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MEMORANDUM

To: Fresno Local Agency Formation Commissioners
Mr. Rick Ballantyne, LAFCo Executive Officer

From: Kenneth J. Price
Baker Manock & Jensen, PC
LAFCo Counsel

Re: Third Amended and Restated Professional Services Agreement

Date: October 27, 2009

Attached you will find a proposed Third Amended and Restated Professional Services Agreement (the "Third Amendment") between the Fresno Local Agency Formation Commission (the "Commission") and the County of Fresno (the "County"). While this proposed Third Amendment has been reviewed and revised by the Fresno County Counsel's Office, it has not been approved the County's Administrative Office and it has not yet been considered by the Fresno County Board of Supervisors. It is certainly possible that the County may have additional changes to the Third Amendment.

I am asking for the Commission to approve this Third Amendment and authorize your Chair and Executive Officer to sign it subject to any material modifications proposed by the County. In the event that the County requests revisions that could reasonably be construed as material modifications to the Third Amendment, your staff would take the revised document back to the Commission for your consideration.

On June 15, 2004, the Commission entered into the original Professional Services Agreement with the County, whereby the Commission agreed to pay the County for staff and various services. As part of this agreement, the Commission had the ultimate authority to determine whether or not most of the County provided employees were acceptable to the Commission and the ability to unilaterally remove or reject any employee from LAFCo service with or without cause. The parties executed two amendments to the agreement that, among other things, extended the term of the agreement. The Commission has now taken action to hire its own staff rather than contract with the County for personnel.

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The attached Third Amendment deletes all requirements relating to the County providing personnel to LAFCo. Now, the Commission is solely responsible for hiring and employing its Executive Officer and staff. Furthermore, the Third Amendment eliminates the requirement that the County provide personnel, accounting (including payroll), risk management, and purchasing services for the Commission.

One change of note, the Commission previously contemplated that this Third Amendment would contain a provision that the County Auditor-Controller/Tax Collector would no longer be providing any services for the Commission. However, Government Code section 56381 requires that the County Auditor-Controller/Tax Collector's shall annually apportion the net operating expenses of the Commission, and seek payment (contribution) from appropriate agencies (here, the County and the cities in Fresno County). This is now reflected in Section 2.3.1 of the Third Amendment. However, the County Auditor-Controller/Tax Collector shall not be required to perform any other services (such as audits) for the Commission, unless that office consents and is requested to do so by the Commission.

I will be at the Commission's November's 4, 2009, meeting to address any questions you have about this item.

**THIRD AMENDMENT AND RESTATED
PROFESSIONAL SERVICES AGREEMENT**
by and between the
**COUNTY OF FRESNO and the
FRESNO LOCAL AGENCY FORMATION COMMISSION**

THIS THIRD AMENDMENT AND RESTATED PROFESSIONAL SERVICES AGREEMENT (this "Amended & Restated Agreement") is made and entered this ____ day of _____, 2009, by and between the COUNTY OF FRESNO, a political subdivision of the State of California (the "COUNTY") and the FRESNO LOCAL AGENCY FORMATION COMMISSION, a State mandated independent agency (the "COMMISSION").

RECITALS:

A. Division 3 of Title 5 of the California Government Code (commencing with Government Code § 56000), which is also commonly known as the Cortese-Knox-Herzberg Local Government Reorganization Act of 2003 (the "Act"), gives the COMMISSION the power and duty to appoint and assign personnel and to employ or contract for professional or consulting service to carry out and effect the functions of the COMMISSION.

B. The COUNTY and the COMMISSION entered into that certain Professional Services Agreement (the "Agreement") on the 15th of June, 2004, whereby the COUNTY, among other things, provided staff and certain services to the COMMISSION.

C. The COUNTY and the COMMISSION executed that certain First Amendment to the Professional Services Agreement on the 26th day of June, 2007, whereby the parties agreed to extend the term of the Agreement for an additional ninety (90) days.

