



Staff Report

Date: July 12, 2016

To: City Council Sitting as the Local Reuse Authority

From: Valerie J. Barone, City Manager

Prepared by: Guy S. Bjerke, Director, Community Reuse Planning
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(925) 671-3076

Subject: **Considering approval of an Agreement for Legal Professional Services with Ebbin Moser + Skaggs, L.L.P. in the amount of \$175,000 for work with the Community Reuse Project (Funding will be provided by the Master Developer or a loan to the Local Reuse Authority (LRA) from the General Fund)**

Report in Brief

Staff is recommending that the Local Reuse Authority (LRA) approve an agreement for Legal Professional Services with Ebbin Moser + Skaggs, L.L.P. to authorize the expenditure of up to \$175,000. The term of the agreement is July 1, 2016 – June 30, 2017.

The Ebbin Moser + Skaggs, L.L.P. scope of work includes specialized legal services associated with the Endangered Species Act and the Clean Water Act. The LRA continues to require this specialized legal support for the U.S. Army Corp of Engineers Section 404 permit under the Clean Water Act, Section 7 Consultation with the U.S. Fish and Wildlife Service and other site-wide resource permitting.

The funding will be provided by the Master Developer or through a loan to the LRA from the General Fund that was approved and appropriated as part of the adoption of the FY 2016/2017 budget, depending on the task. The loan will be repaid, with interest, from land sales and leases within the former CNWS. Total funding for Ebbin Moser + Skaggs since 2006, including this agreement is \$840,000. Funding has been provided by the City's former Redevelopment Agency (\$290,000) and General Fund loans to the LRA (\$550,000).

Recommended Action

Staff recommends approving an agreement for Legal Professional Services with Ebbin Moser + Skaggs, L.L.P. in an amount not to exceed \$175,000 and authorizing the City Attorney to execute the agreement on behalf of the City, subject to approval of the City Attorney.

Background

Ebbin Moser + Skaggs, L.L.P. have been providing specialized CEQA and Endangered Species Act legal advice to LRA staff during the development and adoption of the Reuse Plan, development/certification of the Final EIR on the Reuse Plan, adoption of the Concord Reuse Project Area Plan and amendment of the Concord 2030 General Plan. Staff requires these services to continue for preparation of a Section 404 permit under the Clean Water Act with the U.S. Army Corps of Engineers, Section 7 Consultation with U.S. Fish and Wildlife Service, operating and maintenance Agreements for conservation areas with the East Bay Regional Park District (EBRPD), and site-wide resource management permits.

Analysis

The Executive Director of the LRA requests legal services on an “as needed” basis as the site-wide permitting effort progresses.

The law firm of Ebbin Moser + Skaggs, L.L.P. has been successfully providing legal services to the City since 2006. Staff recommends they continue legal support on the Clean Water Act and related state laws administered by the Regional Water Quality Control Board and Department of Fish and Game and the federal Endangered Species Act and Migratory Bird Treaty Act and related state laws administered by the U.S. Fish and Wildlife Service and the California Department of Fish and Wildlife. These services are also required in support of negotiations with the EBRPD over operation of conservation areas within the new regional park.

Specific tasks associated with the Ebbin Moser + Skaggs, L.L.P. scope of work this fiscal year include:

- Provide strategic advice and advocacy for the Master Developer Phase I Entitlement Process
- Assist transactional legal team on completion of an MOA with the East Bay Regional Park District (EBRPD)
- Conclude National Historic Preservation Act consultation (Section 106) with the State
- Serve as lead Counsel for Endangered Species Act (ESA) Consultation (Section 7)
- Support review and completion of United States Army Corps of Engineers (USACOE) site wide 404/401 permits

- Support review and completion of California Department of Fish and Wildlife (CDFW), ESA and Section 1600 permits

Financial Impact

The funding will be provided by the Master Developer or through a loan to the LRA from the General Fund that was approved and appropriated as part of the adoption of the FY 2016/2017 budget, depending on the task. The loan will be repaid, with interest, from land sales and leases within the former CNWS. Total funding for Ebbin Moser + Skaggs since 2006, including this agreement is \$840,000. Funding has been provided by the City's former Redevelopment Agency (\$290,000) and General Fund loans to the LRA (\$550,000).

