.
- (2) Automobile Liability: One million dollars (\$1,000,000) per accident for bodily injury and property damage.
- (3) Worker's Compensation as required by the State of California; Employer's Liability: One million dollars (\$1,000,000) per accident for bodily injury or disease.

c. Deductibles and Self-Insured Retentions. Any deductibles or self-insured retentions must be declared to and approved by the City Manager. At the option of the City Manager, either the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the City, its officers, officials, employees and volunteers; or the Consultant shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses.

d. Other Insurance Provisions. The general liability and automobile liability policies are to contain, or be endorsed to contain, the following provisions:

- (1) The City, its officers, officials, employees and volunteers are to be covered as Additional insured's as respects: liability arising out of activities performed by or on behalf of the Consultant; products and completed operations of the Consultant; premises owned, occupied or used by the Consultant; or automobiles owned, leased, hired or borrowed by the Consultant. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officers, officials, employees or volunteers.
- (2) For any claims related to this project, the Consultant's insurance coverage shall be primary insurance as respects the City, its officers, officials, employees and volunteers. Any insurance or self-insured maintained by the City, its officers, officials, employees or volunteers shall be excess of the Consultant's insurance and shall not contribute with it.
- (3) Any failure to comply with reporting or other provisions of the policies including breaches of warranties shall not affect coverage provided to the City, its officers, officials, employees or volunteers.
- (4) The Consultant'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.
- (5) Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, canceled by either party, reduced in coverage or in limits except after thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to the City.
- (6) Waiver of Subrogation Rights: Consultant shall require the carriers of Commercial General Liability, Automobile Liability and Worker's Compensation to waive all rights of subrogation against the City of Upland, and its officers, employees, agents and volunteers. Such insurance coverage provided shall not prohibit Consultant's employees or agents from waiving the right of subrogation prior to a loss or claim. Consultant hereby waives all rights of subrogation against the City of Upland.

e. Acceptability of Insurers. Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A: VIII, and admitted and licensed to do business in the State of California, unless otherwise acceptable to the City. Self-insurance shall not be considered to comply with these insurance requirements.

f. Verification of Coverage. Consultant shall furnish the City with original endorsements effecting coverage required by this clause. The endorsements are to be signed by a person authorized by that insurer to bind coverage on its behalf. All endorsements are to be received and approved by the City before work commences. As an alternative to the City's forms, the Consultant's insurer may provide complete, certified copies of all required insurance policies, including endorsements effecting the coverage required by these specifications.

g. Property Insurance. City will keep its buildings and their contents insured against loss, cost, damage or expense resulting from fire, explosion or any other casualty in an amount equal to the full replacement cost thereof ("Casualty Insurance"). If any loss, cost, damage or expense resulting from fire, explosion, or any other casualty or occurrence is incurred by City in connection with its buildings or their contents, then City hereby releases Consultant, its owners, officers, employees, agents and volunteers from any liability it may have on account of such loss, cost, damage or expense to the extent of any amount receivable by reason of such Casualty Insurance, and waives any right of subrogation which might otherwise have existed or accrued to any person on account thereof.

## **11. INDEPENDENT CONTRACTOR.**

a. Consultant is and shall at all times remain as to the City a wholly independent contractor. 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, agents, or volunteers 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 whatever against City, or bind City in any manner.

b. No employee benefits shall be available to Consultant or its employees 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 to its employees or agents arising out of performing services hereunder.

c. PERS Eligibility Indemnification: In the event that Consultant or any employee, agent, or subcontractor of Consultant providing services under this Agreement claims or is determined by a court of competent jurisdiction or the California Public Employees Retirement System (PERS) to be eligible for enrollment in PERS as an employee of the City, Consultant shall indemnify, defend, and hold harmless City for the payment of any employee and/or employer contributions for PERS benefits on behalf of Consultant or its employees, agents, or subcontractors, as well as for the payment of any penalties and interest on such contributions, which would otherwise be the responsibility of City.

d. Notwithstanding any other agency, state or federal policy, rule, regulation, law or ordinance to the contrary, Consultant and any of its employees, agents, and subcontractors providing service under this Agreement shall not qualify for or become entitled to, and hereby agree to waive any claims to, any compensation, benefit, or any incident of employment by City, including but not limited to eligibility to enroll in PERS as an employee of City and entitlement to any contribution to be paid by City for employer contribution and/or employee contributions for PERS benefits.

**12. LEGAL RESPONSIBILITIES.** The Consultant shall keep itself informed of all local, State and Federal ordinances, 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.

Consultant is responsible for compliance with the Patient Protection and Affordable Care Act (2010), and City shall not be obligated to provide any health care coverage to Consultant or any of its employees. The Consultant shall at all times observe and comply with all such ordinances, 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. RELEASE OF INFORMATION.**

a. In the performance of this Agreement, Consultant may be exposed to information regarding the identity of City's patrons, City may be exposed to information regarding Consultant's proprietary library management techniques, and either party may be exposed to other information designated in writing by the disclosing party as confidential (collectively, "Confidential Information"). Each party shall: (1) use the same care to protect the other party's Confidential Information from disclosure that such party uses to protect its own information of like importance; (2) limit duplication of Confidential Information to the extent needed to perform this Agreement; and (3) disclose Confidential Information only to employees having a need to know in connection with performance of this Agreement, and who are informed of the contents of this provision prior to disclosure. This provision shall survive termination or expiration of this Agreement; and, on such termination or expiration, each party shall return all Confidential Information, including all copies, to the owner of such information and, if requested, shall certify in writing that all such information has been returned. Because the damage resulting from a breach of this provision would be difficult or impossible to quantify and any remedy at law will not be adequate, in case of such breach, or the threat of such breach, the party whose Confidential Information is threatened to be disclosed shall be entitled to injunctive or other equitable relief. If such confidential information derived from Consultant is requested to be produced by City pursuant to the California Public Records Act, City shall inform Consultant and confer with Consultant concerning any disclosure which may be required by law or any potentially applicable exemption from such disclosure.

b. Nothing in this Agreement confers any license or right to use any trademark, service mark, copyright or other intellectual property right, whether now owned or hereafter developed, of either party.

c. City shall not actively solicit for hire or hire any employee of Consultant during the term of this Agreement or for a period of six (6) months after termination or expiration of this Agreement, unless such employee previously was an employee of City.

d. Consultant shall promptly notify City should Consultant, 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 thereunder or with respect to any project or property located within the City. City retains the right, but has no obligation, to represent Consultant and/or be present at any deposition, hearing or similar proceeding. Consultant agrees to cooperate fully with City and to provide City with the opportunity to review any response to discovery requests provided by Consultant. However, City's right to review any such response does not imply or mean the right by City to control, direct, or rewrite said response.

