

**AGREEMENT FOR PROFESSIONAL CONSULTANT SERVICES BETWEEN THE CITY OF
ENCINITAS AND CERRELL ASSOCIATES**

**HOUSING ELEMENT UPDATE
WORK PROJECT # WC14B**

This Agreement is made and entered into as of the date of execution by the City of Encinitas, a municipal corporation, hereinafter referred to as "City," and Cerrell Associates, Inc., hereinafter referred to as "Consultant."

RECITALS

The City requires outside assistance to provide the following services:

Ballot proposition preparation services, inclusive of strategy and polling, to deliver a ballot measure to the Encinitas voters to update the City's Housing Element. Housing Element ballot measure to include a preferred plan or plans that will identify the locations and types of development that could accommodate the additional housing units needed in order to be in compliance with State Housing Element Law.

WHEREAS, Consultant represents itself as possessing the necessary skills and qualifications to provide the services required by the City and as being fully qualified to perform those services in accordance with the standard of quality ordinarily expected of competent professionals in Consultant's field of expertise;

WHEREAS, Consultant will render such professional services, as hereinafter defined, on the following terms and conditions;

NOW THEREFORE, in consideration of these recitals and the mutual covenants contained herein, the City and Consultant agree as follows:

1.0 TERM OF AGREEMENT

1.1 This Agreement shall be effective on and from the day, month and year of the execution of this document by the City.

1.2 Consultant shall commence the performance of the services in accordance with the Scope of Work section provided in Attachment A to this Agreement and shall continue such services until all tasks to be performed are completed, or this Agreement is otherwise terminated. Consultant shall complete the services and provide final data and reports no later than February 1, 2017, unless an extension of time is mutually agreed to by both parties.

2.0 CONSULTANT'S OBLIGATIONS- SCOPE OF WORK (ATTACHMENT A)

2.1 Consultant shall provide the City with the following services:

The specific manner in which the services are to be performed is described in Attachment A which is attached hereto, and incorporated herein as though fully set forth at length, collectively hereinafter referred to as "Described Services".

2.2 Consultant shall perform all work required to accomplish the Described Services in conformity with applicable requirements of City, State, and Federal law.

2.3 Consultant is hired to render the Described Services and any payments made to Consultant are compensation fully for such services.

2.4 Consultant shall maintain professional certifications as required in order to properly comply with all City, State, and Federal law.

2.5 Consultant shall assign only competent personnel to perform services pursuant to this Agreement. In the event that City, in good faith, at any time during the term of this Agreement, desires the removal of any such persons, Consultant shall, immediately upon receiving notice from City of such desire of City, cause the removal of such person or persons.

3.0 PAYMENT FOR SERVICES (ATTACHMENT B)

3.1 Payment to Consultant to render the Described Services hereunder shall be as set forth in Attachment B which is attached hereto and incorporated herein as though fully set forth at length. The payments provided in this Section are full compensation for the Described Services as outlined in Attachment A.

3.2 Consultant shall submit monthly bills to the City the following month, describing its services and costs provided during the previous month, based upon percentage of task completed. Except as specifically authorized by City, Consultant shall not bill City for duplicate services performed by more than one person. Consultant's monthly bills shall include the following information to which such services or costs pertain: a description of services performed; the date the services were performed; the number of hours spent and by whom and a description of all costs incurred. Consultant agrees to use every appropriate method to contain fees and costs under this Agreement.

3.3 The amount set forth in Attachment B may be modified or amended only by a written document executed by both Consultant and authorized City representative prior to the performance of the additional work. Such document shall expressly state that it is intended by the parties to amend the terms and conditions of this Agreement.

4.0 SUBCONTRACTING (ATTACHMENT C)

4.1 If Consultant subcontracts for any of the work to be performed under this Agreement, Consultant shall be as fully responsible to the City for the acts and omissions of Consultant's subcontractors and for the persons either directly or indirectly employed by the subcontractors, as Consultant is for the acts and omissions of persons directly employed by Consultant. Nothing contained in the Agreement shall create any contractual relationship between any subcontractor of Consultant and the City. Consultant shall bind every subcontractor to the terms of the Agreement

applicable to consultant's work unless specifically noted to the contrary in the subcontract in question and approved in writing by the City.