Public Contact

The City Council Agenda was posted.

Attachments

1. Agreement for Ebbin Moser + Skaggs LLP

1 subconsultants and/or expert witnesses.

2 **2. Term.** The term of this Agreement shall be from the EFFECTIVE DATE, set forth
3 above until June 30, 2017 or unless otherwise terminated by either party in accordance with the terms
4 of this Agreement, subject to available funds.

5 **3. Consideration.** As full consideration for the work to be performed by
6 CONSULTANT, CITY shall pay CONSULTANT based upon the hourly rates for its attorney(s)
7 assigned to assist CITY to be paid upon submission and approval of invoices. The hourly rates are as
8 follows:

9 Partner - \$495 per hour

10 Associates/Senior Counsel/Junior Partners - \$395 per hour

11 CONSULTANT will bill time monthly on a straight hourly basis. CONSULTANT charges
12 clients for actual costs for travel and other extraordinary expenses such as courier services and express
13 mail, but does not separately charge for long-distance telephone calls, copying, postage, etc., adding
14 instead for these itemized charges a four percent (4%) administrative charge to the monthly billing.

15 For each matter or case for which CONSULTANT provides services during the period covered
16 in each monthly billing, invoices shall include a separate cover letter identifying the total amount
17 billed for each matter or case. As these cover letters will be subject to disclosure through the
18 California Public Records Act (California Government Code §§ 6250, *et seq.*), CONSULTANT shall
19 ensure that the case or matter descriptions used therein do not reflect CONSULTANT impressions,
20 conclusions, opinions, or legal research or strategy.

21 The total amount paid to CONSULTANT pursuant to this Agreement shall not exceed One
22 Hundred Seventy-five Thousand Dollars (\$175,000) for fiscal year 2016/2017, without CITY's
23 express written authorization. If requested by CITY, the "not to exceed" amount described in this
24 Paragraph 3 may be increased upon execution of an amendment setting forth the new "not to exceed"
25 amount, all in accordance with Paragraph 14 of this Agreement.

26 **4. Records.** CONSULTANT shall maintain accounting records and other evidence
27 pertaining to the cost incurred and shall make the records available to authorized representatives of
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1 CITY or other governmental agency or district authorized by CITY to inspect such records. These
2 records shall be available at all reasonable times during the Agreement period and for four (4) years
3 from the date of final payment for work performed hereunder.

4 **5. Key Personnel.** All of the services required hereunder shall be performed by
5 CONSULTANT or under his/her/its supervision, and all personnel engaged in the work shall be fully
6 qualified to perform such services. Any change in the key personnel shall be subject to the written
7 approval of CITY. The following are the key personnel for the subject of this Agreement:
8 Shawn Zovod, Esq.

9 **6. CITY-Authorized Representative.** An authorized representative shall represent
10 CITY in all matters pertaining to the services rendered by CONSULTANT under this Agreement. All
11 documents and requests for information shall be submitted through this representative and CITY will
12 cooperate with CONSULTANT in all matters relating to this Agreement in such manner as will result
13 in the performance of such work without delay. The CITY-authorized representative is the City
14 Attorney.

15 **7. Termination.**

16 **A.** Either party may terminate this Agreement at any time, without cause, upon
17 seven (7) days notice of discontinuance and termination of said Agreement given in writing. Such
18 notice shall be sufficient and complete when same is deposited in the United States mail, first class
19 postage prepaid, to the address shown in the paragraph herein concerning notice.

20 **B.** CITY may at any time, at its discretion, abandon or suspend any portion of
21 work to be done under the terms of this Agreement.