**14. NOTICES.** Any notices which either party may desire to give to the other party under this Agreement must be in writing and may be given either by (i) personal service, (ii) delivery by a reputable document delivery service, such as but not limited to, Federal Express, that provides a receipt showing date and time of delivery, or (iii) mailing in the United States Mail, certified mail, postage prepaid, return receipt requested, addressed to the address of the party as set forth below or at any other address as that party may later designate by Notice. Notice shall be effective upon delivery to the addresses specified below or on the third business day following deposit with the document delivery service or United States Mail as provided above.

To City: City of Upland  
P.O. Box 460  
Upland, California 91785  
460 North Euclid Avenue  
Upland, California 91785  
Attention: City Manager

To Consultant: Greg Toth, CEO  
2600 Tower Oaks Blvd, Suite 500  
Bethesda, MD 20852  
Email:[greg.toth@lsslibraries.com](mailto:greg.toth@lsslibraries.com)

**15. ASSIGNMENT.** The Consultant shall not assign the performance of this Agreement, nor any part thereof, nor any monies due hereunder, without prior written consent of the City. Upon termination of this Agreement, Consultant's sole compensation shall be payment for actual services performed up to, and including, the date of termination or as may be otherwise agreed to in writing between the City Council and the Consultant.

**16. 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 described in this Agreement.

**17. GOVERNING LAW.** 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. Any litigation concerning this Agreement shall take place in the municipal, superior, or federal district court with geographic jurisdiction over the City of Upland. In the event such litigation is filed by one party against the other to enforce its rights under this Agreement, the prevailing party, as determined by the Court's judgment, shall be entitled to reasonable attorney fees and litigation expenses for the relief granted.

**18. PROHIBITED INTEREST.**

a. No officer, or employee of the City of Upland shall have any financial interest, direct or indirect, in this Agreement, the proceeds thereof, the Consultant, or Consultant's sub-contractors for this project, during his/her tenure or for one year thereafter. The Consultant hereby warrants and represents to the City that no officer or employee of the City of Upland has any interest, whether contractual, non-contractual, financial or otherwise, in this transaction, or in the business of the Consultant or Consultant's sub-contractors on this project. Consultant further agrees to notify the City in the event any such interest is discovered whether or not such interest is prohibited by law or this Agreement.

b. Consultant shall not, directly or indirectly, acquire any interest which will conflict in any manner or degree with the performance of its services hereunder. In this connection, Consultant, its employees and consultants shall make no political contributions to any political campaign or initiative affecting the City, nor should the City make such a request of Consultant to do so.

**19. 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.

**20. AUTHORITY TO EXECUTE THIS AGREEMENT.** The person or persons executing this Agreement on behalf of Consultant warrants and represents that he or she has the authority to execute this Agreement on behalf of the Consultant and has the authority to bind Consultant to the performance of its obligations hereunder.

**21. SEVERABILITY.** If any provision of this Agreement is determined by a court of competent jurisdiction to be unenforceable in any circumstance, such determination shall not affect the validity or enforceability of the remaining terms and provisions hereof or of the offending provision in any other circumstance. Notwithstanding the foregoing, if the value of this Agreement, based upon the substantial benefit of the bargain for any party, is materially impaired, which determination made by the presiding court or arbitrator of competent jurisdiction shall be binding, then both parties agree to substitute such provision(s) through good faith negotiations.

**22. WAIVER.** The delay or failure of either party at any time to require performance or compliance by the other of any of its obligations or agreements shall in no way be deemed a waiver of those rights to require such performance or compliance. No waiver of any provision of this Agreement shall be effective unless in writing and signed by a duly authorized representative of the party against whom enforcement of a waiver is sought. The waiver of any right or remedy in respect to any occurrence or event shall not be deemed a waiver of any right or remedy in respect to any other occurrence or event, nor shall any waiver constitute a continuing waiver.

**23. CONSTRUCTION.** The parties have participated jointly in the negotiation and drafting of this Agreement. In the event an ambiguity or question of intent or interpretation arises with respect to this Agreement, this Agreement shall be construed as if drafted jointly by the parties and in accordance with its fair meaning. There shall be no presumption or burden of proof favoring or disfavoring any party by virtue of the authorship of any of the provisions of this Agreement.

**24. COSTS.** Each party shall bear its own costs and fees incurred in the preparation and negotiation of this Agreement and in the performance of its obligations hereunder except as expressly provided herein.

**25. ATTORNEYS' FEES.** In the event that litigation is brought by any party in connection with this Agreement, the prevailing party shall be entitled to recover from the opposing party all costs and expenses, including reasonable attorneys' fees, incurred by the prevailing party in the exercise of any of its rights or remedies hereunder or the enforcement of any of the terms, conditions, or provisions hereof.

**26. LIMITATION OF LIABILITY.** In no case shall either party be liable for any damages, losses, costs or expenses under or in connection with this Agreement, whether for breach of contract, tort or otherwise, in excess of an amount equal to the lesser of (i) the actual damages suffered by the aggrieved party, or (ii) the charges for the twelve (12) month period (as shown in Exhibit B, as it may be amended) in which such damages were allegedly incurred. In no case shall either party be liable for any punitive, exemplary, incidental, consequential, or special damages arising out of or in connection with this Agreement.

**27. FORCE MAJEURE.** Consultant shall not be liable for any failure or delay in performance of this Agreement due to causes beyond its control, including, but not limited to, strike, war or civil disturbance, weather emergency, or general failure of any necessary supply, service or utility.

