



Town Council Agenda Report

Date: September 8, 2020 Item No. 15

To: Honorable Mayor and Town Council

Subject: TOWN TO ENTER INTO AGREEMENT WITH THE VILLAGE PROPERTY OWNERS BUSINESS ASSESSMENT DISTRICT (PBID) FOR THE REIMBURSEMENT OF CONSULTANT COSTS FOR THE PREPARATION AND REVIEW OF A SPECIFIC PLAN AND ENVIRONMENTAL DOCUMENTS FOR THE APPLE VALLEY VILLAGE

From: Douglas Robertson, Town Manager

Submitted by: Lori Lamson, Assistant Town Manager

Budgeted Item: Yes No N/A

RECOMMENDED ACTION

Direct the Town Manager to enter into attached agreement between the Town of Apple Valley and the Apple Valley Village Property Owners Business Assessment District (PBID) for the purpose of reimbursing the Town for the costs in the preparation and review of a Village Specific Plan and supporting environmental documents.

BACKGROUND & ANALYSIS

On the agenda for this meeting includes the award of contract for the preparation of a Specific Plan and Environmental compliance for the Apple Valley Village. In 2019, the Village Property Owners and Business Improvement District (PBID), submitted a formal request/application to have a Specific Plan prepared for the Village, which would be administered by the Town. In March 2020 the Town Council approved a Request for Proposals to solicit professional planning firms to prepare a proposal to complete this work. The PBID included within their planning budget, the costs for the Specific Plan preparation and review. This agreement would formalize the collaboration between the Town and the PBID on the efforts to complete the Specific Plan and have the PBID assume all related consultant costs.

These costs include the contract award for the consulting firm to complete the work and the legal review of the prepared Environmental Impact Report. Below are the cost breakdowns. Not included in this cost are the administrative costs of Town staff to oversee the preparations of the work by both consultants. Initially, the PBID deposited \$13,365.00 with the formal application for the preparation of the Request for Proposal

and any required administrative processing. To date there is a remaining balance of approximately \$3,000.00 left in this fund, which will continue to go toward staff time on this project. Once this balance is used, in-kind work on this project can be provided by the Town through additional staff time allocated towards the oversight of the project.

Terra Nova Planning and Research, Inc.\$359,000.00
BB&K\$10,000.00

The PBID Board approved the budget and this agreement with the Town to reimburse the Town for the costs of \$369,000.00 at their regular meeting on August 19, 2020.

A Village Specific Plan has been identified for many years as a key component to improving and encouraging cohesive development in the Apple Valley Village. It is identified in the Town’s General Plan under Program 6.C.3 “Future development and redevelopment of The Village shall be governed by a Specific Plan” The responsible parties under this Program are identified as the Village Association, the Planning Commission and the Town Council. Preparation of a Specific Plan for The Village has been planned for many years and through cooperation of the Town and the Village PBID, the commencement of preparation can begin. The proposed schedule is an aggressive 14 month schedule that would have the plan completed by November 2021.

FISCAL IMPACT

In-kind work on this project can be provided by the Town through staff time allocated towards the oversight of the project. To date, the Village PBID has paid the Town a total of \$13,365.00, of which there is a balance of approximately \$3,000.00, which will continue to go toward staff time.

ATTACHMENTS

Attachment A – Reimbursement Agreement between the Town and PBID

REIMBURSEMENT AGREEMENT

Between

TOWN OF APPLE VALLEY

a California general law city

and

THE APPLE VALLEY

**VILLAGE PROPERTY BUSINESS IMPROVEMENT
DISTRICT**

REIMBURSEMENT AGREEMENT

This Reimbursement Agreement (“**Agreement**”) is executed this 8th day of September, 2020, (“Effective Date”) by and between the Town of Apple Valley, a California general law city (the “**Town**”), and The Village Property Business Improvement District (“**Village PBID**”) and together with the Town, occasionally, each a “**Party**” and collectively the “**Parties**”).

RECITALS

This Agreement is made with respect to the following Recitals:

A. The Village PBID with its principal place of business at P.O. Box 1044, Apple Valley, California, 92307, the administrator of the Property Improvement District in the Village of Apple Valley, California (the “**Property**”) located within the Town of Apple Valley, County of San Bernardino, California.

B. The Village PBID proposes to work with the Town to establish a Specific Plan and Environmental Impact Report (EIR) for the Village District (the “**Project**”).

C. The purpose of this Agreement is to facilitate the completion of the Project by establishing the terms and conditions governing the reimbursement of the Town by Village PBID for Costs (as defined in Section 5) incurred by the Town in the selection and hiring of a Consultant to prepare a Specific Plan and Environmental Impact Report for the Village District (“**Purpose**”).