22 **C.** In the event of CITY's abandonment or suspension of CONSULTANT's work
23 under this Agreement, or in the event of the termination of this Agreement, CONSULTANT shall stop
24 work at the stage directed by CITY and shall deliver to CITY all reports, pleadings, discovery, and file
25 materials relating to the Savage Arbitration. At the discretion of CITY, CONSULTANT shall also
26 cancel all orders for goods or services connected with this Agreement which have not been delivered
27 or received,
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1 **8. Equal Opportunity Assurance.** During the performance of this Agreement,
2 CONSULTANT agrees as follows:

3 **A.** CONSULTANT will not discriminate against any employee or applicant for
4 employment because of race, sex, creed, physical handicap, color, sexual orientation, or national
5 origin. CONSULTANT will take affirmative action to ensure that employees are treated equally
6 without regard to race, gender, creed, physical handicap(s), color, sexual orientation, or national
7 origin. Such action shall include but not be limited to the following: employment, upgrading,
8 demotion, or transfer; recruitment or recruitment advertising; layoffs and terminations, rates of pay or
9 other forms of compensation; and selection for training, including apprenticeship. CONSULTANT
10 agrees to post, in conspicuous places, available to employees and applicants for employment, notices
11 setting forth the provisions of this nondiscrimination clause.

12 **B.** In the event of CONSULTANT's noncompliance with the nondiscrimination
13 clause of this Agreement, this Agreement may be canceled, terminated, or suspended in whole or in
14 part.

15 **9. Insurance.** CONSULTANT shall, at its own expense, procure and maintain in full
16 force at all times during the term of this Agreement the following insurance:

17 **A. Commercial General Liability Coverage.** CONSULTANT shall maintain
18 commercial general liability insurance with limits of no less than One Million Dollars (\$1,000,000)
19 combined single limit per occurrence or Two Million Dollars (\$2,000,000) aggregate limit for bodily
20 injury, personal injury, and property damage.

21 **B. Automobile Liability Coverage.** CONSULTANT shall maintain automobile
22 liability insurance covering all vehicles used in the performance of this Agreement providing a One
23 Million Dollars (\$1,000,000) combined single limit per occurrence for bodily injury, personal injury,
24 and property damage.

25 **C. Professional Liability Coverage (Errors and Omissions).** CONSULTANT
26 shall maintain professional liability insurance with coverage for all negligent errors, acts or omissions
27 committed by CONSULTANT, its agents and employees in the performance of this Agreement. The
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1 amount of this insurance shall be not less than One Million Dollars (\$1,000,000) on a claims made
2 annual aggregate basis or a combined single limit per occurrence basis.

3 **D. Compliance with State Workers' Compensation Requirements.**

4 CONSULTANT covenants that it will insure itself against liability for Workers' Compensation
5 pursuant to the provisions of California Labor Code §3700, et seq. CONSULTANT shall, at all
6 times, upon demand of the City, furnish proof that Workers' Compensation Insurance is being
7 maintained by it in force and effect in accordance with the California Labor Code. The insurer shall
8 also agree to waive all rights of subrogation against the CITY, its officers, officials, employees and
9 volunteers for losses arising from work performed by CONSULTANT for CITY. This provision
10 shall not apply upon written verification by CONSULTANT that CONSULTANT has no employees.

11 **E. Other Insurance Provisions.** The policies are to contain, or be endorsed to
12 contain the following provisions:

13 **(1) Additional Insured.** CITY, its officers, agents, employees, and
14 volunteers are to be covered as an additional insured as respects: Liability arising out of activities
15 performed by or on behalf of CONSULTANT and operations of CONSULTANT, premises owned,
16 occupied, or used by CONSULTANT. The coverage shall contain no special limitations on the scope
17 or protection afforded to CITY, its officers, officials, employees, or volunteers.

18 Except for worker's compensation and professional liability insurance, the policies mentioned
19 in this subsection shall name CITY as an additional insured and provide for notice of cancellation to
20 CITY. CONSULTANT shall also provide timely and prompt notice to CITY if CONSULTANT
21 receives any notice of cancellation or nonrenewal from its insurer.