\*\*\*

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

CITY OF UPLAND

\_\_\_\_\_  
Jeannette Vagnozzi, City Manager

Attest:

\_\_\_\_\_  
Keri Johnson, City Clerk

Approved As to Form:

\_\_\_\_\_  
James L. Markman, City Attorney

**CONSULTANT**

**LIBRARY SYSTEMS & SERVICES, LLC**

By: \_\_\_\_\_  
Greg Toth  
CEO, LS&S

By: \_\_\_\_\_  
Todd Frager  
CFO, LS&S

(Two Signatures of Corporate Officers Required for Corporations)

## EXHIBIT A

### TASKS TO BE PERFORMED

#### **A. Statement of Work**

Consultant will administer the operations of City's library facilities (collectively, "Library"), including the accounting for, purchase of and payment for payroll services and goods and services from vendors for budgeted supplies, other direct operating expenditures, Library Materials (as defined below and as provided for in Exhibit B) and Capital Items (as defined below) sufficient to operate the Library in accordance with the policies and guidelines approved by City.

Consultant shall provide, by and through its own employees or independent contractors ("Consultant Staff") any labor Consultant deems necessary for the operation of the library. The cost of the Consultant Staff shall be paid by Consultant and is included in the Operating Budget (as defined below). Consultant shall have the sole and absolute right to hire, manage, evaluate and terminate the employment of the Consultant Staff from time to time to perform work under this Agreement. Consultant will provide the appropriate staffing levels to keep the Library open to the public for fifty-two (52) hours per week.

In addition, in the second year of this Agreement, Consultant will ~~develop~~ update the existing long-range plan for the City in cooperation with City, elected and appointed local officials, other community stakeholders and the Consultant Staff ("Plan"). Using current professional standards and practice, the Plan will identify challenges and opportunities for the Consultant Staff and corresponding strategic responses, including specific goals and measurable objectives.

This Plan, when approved by City, will help govern the direction and focus of the Consultant Staff in fulfillment of their mission of providing effective and efficient Library service to meet the personal, professional and lifelong learning needs of the patrons served by the Library.

#### **B. Scope of Work**

1. Governance - Develop and maintain effective working relationships with local staff, elected officials, Library Board members, other appointed officials and community groups such as the Friends of the library.
2. Fiscal Responsibility:
  - a. Develop and maintain effective and efficient financial procedures.
  - b. Review all aspects of Library operation and service for efficiency and cost-effectiveness, while making changes as appropriate.
  - c. Lead preparation of annual operating and capital budget requests.
  - d. Continue to seek innovative means of adding value for City at little or no additional cost, including completing grant applications.
3. Reporting
  - a. Prepare and provide regular reports to City, describing Library activities and recommending changes in policies and operations as necessary and appropriate.
  - b. Prepare and provide timely statistical reports to the City on Library activities.
4. Staff Development and Coaching:
  - a. Support the professional development of all Consultant Staff.

- b. Provide leadership and guidance to maximize Consultant Staff effectiveness in Library operations.
- 5. Public Services:
  - a. Provide prompt, friendly and accurate assistance in the use of the Library.
  - b. Provide prompt and accurate circulation information and reference services.
  - c. Provide requested materials promptly.
- 6. Collections - Provide high quality materials on a wide variety of subjects in varied formats for the community, according to established collection development plans.
- 7. Programming - Provide high quality, effective programs of interest to all major demographic groups in the community.
- 8. Information Technology - Develop short- and long-range plans to address the installation and support of sufficient hardware, software, network, telecommunications and other resources necessary to support the library's mission.
- 9. Marketing - Effectively disseminate information and promote use of the Library, resources and services.
- 10. Facilities - Work with Consultant Staff and local officials to ensure effective building maintenance by promptly identifying and reporting problems with the physical plant.

**C. Library Materials and Materials Handling Fee**

On behalf and for the benefit of City, Consultant will negotiate favorable discounts and prices from Library suppliers for the purchase of all Library materials, which shall include, but not be limited to, books, periodicals, newspapers, microfilms, e-books and other electronic publications, electronic database subscriptions, standing orders, audio and video materials and cases, automated reference services, binding, cataloging and processing costs and the Materials Handling Fee (as defined below) (collectively, "Library Materials"). The responsibility for Library collection development policies will remain with City, and all Library Materials selections will be the responsibility of Consultant. Consultant will place orders with the suppliers and perform the accounting functions related to those orders, including prompt payment of the invoices. In accounting for the cost of the Library Materials, Consultant shall include a fee of five percent (5%) of the cost of the Library Materials ordered ("Materials Handling Fee"). Annually, the Consultant will provide the City with an accounting of the Library Materials purchased.

**D. Excluded Costs**

City shall be responsible for the following:

- (a) Any costs, expenses, damages or losses occurring prior to the Effective Date.
- (b) Any Capital Items, which shall mean any capital acquisitions, improvements or replacements of any of the properties, facilities, equipment, computers, furniture, furnishings, fixtures or leasehold improvements of the Library, except that such Capital Items proposed by Consultant for its benefit shall be approved by City and paid for by Consultant.
- (c) Any amount of costs for unbudgeted repairs, maintenance and/or upkeep of Capital Items owned by City.
- (d) Any increases in the cost of any state or federal tariff items over the rate for such items prevailing as of the date of execution of this Agreement.