D. The COUNTY and the COMMISSION executed that certain Second Amendment to the Professional Services Agreement on the 18th day of September, 2007, whereby the parties agreed to further amend the term of the Agreement, revise certain provisions related to the termination of the Agreement, the parties' obligations to maintain certain insurances, and relieving the COUNTY of the obligation to provide legal services to the COMMISSION.

E. The COUNTY and the COMMISSION desire to further amend and restate the Agreement, as previously amended, whereby, *inter alia*, the COMMISSION would no longer require COUNTY personnel to carryout the affairs of the COMMISSION.

NOW, THEREFORE, in consideration of their mutual promises, covenants, and agreements, the receipt and adequacy of which are hereby acknowledged by the parties, the parties hereto agree as follows:

1. **Amendment to Section 1 COMMISSION'S AUTHORITY AND OBLIGATIONS.** The parties hereby agree to delete Section 1 of the Agreement, as previously amended, in its entirety and replace it with the following:

1.1 Control COMMISSION, acting through its commissioners and alternate commissioners, when applicable, shall exercise control over the assets, operation, and staff of the COMMISSION. COMMISSION shall retain the authority over the powers of and the responsibility for performing the duties vested in COMMISSION by law, including the Act, provided, however, nothing contained in this section 1 shall relieve the COUNTY of, or alter, COUNTY's responsibility to perform its professional services and to provide resources herein according to the terms and conditions hereof.

1.2 Obligations, Relating to County Personnel COMMISSION shall compensate COUNTY, pursuant to section 3 of this Restated & Amended Agreement, for the professional services and resources that COUNTY provides to COMMISSION herein.

2. **Amendment to Section 2 COUNTY's OBLIGATIONS.** The parties hereby agree to delete Section 2 of the Agreement, as previously amended, in its entirety and replace it with the following:

2.1 Provision of Services

COUNTY shall perform those professional services for the COMMISSION and provide those resources to the COMMISSION that are described in this Restated & Amended Agreement. COUNTY's personnel shall exercise the same degree of care that they would in performing the same or similar tasks for the COUNTY in the operation of its affairs under the circumstances, consistent with the COUNTY's general employment policies and practices.

2.2 Personnel

2.2.1 Effective January 11, 2010, the COMMISSION shall be responsible for hiring and employing its Executive Officer and staff, including secretary(ies), analysts, and assistants to the COMMISSION, and that the COUNTY shall no longer have any responsibility whatsoever to provide personnel for the COMMISSION.

2.3 Fiscal Services

2.3.1 The parties hereto acknowledge that the COUNTY's Auditor-Controller/Treasurer-Tax Collector shall annually apportion the net operating expenses of the COMMISSION, and seek payment from the appropriate agencies, pursuant to Government Code section 56381, and that the COUNTY's Auditor-Controller/Treasurer-Tax Collector will recover his or her administrative costs for performing such functions as provided under such statute.

2.3.2 COUNTY's Auditor-Controller/Treasurer-Tax Collector may provide certain auditing and financial services to the COMMISSION upon COMMISSION's request, provided, however, the provision of such additional services are at the discretion of the COUNTY's Auditor-Controller/Treasurer-Tax Collector and will only be performed upon written request by the COMMISSION, and written confirmation thereof by the COUNTY's

Auditor-Controller/Treasurer-Tax Collector, subject in all instances to the terms and conditions of this Restated & Amended Agreement.

2.4 Miscellaneous Professional Services

2.4.1 For any other professional services, functions or duties that COUNTY departments normally provide to or perform for the COUNTY, COUNTY, through the County Administrative Office, shall provide the same to COMMISSION in the same fashion and at the same level as for COUNTY departments, upon COMMISSION's request. Without limiting the generality of the foregoing, the following services are examples.