D. The Specific Plan and EIR will be prepared by a professional planning consultant that will be administered and reviewed by the Town. The Village PBID will submit to the Town all necessary applications in furtherance of the Purpose and reimburse the Town for all costs and fees incurred by the Town in processing of a Specific Plan and EIR. .

E. The Town will prepare the Request for Proposals (“**RFPs**”) to engage the services of a Consultant for the Project and publicly distribute said RFPs to firms in the planning/architectural industry.

F. Members of the Village PBID and the Town shall interview qualified and responsive consulting firms in the planning/architectural industry in choosing a firm and recommending approval for hire by the sole discretion of the Town Council of the Town of Apple Valley. Said firm shall include experts for the Project that will collectively prepare the Specific Plan and EIR in a process directed by the Town to meet all necessary planning and environmental requirements under state law, including but not limited to the California Environmental Quality ACT (“**CEQA**”) (codified in Pub. Resources Code, §§ 2100 *et seq.* and its implementing regulations codified in Cal. Code Regs., §§ 15000 *et seq.*)

G. As a condition to the Town's completion of the Project review process, the Village PBID has agreed to reimburse the Town for the Consultants' reasonable Costs (as defined in Section 5) in furtherance of the Purpose of this Agreement in the manner and amounts set forth in this Agreement. The Village PBID's reimbursement of Consultant's costs and expenses under this Agreement will ensure that the Town has the necessary resources to diligently and efficiently complete the Project.

TERMS

NOW, THEREFORE, in consideration of the following mutual promises and agreements, Town and Village PBID agree as follows:

1. Incorporation of Recitals. The Parties agree that the Recitals constitute the factual basis upon which they have entered into this Agreement. The Parties each acknowledge the accuracy of the Recitals and agree that the Recitals are incorporated into this Agreement as though fully set forth at length.

2. Town to Retain Consultants. As a necessary and indispensable part of its fact finding process relating to the review of the Village PBID's Project, the Town shall retain the services of Consultants as set forth in Section 4 to provide advice to the Town as the Town may deem necessary in its reasonable discretion. The contemplated general scopes of work of the Consultants for the Project is attached hereto as Exhibit A, but the Town reserves the right, in its reasonable discretion, to amend the scope of work (pursuant to Section 5) as it deems necessary and appropriate to the Town's proper review and consideration of the Project. The Town will provide Village PBID with written notice of any amended scope of work as set forth in Section 5.

2.1 No Village PBID/Consultant Privity. The Village PBID agrees that, notwithstanding the Village PBID's reimbursement obligations under this Agreement, Consultants shall be engaged as contractors exclusively by the Town and not by the Village PBID. Except for those disclosures required by law, including, without limitation, the Public Records Act (codified in Government Code section 6250 *et seq.*), all conversations, notes, memoranda, correspondence and other forms of communication by and between the Town and its Consultants shall be, to the extent permissible by law, privileged and confidential and not subject to disclosure to the Village PBID. The Village PBID agrees that it shall have no claim to, nor shall it assert any right in any reports, correspondence, plans, maps, drawings, news releases, or any and all other documents or work product produced by the Consultants.

3. Village PBID to Cooperate with Consultants. The Village PBID agrees to cooperate in good faith with the Consultants. The Village PBID agrees that it will instruct its agents, employees, consultants and contractors to reasonably cooperate with the Consultants and to provide all necessary documents or information reasonably requested of them by the Town and/or the Consultants; provided, however, that the foregoing shall not require the disclosure of any documents or information of the Village PBID which is proprietary, confidential, a trade secret, or subject to attorney-client communication, attorney work product or other legal privilege. Notwithstanding the foregoing, Town acknowledges that certain information provided by Village

PBID may be sensitive or proprietary in nature, and, to the extent allowed by law (including, without limitation, the Public Records Act), Town agrees to keep such information confidential.

4. Town's Selection of Consultants. The Town has retained the following as Consultants pursuant to this Agreement, but may retain additional consultants or sub-consultants pursuant to the terms of this Agreement: (1) Terra Nova Planning & Research, Inc. (Planning and Environmental) and (2) Best Best & Krieger LLP (Legal Services). The Town will provide Village PBID with written notice of any additional consultants or sub-consultants engaged within ten (10) days of that engagement; provided, however, any engagement that would result in a Change in Scope (defined in Section 5.3) shall be subject to the terms and conditions of Section 5.