EXHIBIT B

PAYMENT RATES AND SCHEDULE

Period	Charges ("Operating Budget")			Minimum Library Materials*
	Yearly	Min Wage**	Monthly	
August 1, 2019 - July 31, 2020	\$1,234,479	\$7,733	\$103,518	\$169,711
August 1, 2020 - July 31, 2021	\$1,265,341	\$27,198	\$107,712	\$173,954
August 1, 2021 - July 31, 2022	\$1,296,975	\$51,732	\$112,392	\$178,303
August 1, 2022 - July 31, 2023	\$1,329,399	\$62,144	\$115,962	\$182,760
August 1, 2023 - July 31, 2024	\$1,362,634	\$62,144	\$118,731	\$187,329

Period	Charges ("Operating Budget")			Minimum Library Materials*
	Yearly	Min Wage**	Monthly	
August 1, 2019 - July 31, 2020	\$ 1,234,479	\$ 7,733	\$ 103,518	\$ 165,572
August 1, 2020 - July 31, 2021	\$ 1,265,341	\$ 27,198	\$ 107,712	\$ 165,572
August 1, 2021 - July 31, 2022	\$ 1,296,974	\$ 51,732	\$ 112,392	\$ 165,572
August 1, 2022 - July 31, 2023	\$ 1,329,399	\$ 62,144	\$ 115,962	\$ 165,572
August 1, 2023 - July 31, 2024	\$ 1,362,634	\$ 62,144	\$ 118,731	\$ 165,572

\*Total cost of Library Materials is not included in the Operating Budget and shall include the Materials Handling Fee. Funding for the Books and Materials will be determined by the City annually. The above amounts reflect the minimum that L&S&SConsultant recommends the City budget for Books and Materials.

\*\*Minimum wage assumes CA state laws that include a minimum wage of \$13 on Jan 1, 2020; \$14 on Jan 1, 2021; and \$15 on Jan 1, 2022. Any increases in the minimum wage mandated by federal, state or local governments following the Effective Date are not included in the above compensation schedule and Customer will be responsible for reimbursing Consultant for such increases.

The Operating Budget is contingent on other existing contractual terms, obligations and responsibilities remaining the same except as expressly noted herein.

Prior to three (3) months before the end of the last Period to which the amount of Charges have been agreed upon, the parties shall begin to negotiate in good faith the amount of Charges that will apply to the next Period, if the Agreement is to be extended. If the parties have not reached such agreement thirty (30) days before the end of such Period, then the new charge for any agreed upon extension period shall be equal to the Charge for the last month of such Period multiplied by twelve (12) or the number of Remaining Months, whichever is less, plus the percentage increase in the Employment Cost Index (ECI) in the immediately preceding twelve (12) month for the census region of the country in which the Library is located, or 2.5%, whichever is greater.

AGREEMENT  
FOR PROFESSIONAL CONSULTANT SERVICES

**THIS AGREEMENT** is made and effective as of \_\_\_\_\_, 2019 between the City of Upland, a municipal corporation ("City") and Library Systems & Services, LLC, a Maryland limited liability company ("Consultant"). In consideration of the mutual covenants and conditions set forth herein, the parties agree as follows:

**1. TERM.**

a. This Agreement shall commence on August 1, 2019, and shall remain and continue in effect until tasks described herein are completed, but in no event later than July 31, 2024 (the "Initial Term"), unless sooner terminated pursuant to the provisions of this Agreement.

b. Either party may terminate this Agreement after twelve (12) calendar months from the date hereof with or without cause by giving the other party six (6) calendar months' written notice of termination

c. At the expiration of the Initial Term, and at the expiration of any subsequent term (if any), Consultant may request City to extend the Agreement for two additional one (1) year terms.

**2. SERVICES.** Consultant shall perform the services and tasks described and set forth in Exhibit A attached hereto and incorporated herein as though set forth in full. Consultant shall complete the tasks according to the schedule of performance which is also set forth in Exhibit A. Consultant may purchase goods for use in the administration and operation of the Library (as defined below). At Consultant's sole discretion, Consultant may select sources of goods. Title to all items purchased by Consultant shall at all times reside in City. If Consultant furnishes any goods to City, Consultant will use good faith efforts to extend the manufacturer's warranty, if any, to City.

**3. PERFORMANCE.** Consultant shall at all times faithfully, competently and to the best of its 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 its obligations under this Agreement. Consultant warrants that it will perform the Services with at least the care, diligence and expertise generally accepted in the library service industry. **There are no other warranties, express or implied, including warranties of merchantability or fitness for a particular purpose.**

**4. CUSTOMER'S OBLIGATIONS.**

a. City shall make available to Consultant without charge, solely for Consultant's use in performing the services, all properties, facilities, equipment, collections, supplies, records, files and data used or useful in the operation of the Library that are in City's possession, custody or control as of the date hereof. City reserves all ownership rights in such properties and Consultant shall return such properties to City, ordinary wear and tear excepted, at the termination or expiration of this Agreement.

City is responsible for the structure, improvements, maintenance, janitorial services and janitorial supplies, repairs and property insurance at the Library building (except for damage caused by Consultant). This includes the interior and exterior of the structure, all restrooms, electrical, building systems, and the heating and air conditioning system. Consultant shall work with

Consultant staff and City to ensure effective building maintenance by promptly identifying and reporting problems with the facilities.

City is responsible for maintaining the entire Library site, including landscaping and grounds maintenance.

b. City is responsible for providing security services for the Library and surrounding area.

c. City is responsible for payment of utilities at the Library facilities, including electricity, gas, water, waste disposal and recycling, telecommunications and Internet access.

d. City shall be responsible for providing, maintaining and supporting the telecommunications network, servers and computers in the Library, including periodic replacement of aged or obsolete equipment.

e. City shall be responsible for setting all policies that govern the operations of the Library.

f. City shall make available to Consultant without charge adequate space in the Library to develop and implement new revenue generating services, such as services to the business community, retail sales (books, gifts, refreshments, etc.) and other fee-based services, to benefit the community, City and Consultant ("Additional Services"). City will use its best efforts to assist Consultant in the promotion and implementation of these Additional Services. City shall have the final approval of all Additional Services, with such approval to not be unreasonably withheld, conditioned or delayed. Unless otherwise approved by City, the provision of these Additional Services shall not in any way substantially reduce the space or Library services provided prior to the implementation of these Additional Services.

## **5. PAYMENT.**

a. 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 B, Payment Rates and Schedule, attached hereto and incorporated herein by this reference as though set forth in full (exclusive of any current or future taxes). This amount shall not exceed \$6,699,779 in charges and \$827,860 in library materials for the total Initial Term of the Agreement unless additional payment is approved as provided in this Agreement.

b. If the City realizes a decline in budgeted revenue for two consecutive quarters in the current contract year, Consultant and the City may renegotiate the Total Budget for the remaining months in the current contract year through adjustments to the Materials and Operating Budget.

c. 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.

