

PROFESSIONAL SERVICES REIMBURSEMENT CONTRACT BETWEEN THE CITY  
OF WATSONVILLE AND LONE OAK - WATSONVILLE, L.L.C. FOR  
ENVIRONMENTAL REVIEW OF A PROPOSED PROJECT ON AN ELEVEN ± ACRE  
SITE LOCATED AT APN 018-711-29

This Contract ("Contract") is entered into as of, \_\_\_\_\_, by and between the City of Watsonville, a municipal corporation ("City"), and Lone Oak - Watsonville, L. L. C. ("Developer"), who agree as follows:

1. RECITALS.

This Contract is made with reference to the following facts and circumstances:

WHEREAS, Developer intends to develop certain real property ("Property") located in Watsonville, and

WHEREAS Developer has filed or is about to file applications to develop the Property. The applications consist of a Special Use Permit with Design Review and Environmental Review, and

WHEREAS environmental review has to be conducted under CEQA and in connection therewith, an appropriate environmental document (the "Environmental Document") has to be prepared and reviewed, and

WHEREAS, City does not have an adequate number of employees with sufficient expertise to prepare or review the Environmental Document and related studies, reports and analyses ("the Project"), and does not have sufficient resources to process the Project, and

WHEREAS, City may need to hire a contract environmental consultant for City to process the Project. The work to be performed by such persons and firms in processing the Project is collectively referred to herein as the "Services", and

WHEREAS City believes it is in the public interest for Developer to pay for such Services, and

WHEREAS Developer desires to move forward with the processing of its Project subject to the reimbursement obligations set forth herein.

2. CONTRACT TO PAY FOR SERVICES.

Developer agrees to pay for the Services as provided for in this Contract.

3. COST OF SERVICES.

For the purpose of conducting the Services and providing the Environmental Document, City has received an environmental consulting proposal from MIG, Inc. ("MIG") for \$127,386.00. City shall make the determination as to what type of Environmental Document is required after reviewing studies that are required for the Project.

Within ten (10) business days of execution and delivery of this Contract, Developer agrees to deposit One Hundred and Twenty-Seven Thousand Three Hundred and Eighty-Six Dollars (\$127,386.00) (the "Deposit Amount") with the City to provide funding for the Services. This amount shall be applied solely to pay invoices received from MIG for Services.

City shall provide Developer with a monthly statement of draws against the deposit, accompanied by invoices, time records, or another reasonable back-up therefor.

City shall not exceed the Deposit Amount without Developer's prior written approval. The City shall use reasonable good faith efforts to consult with Developer before amending the scope of Services to be provided by MIG. Developer's obligation to reimburse the City for more than the Deposit Amount shall be contingent upon the City providing Developer with written notice of the amendment of the scope of work to be performed by MIG and the estimated excess costs before starting such extra work. The City shall not incur more than the Deposit Amount without Developer's prior written approval.

For purposes of this section, the City shall be deemed to have consulted with the Developer when the City has provided written notice to the Developer that the City reasonably anticipates that it will incur or has incurred MIG fees exceeding the Deposit Amount. If after consultation, Developer disagrees with City's incurring more than the Deposit Amount, then the Developers sole and exclusive remedy will be to terminate this contract subject to Developer's obligation to reimburse the City for all MIG fees incurred by the City before the date of termination whether or not yet paid by City to MIG, so long as such MIG fees are less than or equal to the Deposit Amount.

If MIG begins work on the Project before execution and delivery of this Contract by all parties, MIG' fees incurred in connection with the Project before execution and delivery will be subject to reimbursement pursuant to this Contract upon execution and delivery of this Contract by all parties and the deposit of funds by Developer, but in no event greater than the Deposit Amount unless otherwise agreed.

#### 4. DEPOSITS.

At any time that City determines in good faith that the sums then held in any deposits are inadequate to pay for the projected Services to be paid from such deposit over the succeeding two (2) month period, Developer shall replenish the relevant deposit with the amount requested by City in writing, which amount shall not exceed Twenty-Five Thousand Dollars (\$25,000) for any particular replenishment, within ten (10) business days of such written request.

Should any deposit not be replenished in the time and amount specified, City may direct that all Services to be paid from the deposit applicable to such Services be halted until such time as such applicable deposit is replenished.

Developer understands and agrees that City will not pay interest to Developer on the deposits, and Developer will not seek interest payments from City.

No later than forty (40) days after the earliest to occur of: (1) final action is taken by City on the Project, (2) Developer notifies the City in writing of its withdrawal of the Project applications, or (3) the Project is otherwise abandoned, City will provide Developer with a final accounting of costs and expenses, accompanied by invoices, time records or other reasonable back-up therefor, which accounting the Developer agrees will be conclusive, in the absence of manifest error. Should the total reimbursement amount required for any Services be less than the total amount deposited by Developer with respect to such Services, City will refund any remaining deposit amount relating to such Services to Developer within forty-five (45) days after determining the final reimbursement amount for such Services.