4.2 The name and location of the place of business of each subcontractor who will perform work or labor or render service to the Consultant in performing this Agreement are contained in Attachment C which is attached hereto and incorporated herein as though fully set forth at length.

5.0 PROJECT SCHEDULE AND COMPLETION DATE (ATTACHMENT D)

5.1 Attachment D is the project schedule that Consultant shall strictly meet, including benchmark dates and completion date, which is attached hereto and incorporated herein. Consultant agrees to diligently prosecute the services to be provided under this Agreement to completion and in accordance with the schedule specified herein. In the performance of this Agreement, time is of the essence.

5.2 Consultant shall promptly notify the City of any anticipated or unforeseen delays to the project schedule. Extensions to the project schedule and to this Agreement shall not be made without the prior written approval of the City. All requests for extensions to the project schedule shall be by written request only and submitted to the City prior to the commencement of such work.

6.0 EXTRA WORK

Consultant shall not perform work in excess of the Described Services without the prior, written approval of the City. All requests for extra work shall be by written Change Order submitted to the City prior to the commencement of such work.

7.0 VERBAL AGREEMENT OR CONVERSATION

No verbal agreement or conversation with any officer, agent or employee of the City, either before, during or after the execution of this Agreement, shall effect or modify any of the terms or obligations herein contained nor shall such verbal agreement or conversation entitle Consultant to any additional payment whatsoever.

8.0 TERMINATION OF AGREEMENT

8.1 In the event Consultant fails to prosecute, deliver, or perform the Described Services, the City may terminate this Agreement by notifying Consultant by certified mail of said termination. Thereupon, Consultant shall cease work and within five (5) working days: (1) assemble all documents owned by the City and in consultant's possession and deliver said documents to the City and (2) place all work in progress in a safe and protected condition. The City Manager of the City shall make a determination of the percentage of work which Consultant has performed which is usable and of worth to the City. Based upon that finding, the City shall determine any final payment due to Consultant.

8.2 This Agreement may be terminated by either party, without cause, upon the giving of ten (10) days written notice to the other party. Prior to the 10th day following the giving of the notice,

the Consultant shall: (1) assemble the completed work product to date, and put same in order for proper filing and closing, and deliver said product to the City and (2) place all work in progress in a safe and protected condition. The City Manager of the City shall make a determination of the percentage of work which Consultant has performed which is usable and of worth to the City. Based upon that finding, the City shall determine any final payment due to Consultant.

9.0 COVENANTS AGAINST CONTINGENT FEES

Consultant warrants that it has not employed or retained any company or person, other than a bona fide employee working for Consultant, to solicit or secure this Agreement, and that Consultant has not paid or agreed to pay any company or person, other than a bona fide employee, any fee, commission, percentage, brokerage fee, gift, or any other consideration contingent upon, or resulting from, the award or making of this Agreement. For breach or violation of this warranty, the City shall have the right to terminate this Agreement without liability, or, at the City's discretion to deduct from the Agreement price or consideration, or otherwise recover the full amount of such fee, commission, percentage, brokerage fee, gift or contingent fee.

10.0 OWNERSHIP OF DOCUMENTS

10.1 All plans, studies, sketches, drawings, reports and specifications as herein required are the property of the City, whether or not the City proceeds with the project for which such documents are prepared.

10.2 This Agreement creates a nonexclusive and perpetual right or license for City to copy, use, modify, reuse, and sublicense any and all copyrights, designs, and other intellectual property embodied in the writings prepared by Consultant, and Consultant's subcontractors, under this Agreement. In the event the City should ever desire to undertake a project or review other proposed projects based upon the documents, the Consultant agrees that the City shall have the right to reuse all or any portion of the documents at no additional compensation to the Consultant.

11.0 STATUS OF CONSULTANT

11.1 Consultant shall perform the services provided for herein in a manner of Consultant's own choice, as an independent contractor and in pursuit of Consultant's independent calling, and not as an employee of the City. Consultant shall be under control of the City only as to the result to be accomplished and the personnel assigned to the project. However, Consultant shall confer with the City.