The City Manager may approve additional work up to ten percent (10%) of the amount of the Agreement or fifty thousand dollars (\$50,000.00). Any additional work in excess of this amount shall be approved by the City Council.

d. Consultant shall invoice City prior to each month's service for the monthly amount set forth in Exhibit B. Invoices shall be paid by bank wire transfer or Automated Clearing House (ACH) direct debit to a bank account designated by Consultant on or before the fifth (5th) day of such month (the "Due Date") and shall bear interest at the rate of one and one quarter percent (1¼%) per month if not paid in full by the Due Date. If Consultant has not received payment by the Due Date, it may suspend performance contemplated under this Agreement until full payment has

been received. Consultant shall add to its invoices any current or future taxes (other than Consultant's federal, state or local income tax, business license tax payable to the City, and any personal property tax on property owned by Consultant levied by the County of San Bernardino) payable by Consultant on account of this Agreement, the services, or City's payments hereunder, except to the extent City furnishes in advance a valid certificate of exemption from such taxes.

**6. EXCLUDED SERVICES.** Notwithstanding any other provision of this Agreement to the contrary, the Consultant shall have no responsibility for and City shall be fully responsible for the following:

- a. Any goods or services, including payroll, that were rendered to City prior to the date hereof.
- b. Unfair labor practices, grievances, or any claims or litigation whatsoever arising out of the hiring and/or firing, layoff, subcontracting, assignment, reassignment or discipline of any Library staff not employed by Consultant at the time of the relevant incident.
- c. Any worker's compensation or other claims arising from injuries sustained prior to the date hereof by any Library staff not employed by Consultant at the time of such injuries.
- d. Any costs of any current or future employee benefits of City employees, including payroll taxes, retirement benefits, voluntary retirement incentives, pension contributions, employee buyouts or other similar programs adopted by City.
- e. Any future increases in wages and salaries mandated by federal, state or local regulations or legislation, which shall be subject to negotiation with the City at the time that regulations or legislation is passed.

**7. DEFAULT OF CONSULTANT.**

- a. 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 and fails to cure the same within thirty (30) days after receipt of written notice thereof, 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.
- b. If the City Manager or his delegate determines that the Consultant is in default in the performance of any of the terms or conditions of this Agreement, it shall serve the Consultant with written notice of the default. The Consultant shall have thirty (30) days after being served 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.** Upon completion of, or in the event of termination of this Agreement, all original documents, designs, drawings, maps, models, computer files containing data generated for the work, surveys, notes, and other documents prepared by Consultant specifically for City in the course of providing the services to be performed pursuant to this Agreement shall at the City's option become the property of the City and may be used, reused or otherwise disposed of by the City without the permission of the Consultant.

## **9. INDEMNIFICATION.**

a. The Consultant agrees to defend, indemnify, protect and hold harmless the City, its officers, officials, employees and volunteers from and against any and all claims, demands, losses, defense costs or expenses, including attorney fees and expert witness fees, or liability of any kind or nature which the City, its officers, agents and employees may sustain or incur or which may be imposed upon them for injury to or death of persons, or damage to property, arising out of Consultant's negligent or wrongful acts or omissions arising out of or in any way related to the performance or non-performance of this Agreement, excepting only liability arising out of the negligence of the City.

b. In the event any claim or action is brought against City relating to Consultant's performance or services rendered under this Agreement, Consultant shall render any reasonable assistance and cooperation which City might require.

**10. INSURANCE REQUIREMENTS.** Consultant shall procure and maintain for the duration of this Agreement insurance against claims for injuries to persons or damages to property, which may arise from or in connection with the performance of the work hereunder by the Consultant, its agents, representatives, or employees.

a. **Minimum Scope of Insurance.** Coverage shall be at least as broad as:

- (1) Insurance Services Office Commercial General Liability form No. CG 00 0111 85 or 88.
- (2) Insurance Services Office Business Auto Coverage form CA 00 01 06 92 covering Automobile Liability, code 1 (any auto). If the Consultant owns no automobiles, a non-owned auto endorsement to the General Liability policy described above is acceptable.
- (3) Worker's Compensation insurance as required by the State of California and Employer's Liability Insurance. If the Consultant has no employees while performing under this Agreement, worker's compensation insurance is not required, but Consultant shall execute a declaration that it has no employees.

b. **Minimum Limits of Insurance.** Consultant shall maintain limits no less than:

- (1) General Liability (per occurrence): One million dollars (\$1,000,000) per occurrence for bodily injury, personal injury and property damage; Two million dollars (\$2,000,000) general aggregate; One million dollars (\$1,000,000) Projects and Completed Operations; One million dollars (\$1,000,000) personal/advertising aggregate; One hundred thousand dollars (\$100,000) damages to rented premises; Ten thousand dollars (\$10,000) medical expense.
- (2) Automobile Liability: One million dollars (\$1,000,000) per accident for bodily injury and property damage.
- (3) Worker's Compensation as required by the State of California; Employer's Liability: One million dollars (\$1,000,000) per accident for bodily injury or disease.

c. Deductibles and Self-Insured Retentions. Any deductibles or self-insured retentions must be declared to and approved by the City Manager. At the option of the City Manager, either the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the City, its officers, officials, employees and volunteers; or the Consultant shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses.

d. Other Insurance Provisions. The general liability and automobile liability policies are to contain, or be endorsed to contain, the following provisions:

- (1) The City, its officers, officials, employees and volunteers are to be covered as Additional insured's as respects: liability arising out of activities performed by or on behalf of the Consultant; products and completed operations of the Consultant; premises owned, occupied or used by the Consultant; or automobiles owned, leased, hired or borrowed by the Consultant. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officers, officials, employees or volunteers.
- (2) For any claims related to this project, the Consultant's insurance coverage shall be primary insurance as respects the City, its officers, officials, employees and volunteers. Any insurance or self-insured maintained by the City, its officers, officials, employees or volunteers shall be excess of the Consultant's insurance and shall not contribute with it.
- (3) Any failure to comply with reporting or other provisions of the policies including breaches of warranties shall not affect coverage provided to the City, its officers, officials, employees or volunteers.
- (4) The Consultant'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.
- (5) Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, canceled by either party, reduced in coverage or in limits except after thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to the City.
- (6) Waiver of Subrogation Rights: Consultant shall require the carriers of Commercial General Liability, Automobile Liability and Worker's Compensation to waive all rights of subrogation against the City of Upland, and its officers, employees, agents and volunteers. Such insurance coverage provided shall not prohibit Consultant's employees or agents from waiving the right of subrogation prior to a loss or claim. Consultant hereby waives all rights of subrogation against the City of Upland.