In the event Developer fails or refuses to make any of the deposits required herein, Developer shall be liable to City for all fees charged to the City for Services actually provided which exceed the amount of the deposit paid by Developer for such Services, and City shall have the right to pursue a breach of contract action against the Developer. Further the prevailing party in any dispute and/or litigation necessary to enforce or interpret this Contract shall be entitled to seek and collect its costs and reasonable attorney's fees from the other party.

5. OTHER COSTS.

Developer acknowledges that the cost of the Services does not include all application, permitting, inspection, or other fees which may be charged by City in connection with the Project. To the extent the fees ordinarily charged by City for projects like the Project related to costs that are not reimbursed under this Contract, such fees shall be separately paid in accordance with the relevant City fee schedule.

6. NO GUARANTEE OF APPROVAL.

Developer acknowledges that its payments and deposits described herein do not mean that the City will approve the Project nor that City staff will make a recommendation in favor of the Project. Even if the Project is not approved, Developer shall remain liable for all costs for Services actually provided concerning the Project.

7. INDEPENDENCE OF CONSULTANTS.

During the term of this Contract, Developer will not directly or indirectly enter or propose to enter any financial or business relationship with any of City's consultants that are working on the Project.

Developer hereby acknowledges and agrees as follows:

- i. City has sole discretion to select which of its employees or independent contractors are assigned to work on Developer's application.
- ii. As between City and Developer, City has sole discretion to direct the work and evaluate the performance of the consultants whom the City hires to work on Developer's application. City retains the right to terminate or replace at any time any consultant who is assigned to work on Developer's application.
- iii. City has sole discretion to determine the amount of compensation paid to consultants hired by City to work on Developer's application.
- iv. City, not Developer, shall pay consultants hired or assigned by City to work on Developer's application from a City account under the exclusive control of City, which is to be funded by Developer as set forth in this Contract.

City and Developer hereby acknowledge and agree that processing of Developer's application is not contingent on the hiring of any specific consultant.

City and Developer hereby acknowledge and agree that Developer's duty to reimburse City is not contingent upon the approval or disapproval of the proposed Project, or upon the result of any action of the City.

Neither Developer nor its officers, employees or agents, shall communicate with MIG during the term of this Contract without prior approval of the City, unless such communication

is initiated by MIG to obtain information about the Project which is needed to prepare the Environmental Document.

8. TERM AND TERMINATION.

Absent a formal withdrawal of the Project application(s), Developer shall not be entitled to terminate this Contract. If Developer does formally withdraw the Project application(s), Developer shall remain liable for all costs for the Services incurred through the date of termination. The term of this Contract shall commence upon the execution and delivery of this Contract by all parties hereto and shall terminate on the earliest to occur of: (a) the City taking final action on the Project; or (b) Developer formally withdrawing its Project applications. The obligation to reimburse shall survive termination of this Contract.

9. DEVELOPER DEFAULT.

Should Developer fail to perform any of its obligations under this Contract, then City may, at its option following prior notice and a reasonable opportunity to cure, pursue any or all the remedies available to it under this Contract, at law or in equity.

Without limiting any other remedy which may be available to it, if Developer fails to perform any of its obligations under this Contract, City may cease performing its obligations under this Contract.

If the Project is approved and any amounts remain owing to City pursuant to this Contract for Services actually performed prior to termination of this Contract, City may withhold permits and/or certificates of occupancy until all such amounts are paid.

10. INDEMNIFICATION.

Developer further agrees that to the fullest extent permitted by law, the Developer shall defend, indemnify, and hold harmless, the City of Watsonville and its officers, employees, volunteers, attorneys and agents (in the aggregate, the "City Indemnitees") from any and all liability, demand, claim, action, or proceeding, whether actual or threatened, including by way of example but not exclusion, proceedings of an administrative or regulatory nature and proceedings that may be associated with alternative dispute resolution (an "Indemnified Claim") brought by third parties against any City Indemnities (including any advisory agency of the City), challenging the validity of any approvals granted for the Project, the Environmental Document concerning the Project, or seeking damages which may arise from this Contract, other than liabilities, demands, claims, actions or proceedings caused by the sole active negligence or willful misconduct of the City or any City Indemnatee. In any defense of any City Indemnitees, City shall have the absolute right to unilaterally select the legal counsel for such City Indemnitees (with the intention of using one law firm to defend all City Indemnitees unless conflicts of interest preclude such joint representation) and any experts or consultants deemed necessary by City in an exercise of City's sole discretion.