5. Village PBID's Reimbursement of Fees, Costs and Expenditures. The Village PBID shall reimburse the Town for one hundred percent (100%) of the actual fees, costs and other expenditures ("**Costs**") reasonably incurred by the Town in furtherance of the Purpose to Village PBID further understands and agrees that Costs are based upon the rates provided by Consultants attached hereto as Exhibit B.

5.1 Estimated Costs; Deposit Account. The Town has preliminarily reviewed the scope of work required and has estimated the aggregate Costs for all Consultants to be approximately three hundred and sixty nine thousand dollars (\$369,000.00) (the "**Estimated Costs**"). This cost estimate includes the contract between the Town and Terra Nova Planning & Research, Inc. for three hundred and fifty nine thousand Dollars (\$359,000.00) and environmental review by Best Best & Krieger LLP of ten thousand Dollars (\$10,000.00). Notwithstanding the details provided for the Estimated Costs, the Estimated Costs does not include Costs expended by the Town for the Project that were incurred prior to or after the submittal of a formal Specific Plan application. Additional costs for Town staff to process said application and administer oversight of the Consultants, shall be part of the actual costs recovered through the Specific Plan application process. Within forty-five (45) calendar days after the execution of this Agreement, the Village PBID shall submit a deposit in the amount of one hundred thousand Dollars (\$100,000.00) to cover the Estimated Costs, which amount the Town shall separately account for in a Project deposit account (the "**Deposit Account**").

5.2 Replenishment of Deposit. As the Consultants invoice the Town for fees, costs, and expenditures associated with the Project, the Town may draw upon the Deposit Account to make the required payments. At any time that the balance in the Deposit Account drops below ten thousand Dollars (\$10,000.00), the Town may make demand in writing on Village PBID to replenish the Deposit Account to one hundred thousand Dollars (\$100,000.00), and Village PBID shall submit the required amount of funds to Town within forty-five (45) calendar days after having received the Town's written request. In the event that Village PBID fails to make any required deposit within such forty-five (45) day period, then the Town may issue Village PBID a written thirty (30) day notice to cure, and if Village PBID does not cure within thirty (30) days of receiving such notice to cure, Town shall have the right to consider the Project applications as withdrawn and cease processing such applications.

5.3 Excess Costs. The Town shall not exceed the Estimated Costs without consulting with Village PBID regarding the need for additional services that cause the Costs to exceed the Estimated Costs (the "**Excess Costs**"). The Town shall consult with the Village PBID

prior to (a) amending any scope of services to be provided by the Consultants or retaining any additional consultant or sub-consultant that would be reasonably expected to result in Excess Costs or (b) authorizing any work by an existing Consultant reasonably expected to cause that Consultant's fees to exceed the sum set forth for such Consultant in Exhibit B (each a "**Change in Scope**").

The Village PBID's obligation to reimburse the Town for the Excess Costs shall be contingent upon the Town providing Village PBID with written notice of the Change in Scope and the estimated Excess Cost thereof at least ten (10) days prior to the commencement of the work to be performed under such Change in Scope. After the period set forth in the preceding sentence expires, if the Town has not received an objection from Village PBID, Village PBID shall be obligated to pay the Excess Costs in the same manner as the Estimated Costs provided above, including, but not limited to, replenishing the Deposit Account.

If the Village PBID notifies the Town in writing within the time prescribed in this Section, that Village PBID disagrees with the Town's incurring of Excess Costs, then the Village PBID's sole and exclusive remedy will be to terminate this Agreement pursuant to Section 8 of this Agreement, subject to the Village PBID's obligation to reimburse the Town for all Costs incurred by the Town prior to the date of termination, whether or not yet paid by the Town to any Consultants.

5.4 Records. The Town shall maintain accurate records of invoices received from, and payments made to the Consultants in furtherance of the Project, and will provide an accounting of payments made within thirty (30) days after request is made in writing by Village PBID. In the event that excess funds remain in the Deposit Account upon conclusion of the Project, or termination as defined in Sections 6, 7 and 8, and after all final payments to the Consultants have been made, the Town agrees to refund that excess amount, if any, to Village PBID within fifteen (15) days of final payment to the Consultants. Alternatively, if the Consultants' Costs exceed the Estimated Costs and Excess Costs, if any, then Village PBID shall remain obligated to pay for all such Costs. Village PBID shall pay any such amount within fifteen (15) days of demand for payment by Town.