2.4.1.1 Assessor-Recorder services (e.g., to review maps and legal descriptions for maps and to record documents with the Office of the County Recorder);

2.4.1.2 Computer and Information Technology services (e.g., provision and maintenance of computer hardware, software, and related services, including e-mail and Internet access);

2.4.1.3 Election Office services (e.g., determining whether individuals are registered voters);

2.4.1.4 Planning services (e.g., electronic land information mapping, preparing mailing lists of property owners and registered voters); and

2.4.1.5 Communications services (e.g., telephone services).

3. Amendment of Section 3 COMPENSATION. The parties hereby agree to delete Section 3 of the Agreement, as previously amended, in its entirety and replace it with the following:

3.1 COMMISSION shall compensate COUNTY for services performed under this Restated & Amended Agreement and shall reimburse COUNTY for any out of pocket expenses or other expenses directly attributable to providing such services.

COUNTY's charges for services to be performed shall be deemed to include the cost of any and all expenses incidental to the performance of services herein, including, but not limited to, office overhead, equipment, and supplies and any other indirect costs and expenses.

Compensation for any services or reimbursement for expenses shall include any applicable taxes that would otherwise be payable by the COMMISSION.

Nothing herein shall be interpreted to mean that COMMISSION shall pay COUNTY for any charge, cost, fee, tax, payment or expense from which COMMISSION would be exempt under the law.

3.2 For services performed, COUNTY shall charge COMMISSION at COUNTY's then-current customary rate for providing the same services to non-COUNTY local

governmental entities, provided that the cost of such services charged to COMMISSION shall not exceed the COUNTY's cost of performing such services. Such rates will vary depending on the COUNTY department and staff member providing the services. In addition, the Parties acknowledge that the COUNTY may change any of its rates from time to time without being required to give COMMISSION prior notice of such changes.

4. **INVOICING**

4.1 COUNTY shall invoice COMMISSION for services performed and expenses incurred on a monthly basis at the address provided in section 16 hereof.

4.2 Payment will be made within thirty (30) days of receipt of a properly completed invoice. Invoices shall be itemized to include the name or initials of the key COUNTY personnel performing the service (if applicable), work performed, date the work was performed, and rate of payment.

5. **Amendment of Section 5 TERM.** The parties hereby agree to delete Section 5 of the Agreement, as previously amended, in its entirety and replace it with the following:

5.1 This Restated & Amended Agreement shall become effective on January 11, 2010, and shall terminate three years from the effective date, unless sooner terminated as provided herein (the "Initial Term"). This Restated and Amended Agreement shall automatically renew for two successive one-year terms after the Initial Terms, unless sooner terminated as provided herein.

6. **Amendment of Section 6 TERMINATION.** The parties hereby agree to delete Section 6 of the Agreement, as previously amended, in its entirety and replace it with the following:

6.1 **Non-Allocation of Funds** – The terms and conditions of this Restated & Amended Agreement, and the services to be provided hereunder, are contingent upon the approval of funds by the appropriating government agencies. Should sufficient funds not be allocated, the services provided may be modified, or this Restated & Amended Agreement terminated at any time by either party giving the other party sixty (60) days advance written notice of such non-allocation of funds.

6.2 **Material Breach** – If either party materially breaches any covenants, terms or conditions of this Restated & Amended Agreement in any manner, the breaching party shall have a period of thirty (30) days in which to cure the breach after written notice thereof is given to breaching party specifying the nature of the breach and requesting that it be cured. In the event the breach remains uncured at the end of the thirty (30) day period after written notice is given, this Restated & Amended Agreement may be terminated by the non-breaching party by giving an additional thirty (30) days written notice of termination to the breaching party.

6.3 Without Cause – Either party may terminate this Restated & Amended Agreement without cause by giving a minimum of ninety (90) days written notice of termination to the other.

6.4 Mutual Agreement – This Restated & Amended Agreement may be terminated at any time by the mutual agreement of the parties hereto.

6.5 Reimbursement Upon Termination - Notwithstanding the above, COUNTY shall be compensated by COMMISSION for services actually provided by COUNTY to COMMISSION, and shall be reimbursed for allowable expenses incurred, up to the termination date of this Restated & Amended Agreement.