City shall promptly render notice to the Developer of the existence of the Indemnified Claim (a "Notice") and Developer shall defend the City Indemnitees at Developer's expense. City shall cooperate fully with Developer in the defense of any Indemnified Claim. In any Notice, City shall estimate the cost of its defense, which shall include but not be limited to actual attorney fees, court costs, expert witnesses and consultant fees, and all other costs that may arise out of, or be incurred by City in the defense of an Indemnified Claim. Upon such Notice, Developer shall

promptly deposit funds equal to the first three (3) months of the Estimated Cost with the City and shall make additional deposits as and when required to fund the further costs of defending the City Indemnitees for such Indemnified Claim. City shall refund, without interest, any unused portion of the deposits once litigation is finally concluded or a dispute is resolved regarding an Indemnified Claim.

11. COMPLIANCE WITH LAW.

Developer will, at its sole cost and expense, comply with all the requirements of all federal, state, and local laws now in force, or which may hereafter be in force, pertaining to this Contract.

12. WAIVER.

Any express or implied waiver of a breach of item of this Contract will not constitute a waiver of any further breach of the same or any other term or condition of this Contract.

13. NOTICES.

Except as otherwise expressly provided by law, all notices or other communications required or permitted by this Contract or by law to be served on or given to either party to this Contract by the other party shall be in writing and will be deemed received on: (i) the day of delivery if delivered by hand, e-mail (with confirmation of receiving party) and fax (both email and fax required for notices delivered by email or fax), or overnight courier service, during regular business hours; or (ii) on the third business day following deposit, with postage prepaid, in the United States Postal Service and addressed to the contracting parties. Name, address, telephone numbers, and email addresses of the Parties are as follows:

<u>City</u>	<u>Developer</u>
City of Watsonville Civic Plaza Building 275 Main Street -4 <sup>th</sup> Floor Watsonville, CA 95076	Lone Oak – Watsonville, L.L.C. Attention: General Counsel 6250 N. River Road, Suite 9000 Rosemont, IL 60018

Either party may change its address for the purpose of this Section by giving written notice of the change to the other party.

14. INTERPRETATION.

This Contract is deemed to have been prepared by all of the parties hereto, and any uncertainty or ambiguity herein shall not be interpreted against the drafter, but rather, if such ambiguity or uncertainty exists, shall be interpreted according to the applicable rules of interpretation of contracts under the law of the State of California.

15. BUSINESS DAY.

For purposes of this Contract, "Business Day" means any day other than a Saturday, Sunday, a federal holiday, or a day on which City Hall for the City of Watsonville is closed for the conduct of regular business.

16. SUCCESSORS.

This Contract shall be binding on and inure to the benefit of the successors and assigns of the respective parties hereto. However, this Contract shall not be assigned by Developer in whole or in part without the prior written consent of City, which consent shall not be unreasonably withheld.

17. GOVERNING LAW.

This Contract has been made in and will be construed in accordance with the laws of the State of California, and exclusive venue for any action involving this Contract will be in Santa Cruz County.

18. PARTIAL BIVALIDITY.

Should any provision of this Contract be held by a court of competent jurisdiction to be either invalid or unenforceable, the remaining provisions of this Contract will remain in effect, unimpaired by the holding.

19. INTEGRATION.

This instrument constitutes the sole agreement between City and Developer respecting the above matters, and correctly sets forth the obligations of City and Developer. Any agreements or representations by City to Developer not expressly set forth in this instrument are void.

20. CONSTRUCTION.

The language of each part of this Contract will be construed simply and according to its fair meaning, and this Contract will never be construed either for or against either party, whether or not that party drafted all or a portion hereof.

21. AUTHORITY/MODIFICATION.

Each party represents and warrants that all necessary action has been taken by such party to authorize the undersigned to execute this Contract on behalf of such party and to engage in the actions of such party described herein. This Contract may be modified solely by written amendment signed by both City and Developer. City's City Manager, or designee, may execute any such amendment on behalf of City.

22. COUNTERPARTS.

This Contract may be executed in any number of counterparts, each of which will be an original, but all of which together will constitute one instrument executed on the same date.

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IN WITNESS WHEREOF the parties hereto have executed this Contract as of the day and year first hereinabove written.

**CITY**

City of Watsonville, a municipal corporation

**DEVELOPER**

Lone Oak - Watsonville, L. L. C.

By \_\_\_\_\_

Tamara Vides, City Manager Pro-  
Tempore

By \_\_\_\_\_

Mike Manfred, Treasurer

ATTEST:

By \_\_\_\_\_

Beatriz Vázquez Flores, City Clerk

APPROVED AS TO FORM:

By \_\_\_\_\_

Samantha W. Zutler, City Attorney