11.2 If the Consultant subcontracts any of the work to be performed under this Agreement, Consultant shall be as fully responsible to the City for the acts and omissions of the Consultant's subcontractor and of the persons either directly or indirectly employed by the subcontractor, as Consultant is for the acts and omissions of persons directly employed by Consultant. Nothing contained in the Agreement shall create any contractual relationship between any subcontractor of Consultant and the City. The Consultant shall bind every subcontract by the terms of the Agreement applicable to Consultant's work, including indemnity and insurance requirements.

12.0 HOLD HARMLESS

12.1 To the greatest extent allowed by law, Consultant shall defend and indemnify and hold City, its officials, officers, agents, employees, and representatives free and harmless from any and all claims, demands, negligence (including the active or passive negligence of City as allowed by law), causes of action, costs, expenses, liabilities, losses, damages or injuries, in law or equity, regardless of whether the allegations are false, fraudulent, or groundless, to property or persons, including wrongful death, to the extent arising out of or incident to any acts, omissions, negligence or willful misconduct of Consultant, its officials, officers, employees, agents, consultants, subcontractors and contractors arising out of or in connection with the performance of the scope of work of this Agreement, including without limitation the payment of all damages and attorney's fees, fines, penalties and other related costs and expenses. The only limitations on this provision shall be those imposed by Civil Code Section 2782 or other applicable provisions of law.

12.2 Consultant's defense obligation (with counsel approved by City), shall arise immediately upon the City's tender, at Consultant's own cost, expense and risk, any and all such aforesaid suits, actions or other legal proceedings of every kind that may be brought or instituted against City, its officials, officers, agents, employees and representatives, notwithstanding whether liability is or can be established against City. Consultant shall pay and satisfy any judgment, award or decree that may be rendered against City, its officials, officers, employees, agents, employees and representatives, in any such suit, action or other legal proceeding. Consultant shall reimburse City, its officials, officers, agents, employees and representatives for any and all legal expenses and costs incurred by each of them in connection therewith or in enforcing the indemnity herein provided. The only limitations on this provision shall be those imposed by Civil Code Section 2782 or other applicable provisions of law.

12.3 Acceptance by City of the work performed under this Agreement does not operate as a release of said Consultant from such professional responsibility for the work performed. It is further understood and agreed that Consultant is apprised of the scope of the work to be performed under this Agreement and Consultant agrees that said work can and shall be performed in a fully competent manner.

12.4 Acceptance of insurance certificates and endorsements required under this Agreement does not relieve Consultant from liability under this indemnification and hold harmless clause. This indemnification and hold harmless clause shall apply whether or not such insurance policies shall have been determined to be applicable to any of such damages or claims for damages.

13.0 ASSIGNMENT OF CONTRACT

Consultant is without right to and shall not assign this Agreement or any part thereof or any monies due hereunder without the prior written consent of the City which shall not be unreasonably withheld.

14.0 INSURANCE

14.1 Consultant shall obtain, and during the term of this Agreement shall maintain insurance policies of general liability and automobile liability insurance from an insurance company authorized

to be in business in the State of California. Each such policy shall be in an amount of not less than one million dollars (\$1,000,000) for each occurrence, and shall be endorsed with the following language:

A. The City and City's officers, elected officials, employees, agents and volunteers are to be covered as additional insured by endorsement, using form ISO CG 20-10-10-01 and CG 20-37-10-01 or the exact equivalent with respect to liability arising out of the acts and omissions by or on behalf of Consultant.

B. The insured waives all rights of subrogation against the City and City's officers, officials, employees, agents and volunteers.

C. Provide that the policy shall remain in full force during the full term of this Agreement and shall not be canceled, voided, terminated, reduced, or allowed to expire without thirty (30) days prior written notice from the issuance company being received by City.

14.2 Consultant shall obtain, and during the term of this Agreement shall maintain, a policy of professional liability insurance that shall:

A. Be from an insurance company authorized to be in business in the State of California;

B. Be in an insurable amount of not less than \$1,000,000 for each occurrence; and

C. Provide that the policy shall remain in full force during the full term of this Agreement and shall not be canceled, terminated, or allowed to expire without thirty (30) days prior written notice to the City from the insurance company.