6. Discretionary Approvals. Village PBID and Town understand and agree that Village PBID's applications to Town concerning the Property are subject to the approval, conditional approval or disapproval of the Planning Commission and/or Town Council of the Town. Further, Village PBID and Town understand and agree that some or all of the applications in furtherance of the Project may require findings (including, without limitation, environmental determinations under CEQA) to be made by those legislative bodies, in some instances following duly noticed public hearings. Nothing set forth in this Agreement shall be deemed to require approval or conditional approval of any or all of such land use and other applications by those legislative bodies, notwithstanding Village PBID's undertaking and completion of its obligations under this Agreement.

7. Term. The term of this Agreement shall commence on the Effective Date of this Agreement, and shall terminate on the earlier of the date that: (a) all services required for the Project by Consultants have been completed to the Town's reasonable satisfaction and the Village PBID has satisfied all of its obligations under this Agreement; or (b) Village PBID withdraws the

application(s). For purposes of this Section 7, Village PBID's obligations shall include, but shall not be limited to, its obligation to reimburse the Town for Estimated Costs and Excess Costs in accordance with Section 5. The Village PBID's obligation to reimburse the Town as provided in this Agreement shall survive the termination of this Agreement.

8. Early Termination.

8.1 By Town. The Town may, in its reasonable discretion, terminate this Agreement prior to the term set forth in Section 6, without cost or liability to the Town, if Village PBID: (a) fails to satisfy any obligation of this Agreement within any applicable cure period; or (b) fails to reasonably prosecute its application(s) for the Project; provided that, prior to such termination, Town must provide Village PBID with a thirty (30) day written notice of such termination, which notice shall contain enough information to reasonably inform Village PBID of: (x) the reason for such termination; and (y) what must be done to effectuate a cure, and Village PBID must fail to cure within such thirty (30) day period, or, in the event of a cure that reasonably takes longer than thirty (30) days to complete, fails to commence and diligently prosecute such cure within such thirty (30) day period. In the event of such termination under this Section 8.1, Village PBID shall be deemed to have withdrawn its application(s) submitted in furtherance of the Project.

8.2 By Village PBID. The Village PBID may, in its sole discretion, terminate this Agreement prior to the end of the term set forth in Section 6, upon thirty (30) days' prior written notice to the Town; provided, however, that Village PBID's right to so terminate this Agreement is expressly contingent upon Village PBID satisfying both of the following: (a) Village PBID shall give Town written notice withdrawing its application(s) for the Project; and (b) Village PBID shall satisfy all of its obligations under this Agreement up through the proposed effective date of termination. For purposes of this Section 8.2, Village PBID's obligations shall include, but shall not be limited to, its obligation to reimburse the Town for Estimated Costs and Excess Costs in accordance with Section 5.

8.3 Notification. Within two (2) business days following either the Town's decision to terminate this Agreement or the Town's receipt of written notice indicating the Village PBID's decision to terminate this Agreement, the Town shall notify all Consultants and instruct them to cease work on the Project. Consultants shall also be instructed to bill the Town for any services completed prior to the date of termination.

9. Assignability. This Agreement may not be assigned by either Party without the prior and express written consent of the other Party, which consent shall not be unreasonably withheld, conditioned or delayed. In determining whether to approve a request by the Village PBID to assign this Agreement, the Town may consider, among other things, the proposed assignee's financial status and commitment to the Project. Any attempted assignment of this Agreement not in compliance with the terms of this Agreement shall be null and void and shall confer no rights or benefits upon the assignee. Notwithstanding the foregoing, Village PBID may freely assign this Agreement to any purchaser of the entire Property or to an affiliate of Village PBID's.

10. No Oral Modifications. This Agreement represents the entire understanding of the Town and the Village PBID, and supersedes all other prior or contemporaneous written or oral agreements pertaining to the subject matter of this Agreement. This Agreement may be modified, only by a writing signed by both the authorized representatives of both the Town and the Village PBID. All modifications to this Agreement must be approved by the Town Manager of the Town of Apple Valley.

11. Binding Upon Successors. This Agreement and each of its terms shall be binding upon the Town, the Village PBID and their respective officers, elected officials, employees, agents, contractors, and permitted successors and assigns.