7. INDEPENDENT CONTRACTOR

7.1 In performance of the work, duties, and obligations assumed by COUNTY under this Restated & Amended Agreement, it is mutually understood and agreed that COUNTY, including any and all of COUNTY's officers, agents, and employees will at all times be acting and performing as an independent contractor, and shall act in an independent capacity and not as an officer, agent, servant, employee, joint venturer, partner, or associate of the COMMISSION. COUNTY and COMMISSION shall comply with all applicable provisions of law and the rules and regulations, if any, of governmental authorities having jurisdiction over matters of the subject thereof.

Because of its status as an independent contractor, COUNTY shall have absolutely no right to employment rights and benefits available to COMMISSION employees, if any. COUNTY shall be solely liable and responsible for providing to, or on behalf of, its employees all legally-required employee benefits. In addition, COUNTY shall be solely responsible and save COMMISSION harmless from all matters related to payment of COUNTY's employees, including compliance with social security, withholding, and all other regulations governing such matters. It is acknowledged that during the term of this Restated & Amended Agreement, COUNTY may be providing services to others unrelated to the COMMISSION or to this Restated & Amended Agreement.

8. ASSIGNMENT AND DELEGATION

8.1 This Restated & Amended Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective permitted successors and assigns. Neither party shall in any manner assign, transfer, or subcontract or otherwise delegate its obligations under this Restated & Amended Agreement nor its rights or duties under this Restated & Amended Agreement without the prior written consent of the other party.

9. SATISFACTORY REPORTS

9.1 All reports and documents produced and submitted by COUNTY pursuant to this Restated & Amended Agreement must meet with and shall be made to the COMMISSION's reasonable satisfaction.

10. **INDEMNIFICATION**

10.1 Each of the parties to this Restated & Amended Agreement shall be solely liable for negligent or wrongful acts or omissions of its board, board members, commission, commissioners, alternate commissioners, officers, agents, and employees occurring in the performance hereof, and if either party becomes liable for any loss, cost, expense, claim or damage as a result of the acts or omissions of its board, board members, commission, commissioners, alternate commissioners, officers, agents, or employees, it shall pay such loss, cost, expense, claim, or damage without contribution of the other party.

10.2 Each of the parties to this Restated & Amended Agreement agrees to hold harmless, indemnify, and defend (at the request of the other party) the other party, its board, board members, commission, commissioners, alternate commissioners, officers, agents, and employees from any and all losses, costs, expenses, claims, damages, suits, and any other liability for bodily or personal injury to or death of any person or loss of any property resulting from or arising out of or in any way connected with any negligent or wrongful acts or omissions of the respective party, its board, board members, commission, commissioners, alternate commissioners, officers, agents, or employees in performing or failing to perform any work services, or functions provided for or referred to or in any way connected with any work, services, or functions under this Restated & Amended Agreement.

11. **MODIFICATION**

11.1 Any matters of this Restated & Amended Agreement may be modified from time to time without, in any way, affecting the remainder, but only by the written consent of the parties.

12. **PARTIAL INVALIDITY**

12.1 Should any part, term, portion, or provision of this Restated & Amended Agreement be finally decided to be in conflict with any law of the United States or the State of California, or otherwise be unenforceable or ineffectual, the validity of the remaining parts, terms, portions, or provisions shall be deemed severable and shall not be affected thereby, provided such remaining portions or provisions can be construed in substance to constitute the agreement which the parties intended to enter into in the first place.

13. **NO WAIVER**

13.1 No waiver of a breach of any provision of this Restated & Amended Agreement shall constitute a waiver of any other breach, or such provision. Failure of COUNTY or COMMISSION to enforce, at any time, or from time to time, any provision of this Restated & Amended Agreement, shall not be construed as a waiver thereof. The remedies herein reserved shall be cumulative and additional to any other remedies in law or equity.

14. **SIGNATURE AUTHORITY**

14.1 The individual executing this Restated & Amended Agreement on behalf of COMMISSION and COUNTY warrants that he or she is duly authorized to execute the Agreement on behalf of COMMISSION or COUNTY, as applicable, and that COMMISSION and COUNTY, as applicable, will be bound by the terms and conditions contained herein.