e. Acceptability of Insurers. Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A: VIII, and admitted and licensed to do business in the State of California, unless otherwise acceptable to the City. Self-insurance shall not be considered to comply with these insurance requirements.

f. Verification of Coverage. Consultant shall furnish the City with original endorsements effecting coverage required by this clause. The endorsements are to be signed by a person authorized by that insurer to bind coverage on its behalf. All endorsements are to be received and approved by the City before work commences. As an alternative to the City's forms, the Consultant's insurer may provide complete, certified copies of all required insurance policies, including endorsements effecting the coverage required by these specifications.

g. Property Insurance. City will keep its buildings and their contents insured against loss, cost, damage or expense resulting from fire, explosion or any other casualty in an amount equal to the full replacement cost thereof ("Casualty Insurance"). If any loss, cost, damage or expense resulting from fire, explosion, or any other casualty or occurrence is incurred by City in connection with its buildings or their contents, then City hereby releases Consultant, its owners, officers, employees, agents and volunteers from any liability it may have on account of such loss, cost, damage or expense to the extent of any amount receivable by reason of such Casualty Insurance, and waives any right of subrogation which might otherwise have existed or accrued to any person on account thereof.

## **11. INDEPENDENT CONTRACTOR.**

a. Consultant is and shall at all times remain as to the City a wholly independent contractor. 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, agents, or volunteers 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 whatever against City, or bind City in any manner.

b. No employee benefits shall be available to Consultant or its employees 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 to its employees or agents arising out of performing services hereunder.

c. PERS Eligibility Indemnification: In the event that Consultant or any employee, agent, or subcontractor of Consultant providing services under this Agreement claims or is determined by a court of competent jurisdiction or the California Public Employees Retirement System (PERS) to be eligible for enrollment in PERS as an employee of the City, Consultant shall indemnify, defend, and hold harmless City for the payment of any employee and/or employer contributions for PERS benefits on behalf of Consultant or its employees, agents, or subcontractors, as well as for the payment of any penalties and interest on such contributions, which would otherwise be the responsibility of City.

d. Notwithstanding any other agency, state or federal policy, rule, regulation, law or ordinance to the contrary, Consultant and any of its employees, agents, and subcontractors providing service under this Agreement shall not qualify for or become entitled to, and hereby agree to waive any claims to, any compensation, benefit, or any incident of employment by City, including but not limited to eligibility to enroll in PERS as an employee of City and entitlement to any contribution to be paid by City for employer contribution and/or employee contributions for PERS benefits.

**12. LEGAL RESPONSIBILITIES.** The Consultant shall keep itself informed of all local, State and Federal ordinances, 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.

Consultant is responsible for compliance with the Patient Protection and Affordable Care Act (2010), and City shall not be obligated to provide any health care coverage to Consultant or any of

its employees. The Consultant shall at all times observe and comply with all such ordinances, 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. RELEASE OF INFORMATION.**

a. In the performance of this Agreement, Consultant may be exposed to information regarding the identity of City's patrons, City may be exposed to information regarding Consultant's proprietary library management techniques, and either party may be exposed to other information designated in writing by the disclosing party as confidential (collectively, "Confidential Information"). Each party shall: (1) use the same care to protect the other party's Confidential Information from disclosure that such party uses to protect its own information of like importance; (2) limit duplication of Confidential Information to the extent needed to perform this Agreement; and (3) disclose Confidential Information only to employees having a need to know in connection with performance of this Agreement, and who are informed of the contents of this provision prior to disclosure. This provision shall survive termination or expiration of this Agreement; and, on such termination or expiration, each party shall return all Confidential Information, including all copies, to the owner of such information and, if requested, shall certify in writing that all such information has been returned. Because the damage resulting from a breach of this provision would be difficult or impossible to quantify and any remedy at law will not be adequate, in case of such breach, or the threat of such breach, the party whose Confidential Information is threatened to be disclosed shall be entitled to injunctive or other equitable relief. [If such confidential information derived from Consultant is requested to be produced by City pursuant to the California Public Records Act, City shall inform Consultant and confer with Consultant concerning any disclosure which may be required by law or any potentially applicable exemption from such disclosure.](#)

b. Nothing in this Agreement confers any license or right to use any trademark, service mark, copyright or other intellectual property right, whether now owned or hereafter developed, of either party.

c. City shall not actively solicit for hire or hire any employee of Consultant during the term of this Agreement or for a period of six (6) months after termination or expiration of this Agreement, unless such employee previously was an employee of City.

d. Consultant shall promptly notify City should Consultant, 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 thereunder or with respect to any project or property located within the City. City retains the right, but has no obligation, to represent Consultant and/or be present at any deposition, hearing or similar proceeding. Consultant agrees to cooperate fully with City and to provide City with the opportunity to review any response to discovery requests provided by Consultant. However, City's right to review any such response does not imply or mean the right by City to control, direct, or rewrite said response.

**14. NOTICES.** Any notices which either party may desire to give to the other party under this Agreement must be in writing and may be given either by (i) personal service, (ii) delivery by a reputable document delivery service, such as but not limited to, Federal Express, that provides a receipt showing date and time of delivery, or (iii) mailing in the United States Mail, certified mail, postage prepaid, return receipt requested, addressed to the address of the party as set forth below or at any other address as that party may later designate by Notice. Notice shall be effective upon delivery to the addresses specified below or on the third business day following deposit with the document delivery service or United States Mail as provided above.