12. Legal Challenges. Nothing herein shall be construed to require Town to defend any third party claims and suits challenging any action taken by the Town with regard to any procedural or substantive aspect of the Town's approval of development of the Property, any required entitlements, the environmental process, or the proposed Project. The Village PBID may, however, in its sole and absolute discretion, appear as a real party in interest in any such third party action or proceeding, and in such event, it and the Town shall defend such action or proceeding and the Village PBID shall be responsible and reimburse the Town for whatever legal fees and expert or other costs, in their entirety, including actual attorneys' fees, which may be incurred by the Town in defense of such action or proceeding. This Town shall have the absolute right to retain such legal counsel as the Town deems necessary and appropriate, and the Village PBID shall reimburse the Town for any and all attorneys' fees and expert or other costs incurred by the Town as a result of such third party action or proceeding. Village PBID may, at any time, notify Town in writing of its decision to terminate such reimbursement obligation and, thereafter, the Town may choose, in its sole discretion, to defend or not defend such third party action or proceeding. In the event that the Town decides not to continue the defense of such third party action or proceeding, Village PBID shall be obligated to reimburse Town for any and all costs, fees, penalties or damages associated with dismissing the action or proceeding. In the event that the Town decides to continue the defense of such third party action or proceeding, Village PBID shall have no further obligation to reimburse Town for its attorney fees and expert or other costs. Notwithstanding the foregoing, the Village PBID shall hold the Town and its Consultants harmless in connection with this Agreement, the Property, and the Project.

13. Attorneys' Fees. In the event that any action or proceeding, including arbitration, is commenced by either the Town or the Village PBID against the other to establish the validity of this Agreement or to enforce any one or more of its terms, the prevailing Party in any such action or proceeding shall be entitled to recover from the other, in addition to all other legal and equitable remedies available to it, its actual attorneys' fees and costs of litigation, including, without limitation, filing fees, service fees, deposition costs, arbitration costs and expert witness fees, including actual costs and attorneys' fees on appeal.

14. Jurisdiction and Venue. This Agreement is to be performed in the Town of Apple Valley, San Bernardino County, California. Any action or proceeding brought relative to this Agreement shall be heard in the appropriate court in the County of San Bernardino, California. The Town and the Village PBID each consent to the personal jurisdiction of the court in any such action or proceeding.

15. Severability. If any term or provision of this Agreement is found to be invalid or unenforceable, the Town and the Village PBID both agree that they would have executed this Agreement notwithstanding the invalidity of such term or provision. The invalid term or provision may be severed from the Agreement and the remainder of the Agreement may be enforced in its entirety.

16. Headings. The headings of each Section of this Agreement are for the purposes of convenience only and shall not be construed to either expand or limit the express terms and language of each Section. References to “Sections” are to sections of this Agreement, unless otherwise specifically provided.

17. Representations of Authority. Each Party signing this Agreement on behalf of a party which is not a natural person hereby represents and warrants to the other Party that all necessary legal prerequisites to that party’s execution of this Agreement have been satisfied and that he or she has been authorized to sign this Agreement and bind the party on whose behalf he or she signs.

18. Exhibits. All references in this Agreement to “Exhibits” shall be construed as though the words “hereby made a part hereof and incorporated herein by this reference” were, in each case, appended thereto.

19. Notices. Notices required under this Agreement shall be sent to the following:

If to Town:

If to the Village PBID:

Town Manager

Town of Apple Valley

Village PBID

Doug Robertson

Email:brt3684@aol.com

Email: drobertson@applevalley.org

Email:kgcpipeline@aol.com

Notices given pursuant to this Agreement shall be deemed received as follows:

- (1) If sent by United States Mail - on the date of receipt by the receiving party.
- (2) If by email - upon transmission and actual receipt by the receiving party.
- (3) If by express courier service or hand delivery - on the date of receipt by the receiving party.

The addresses for notices set forth in this Section 19 may be changed upon written notice of such change to either the Town or the Village PBID, as appropriate.

[SIGNATURES ON FOLLOWING PAGES]

**SIGNATURE PAGE TO
REIMBURSEMENT AGREEMENT**

TOWN OF APPLE VALLEY

a California general law city

By: _____

Town Manager

ATTEST:

By: _____

Town Clerk

APPROVED AS TO FORM:

Town Attorney

THE VILLAGE PROPERTY BUSINESS IMPROVEMENT DISTRICT

By: _____ Print Name: _____

Village PBID

EXHIBIT A

PROPOSAL OF SERVICE FOR CONSULTANTS

TERRA NOVA PLANNING & RESEARCH, INC. (PLANNING)

Any and all planning and environmental services needed for the Project as described in the proposal of service submitted by Terra Nova Planning & Research, Inc. (See Exhibit A-1)

BEST BEST & KRIEGER LLP (LEGAL)

Any and all legal services as needed for the Project, including, but not limited to, review of the environmental documents and related documents and any Town approval documents needed for the Project.

OTHER CONSULTANTS

Any and all other consultants determined by the Town to be reasonably necessary for its review and processing of the Project application(s).