22 **(2) Primary Coverage.** CONSULTANT'S insurance coverage shall be
23 primary insurance with respect to CITY, its officers, officials, employees, and volunteers. Any
24 insurance, risk pooling arrangement, or self-insurance maintained by CITY, its officers, officials,
25 employees, or volunteers shall be in excess of CONSULTANT'S insurance and shall not contribute
26 with it.

27 **(3) Reporting Provisions.** Any failure to comply with the reporting
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1 provisions of the policy shall not affect the coverage provided to the CITY, its officers, officials,
2 employees, or volunteers.

3 **(4) Verification of Coverage.** CONSULTANT shall furnish CITY with
4 certificates of insurance and the original endorsements effecting coverage required by this Agreement.
5 The certificates and endorsements for each insurance policy are to be signed by a person authorized by
6 that insurer to bind coverage on its behalf. The aforementioned policies shall be issued by an
7 insurance carrier having a rating of Best A-7 or better which is satisfactory to the City Attorney and
8 shall be delivered to CITY at the time of the execution of this Agreement or before work commences.
9 Such policies and certificates shall be in a form approved by the City Attorney. CITY reserves the
10 right to require complete certified copies of all required insurance policies at any time.

11 **10. Indemnification.** CONSULTANT shall indemnify, defend, and hold harmless CITY
12 against and from any and all claims or suits for damages or injury arising from CONSULTANT's
13 negligence, errors or omissions in the performance of this Agreement, and shall further indemnify,
14 defend, and hold harmless CITY against and from any and all claims or suits arising from any breach
15 or default of any performance of any obligation of CONSULTANT hereunder, and against and formal
16 costs, attorney's fees, expenses, and liabilities related to any claim or any action or proceeding brought
17 within the scope of this indemnification.

18 **11. Independent Contractor.** CONSULTANT is an independent contractor retained by
19 CITY to perform the work described herein. All personnel employed by CONSULTANT, including
20 subcontractors and personnel of said subcontractors approved by CITY, are not and shall not be
21 deemed to be employees of CITY. CONSULTANT and approved subcontractors shall comply with
22 all State and Federal laws pertaining to employment and compensation of their employees or agents,
23 including the provision of Workers' Compensation. CITY shall not, under any circumstances, be
24 liable to CONSULTANT or any person or persons acting for him/her/it for any death, injury, or
25 property destruction or damage received or claimed relating to or stemming from the activities
26 undertaken pursuant to this Agreement.

27 **12. Notice.** All notices required herein shall be sent via First Class U.S. Mail with postage
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1 prepaid thereon to the parties as follows:

2 To CITY: Susanne Meyer Brown, Esq.
3 City Attorney
4 City of Concord
5 1950 Parkside Drive MS/08
6 Concord, CA 94519

7 To CONSULTANT: Shawn Zovod, Esq.
8 Ebbin Moser + Skaggs, LLP
9 550 Montgomery Street, Suite 900
10 San Francisco, CA 94111

11 Notices shall be deemed effectively served upon deposit in the United States Mail.

12 **13. Assignment.** CITY is entering into this Agreement in consideration of the rendition
13 of the services required herein by CONSULTANT. CONSULTANT shall not assign any of the
14 duties, responsibilities, or obligations of this Agreement to any other firm, company, entity, or
15 individual, except with the express written consent of CITY. Nothing set forth in this paragraph shall
16 preclude CONSULTANT from assigning any of the monies due and owing to him/her/it from CITY.

17 **14. Amendment.** This Agreement may be amended, modified, or changed by the parties
18 provided that said amendment, modification, or change is in writing and approved by both parties.

19 **15. Entire Agreement.** This Agreement contains the entire agreement between the
20 parties hereto. No promise, representation, warranty, or covenant not included in the Agreement has
21 been or is relied upon by any party hereto.

22 **IN WITNESS WHEREOF,** the parties have executed this Agreement the day and year
23 written above.

24 **CONSULTANT**

25 By: _____
26 Name: _____
27 Its: _____

CITY OF CONCORD

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By: _____
Susanne Meyer Brown, City Attorney