To City: City of Upland  
P.O. Box 460  
Upland, California 91785  
460 North Euclid Avenue  
Upland, California 91785  
Attention: City Manager

To Consultant: Greg Toth, CEO  
2600 Tower Oaks Blvd, Suite 500  
Bethesda, MD 20852  
Email:[greg.toth@lsslibraries.com](mailto:greg.toth@lsslibraries.com)

**15. ASSIGNMENT.** The Consultant shall not assign the performance of this Agreement, nor any part thereof, nor any monies due hereunder, without prior written consent of the City. Upon termination of this Agreement, Consultant's sole compensation shall be payment for actual services performed up to, and including, the date of termination or as may be otherwise agreed to in writing between the City Council and the Consultant.

**16. 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 described in this Agreement.

**17. GOVERNING LAW.** 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. Any litigation concerning this Agreement shall take place in the municipal, superior, or federal district court with geographic jurisdiction over the City of Upland. In the event such litigation is filed by one party against the other to enforce its rights under this Agreement, the prevailing party, as determined by the Court's judgment, shall be entitled to reasonable attorney fees and litigation expenses for the relief granted.

**18. PROHIBITED INTEREST.**

a. No officer, or employee of the City of Upland shall have any financial interest, direct or indirect, in this Agreement, the proceeds thereof, the Consultant, or Consultant's sub-contractors for this project, during his/her tenure or for one year thereafter. The Consultant hereby warrants and represents to the City that no officer or employee of the City of Upland has any interest, whether contractual, non-contractual, financial or otherwise, in this transaction, or in the business of the Consultant or Consultant's sub-contractors on this project. Consultant further agrees to notify the City in the event any such interest is discovered whether or not such interest is prohibited by law or this Agreement.

b. Consultant shall not, directly or indirectly, acquire any interest which will conflict in any manner or degree with the performance of its services hereunder. In this connection, Consultant, its employees and consultants shall make no political contributions to any political campaign or initiative affecting the City, nor should the City make such a request of Consultant to do so.

**19. 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.

20. **AUTHORITY TO EXECUTE THIS AGREEMENT.** The person or persons executing this Agreement on behalf of Consultant warrants and represents that he or she has the authority to execute this Agreement on behalf of the Consultant and has the authority to bind Consultant to the performance of its obligations hereunder.

21. **SEVERABILITY.** If any provision of this Agreement is determined by a court of competent jurisdiction to be unenforceable in any circumstance, such determination shall not affect the validity or enforceability of the remaining terms and provisions hereof or of the offending provision in any other circumstance. Notwithstanding the foregoing, if the value of this Agreement, based upon the substantial benefit of the bargain for any party, is materially impaired, which determination made by the presiding court or arbitrator of competent jurisdiction shall be binding, then both parties agree to substitute such provision(s) through good faith negotiations.

22. **WAIVER.** The delay or failure of either party at any time to require performance or compliance by the other of any of its obligations or agreements shall in no way be deemed a waiver of those rights to require such performance or compliance. No waiver of any provision of this Agreement shall be effective unless in writing and signed by a duly authorized representative of the party against whom enforcement of a waiver is sought. The waiver of any right or remedy in respect to any occurrence or event shall not be deemed a waiver of any right or remedy in respect to any other occurrence or event, nor shall any waiver constitute a continuing waiver.

23. **CONSTRUCTION.** The parties have participated jointly in the negotiation and drafting of this Agreement. In the event an ambiguity or question of intent or interpretation arises with respect to this Agreement, this Agreement shall be construed as if drafted jointly by the parties and in accordance with its fair meaning. There shall be no presumption or burden of proof favoring or disfavoring any party by virtue of the authorship of any of the provisions of this Agreement.

24. **COSTS.** Each party shall bear its own costs and fees incurred in the preparation and negotiation of this Agreement and in the performance of its obligations hereunder except as expressly provided herein.

25. **ATTORNEYS' FEES.** In the event that litigation is brought by any party in connection with this Agreement, the prevailing party shall be entitled to recover from the opposing party all costs and expenses, including reasonable attorneys' fees, incurred by the prevailing party in the exercise of any of its rights or remedies hereunder or the enforcement of any of the terms, conditions, or provisions hereof.

26. **LIMITATION OF LIABILITY.** In no case shall either party be liable for any damages, losses, costs or expenses under or in connection with this Agreement, whether for breach of contract, tort or otherwise, in excess of an amount equal to the lesser of (i) the actual damages suffered by the aggrieved party, or (ii) the charges for the twelve (12) month period (as shown in Exhibit B, as it may be amended) in which such damages were allegedly incurred. In no case shall either party be liable for any punitive, exemplary, incidental, consequential, or special damages arising out of or in connection with this Agreement.

27. **FORCE MAJEURE.** Consultant shall not be liable for any failure or delay in performance of this Agreement due to causes beyond its control, including, but not limited to, strike, war or civil disturbance, weather emergency, or general failure of any necessary supply, service or utility.

\*\*\*

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

CITY OF UPLAND

\_\_\_\_\_  
Jeannette Vagnozzi, City Manager

Attest:

\_\_\_\_\_  
Keri Johnson, City Clerk

Approved As to Form:

\_\_\_\_\_  
James L. Markman, City Attorney

**CONSULTANT**

**LIBRARY SYSTEMS & SERVICES, LLC**

By: \_\_\_\_\_  
Greg Toth  
CEO, LS&S

By: \_\_\_\_\_  
Todd Frager  
CFO, LS&S

(Two Signatures of Corporate Officers Required for Corporations)

## EXHIBIT A

### TASKS TO BE PERFORMED

#### **A. Statement of Work**

Consultant will administer the operations of City's library facilities (collectively, "Library"), including the accounting for, purchase of and payment for payroll services and goods and services from vendors for budgeted supplies, other direct operating expenditures, Library Materials (as defined below and as provided for in Exhibit B) and Capital Items (as defined below) sufficient to operate the Library in accordance with the policies and guidelines approved by City.

Consultant shall provide, by and through its own employees or independent contractors ("Consultant Staff") any labor Consultant deems necessary for the operation of the library. The cost of the Consultant Staff shall be paid by Consultant and is included in the Operating Budget (as defined below). Consultant shall have the sole and absolute right to hire, manage, evaluate and terminate the employment of the Consultant Staff from time to time to perform work under this Agreement. Consultant will provide the appropriate staffing levels to keep the Library open to the public for fifty-two (52) hours per week.