15. **AUDITS AND INSPECTIONS**

15.1 At any time during normal business hours, upon reasonable notice, and as often as either party or any appropriate state agency, or duly authorized representative thereof may deem necessary, either party shall make available to the other party for examination all of its records and data with respect to all matters covered by this Restated & Amended Agreement. Either party shall, upon request by the other party, permit the other party to audit and inspect all such records and data necessary to ensure the other party's compliance with the terms and conditions of this Restated & Amended Agreement.

15.2 If this Restated & Amended Agreement exceeds Ten Thousand and No/100 (\$10,000.00), both parties shall be subject to the examination and audit of the State Auditor General for a period of three (3) years after final payment under contract. (Government Code section 8546.7).

15.3 Such records shall be retained and access to the facilities and premises of either party shall be made available during the period of performance of this Restated & Amended Agreement, and for three (3) years after the COMMISSION makes final payment under this Restated & Amended Agreement.

16. **NOTICES**

16.1 The persons and their addresses having authority to give and receive notices under this Restated & Amended Agreement include the following:

COUNTY

County Administrative Officer
Hall of Records, Room 304
2281 Tulare Street
Fresno, California 93721

COMMISSION

LAFCo Executive Officer
2115 Kern Street, Suite 310
Fresno, California 93721

16.2 Any and all notices between the COUNTY and COMMISSION provided for or permitted under this Restated & Amended Agreement or by law shall be in writing and shall be deemed duly served when personally delivered to one of the parties, or in lieu of such personal service, when deposited in the United States Mail, postage prepaid, addressed to such party, provided however, notices of termination of this Restated & Amended Agreement that are provided via United State Mail shall be deemed to have been served when the party to is the addressee of the notice actually receives the notice.

17. **GOVERNING LAW**

17.1 Venue for any action arising out of or relating to his Agreement shall only be in Fresno County, California.

17.2 The rights and obligations of the parties and all interpretation and performance of this Restated & Amended Agreement shall be governed in all respects by the laws of the State of California.

18. **NO THIRD PARTY BENEFICIARIES**

18.1 It is understood between the parties that the COUNTY is providing services herein only to and for the benefit of the COMMISSION and that there shall not be any included third party beneficiaries of this Restated & Amended Agreement.

19. **NO PERSONAL LIABILITY OF COUNTY PERSONNEL**

19.1 COUNTY-provided personnel performing services under this Restated & Amended Agreement shall not be personally liable to the COMMISSION for performing or failing to perform his or her services under this Restated & Amended Agreement.

20. **ENTIRE AGREEMENT**

20.1 This Restated & Amended Agreement, including all exhibits hereto, constitutes the entire agreement between the COMMISSION and COUNTY with respect to the subject matter hereof and supersedes all previous agreement negotiations, proposals, commitments, writings, advertisements, publications, and understandings of any nature whatsoever unless expressly included in this Restated & Amended Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Restated & Amended Agreement as of the day and year first hereinabove written.

ATTEST:

BERNICE SEIDEL, Clerk
Board of Supervisors

COUNTY OF FRESNO

By _____

By _____
Chairman, Board of Supervisors

APPROVED AS TO LEGAL FORM:

KEVIN B. BRIGGS,
INTERIM COUNTY COUNSEL

County Counsel

REVIEWED AND RECOMMENDED FOR
APPROVAL

County Administrative Officer

APPROVED AS TO ACCOUNTING FORM:

VICKI CROW, C.P.A. AUDITOR-
CONTROLLER TREASURER-TAX
COLLECTOR

By _____

FRESNO COUNTY LOCAL AGENCY
FORMATION COMMISSION

By _____
, Chairman

Tax I.D. No.: 03-0377798

Mailing Address:

2100 Tulare Street, Suite 502
Fresno, California 93721

REVIEWED AND RECOMMENDED FOR
APPROVAL:

RICK BALLANTYNE
LAFCo EXECUTIVE OFFICER

By _____
Executive Officer

APPROVED AS TO LEGAL FORM:
KENNETH J. PRICE
LAFCo COUNSEL

By _____
LAFCo Counsel