In addition, in the second year of this Agreement, Consultant will update the existing long-range plan for the City in cooperation with City, elected and appointed local officials, other community stakeholders and the Consultant Staff ("Plan"). Using current professional standards and practice, the Plan will identify challenges and opportunities for the Consultant Staff and corresponding strategic responses, including specific goals and measurable objectives.

This Plan, when approved by City, will help govern the direction and focus of the Consultant Staff in fulfillment of their mission of providing effective and efficient Library service to meet the personal, professional and lifelong learning needs of the patrons served by the Library.

#### **B. Scope of Work**

1. Governance - Develop and maintain effective working relationships with local staff, elected officials, Library Board members, other appointed officials and community groups such as the Friends of the library.
2. Fiscal Responsibility:
  - a. Develop and maintain effective and efficient financial procedures.
  - b. Review all aspects of Library operation and service for efficiency and cost-effectiveness, while making changes as appropriate.
  - c. Lead preparation of annual operating and capital budget requests.
  - d. Continue to seek innovative means of adding value for City at little or no additional cost, including completing grant applications.
3. Reporting
  - a. Prepare and provide regular reports to City, describing Library activities and recommending changes in policies and operations as necessary and appropriate.
  - b. Prepare and provide timely statistical reports to the City on Library activities.
4. Staff Development and Coaching:
  - a. Support the professional development of all Consultant Staff.

- b. Provide leadership and guidance to maximize Consultant Staff effectiveness in Library operations.
5. Public Services:
  - a. Provide prompt, friendly and accurate assistance in the use of the Library.
  - b. Provide prompt and accurate circulation information and reference services.
  - c. Provide requested materials promptly.
6. Collections - Provide high quality materials on a wide variety of subjects in varied formats for the community, according to established collection development plans.
7. Programming - Provide high quality, effective programs of interest to all major demographic groups in the community.
8. Information Technology - Develop short- and long-range plans to address the installation and support of sufficient hardware, software, network, telecommunications and other resources necessary to support the library's mission.
9. Marketing - Effectively disseminate information and promote use of the Library, resources and services.
10. Facilities - Work with Consultant Staff and local officials to ensure effective building maintenance by promptly identifying and reporting problems with the physical plant.

**C. Library Materials and Materials Handling Fee**

On behalf and for the benefit of City, Consultant will negotiate favorable discounts and prices from Library suppliers for the purchase of all Library materials, which shall include, but not be limited to, books, periodicals, newspapers, microfilms, e-books and other electronic publications, electronic database subscriptions, standing orders, audio and video materials and cases, automated reference services, binding, cataloging and processing costs and the Materials Handling Fee (as defined below) (collectively, "Library Materials"). The responsibility for Library collection development policies will remain with City, and all Library Materials selections will be the responsibility of Consultant. Consultant will place orders with the suppliers and perform the accounting functions related to those orders, including prompt payment of the invoices. In accounting for the cost of the Library Materials, Consultant shall include a fee of five percent (5%) of the cost of the Library Materials ordered ("Materials Handling Fee"). Annually, the Consultant will provide the City with an accounting of the Library Materials purchased.

**D. Excluded Costs**

City shall be responsible for the following:

- (a) Any costs, expenses, damages or losses occurring prior to the Effective Date.
- (b) Any Capital Items, which shall mean any capital acquisitions, improvements or replacements of any of the properties, facilities, equipment, computers, furniture, furnishings, fixtures or leasehold improvements of the Library, except that such Capital Items proposed by Consultant for its benefit shall be approved by City and paid for by Consultant.
- (c) Any amount of costs for unbudgeted repairs, maintenance and/or upkeep of Capital Items owned by City.
- (d) Any increases in the cost of any state or federal tariff items over the rate for such items prevailing as of the date of execution of this Agreement.

EXHIBIT B

PAYMENT RATES AND SCHEDULE

	Period	Charges ("Operating Budget")			Minimum
		Yearly	Min Wage**	Monthly	Library
					Materials*
August 1, 2019 - July 31, 2020	\$ 1,234,479	\$ 7,733	\$ 103,518	\$ 165,572	
August 1, 2020 - July 31, 2021	\$ 1,265,341	\$ 27,198	\$ 107,712	\$ 165,572	
August 1, 2021 - July 31, 2022	\$ 1,296,974	\$ 51,732	\$ 112,392	\$ 165,572	
August 1, 2022 - July 31, 2023	\$ 1,329,399	\$ 62,144	\$ 115,962	\$ 165,572	
August 1, 2023 - July 31, 2024	\$ 1,362,634	\$ 62,144	\$ 118,731	\$ 165,572	

\*Total cost of Library Materials is not included in the Operating Budget and shall include the Materials Handling Fee. Funding for the Books and Materials will be determined by the City annually. The above amounts reflect the minimum that Consultant recommends the City budget for Books and Materials.

\*\*Minimum wage assumes CA state laws that include a minimum wage of \$13 on Jan 1, 2020; \$14 on Jan 1, 2021; and \$15 on Jan 1, 2022. Any increases in the minimum wage mandated by federal, state or local governments following the Effective Date are not included in the above compensation schedule and Customer will be responsible for reimbursing Consultant for such increases.

The Operating Budget is contingent on other existing contractual terms, obligations and responsibilities remaining the same except as expressly noted herein.

Prior to three (3) months before the end of the last Period to which the amount of Charges have been agreed upon, the parties shall begin to negotiate in good faith the amount of Charges that will apply to the next Period, if the Agreement is to be extended. If the parties have not reached such agreement thirty (30) days before the end of such Period, then the new charge for any agreed upon extension period shall be equal to the Charge for the last month of such Period multiplied by twelve (12) or the number of Remaining Months, whichever is less, plus the percentage increase in the Employment Cost Index (ECI) in the immediately preceding twelve (12) month for the census region of the country in which the Library is located, or 2.5%, whichever is greater.