14.3 Before Consultant shall employ any person or persons in the performance of the Agreement, Consultant shall procure a policy of statutory Workers' Compensation Insurance and Employer's Liability insurance for any and all persons employed directly or indirectly by Consultant and shall be provided with limits not less than one million dollars (\$1,000,000). The insurer shall waive all rights of subrogation against the City for loss arising from work performed under this Agreement

14.4 Consultant shall provide certificates of insurance with original endorsements to City as evidence of the insurance coverage required herein. Certificates of such insurance shall be filed with the City on or before commencement of performance of this Agreement. Current certification of insurance shall be kept on file with the City at all times during the term of this Agreement.

15.0 DISPUTES

15.1 If a dispute should arise regarding the performance of this Agreement, the following procedures shall be used to address any question of fact or interpretation not otherwise settled by agreement between the parties. Such questions, if they become identified as part of a dispute between persons operating under the provisions of the Agreement, shall be reduced to writing by the complaining party within twenty (20) working days. A copy of such documented dispute shall be

forwarded to the other party involved along with recommended methods of resolution. The party receiving the letter shall reply to the letter along with a recommended method of resolution within ten (10) working days of receipt of the letter.

15.2 If the dispute is not resolved at staff level in accordance with Section 15.1, within five (5) City working days of the receiving party response, the aggrieved party, through its respective project manager shall deliver to the City Manager's office a letter outlining the dispute for the City Manager's review. The City Manager, at his/her sole discretion may respond as he/she deems appropriate, including recommendations for resolution, discussions or rejection of the dispute within fifteen (15) working days of receipt of the complaint.

15.3 If the dispute remains unresolved and the parties have exhausted the procedures outlined in this section, the parties may then seek remedies available to them under this Agreement and at law, including, but not limited to, under the termination procedures. This provision does not relieve Consultant of its obligation and Consultant is required to timely comply with all applicable provisions of the Government Claims Act before initiating any legal proceeding against City.

16.0 CONFLICT OF INTEREST.

Consultant warrants and covenants that it presently has no interest in, nor shall any interest be hereinafter acquired in, any matter which will render the services required under the provisions of this Agreement a violation of any applicable state, local, or federal law, including, but not limited to, Government Code section 1090. If any principal provider of services is a "consultant" for the purposes of the Fair Political Practices Act (Gov. Code § 81000 et seq.), each such person shall comply with Form 721 Statement of Economic Interests filing requirements in accordance with state or City local Conflict of Interest Code. In addition, if any other conflict of interest should nevertheless hereinafter arise, Consultant shall promptly notify City of the existence of such conflict of interest so that the City may determine whether to terminate this Agreement.

17.0 Consultant's Books and Records.

17.1 Consultant shall maintain any and all ledgers, books of account, invoices, vouchers, canceled checks, and other records or documents evidencing or relating to charges for services, or expenditures and disbursements charged to City for a minimum period of three (3) years, or for any longer period required by law, from the date of final payment to Consultant.

17.2 Any records or documents required to be maintained pursuant to this Agreement shall be made available for inspection or audit, at any time during regular business hours, upon written request by the City Attorney, City Auditor, City Manager, or a designated representative of any of these officers. Copies of such documents shall be provided to City for inspection when it is practical to do so. Otherwise, unless an alternative is mutually agreed upon, the records shall be available at Consultant's address indicated for receipt of notices in this Agreement.

18.0 NOTICES

18.1 Any notices to be given under this Agreement, or otherwise, shall be served by certified mail.

18.2 For the purposes hereof, unless otherwise provided in writing by the parties hereto, the address of the City and the proper person to receive any notice on the City's behalf is:

TO: City of Encinitas
Attn: City Manager
505 South Vulcan Avenue
Encinitas, CA 92024
(760) 633-2600

18.3 For the purposes hereof, unless otherwise provided in writing by the parties hereto, the address of Consultant and the proper person to receive any notice on the consultant's behalf is:

Steve Bullock
Chief Financial Officer
320 North Larchmont Boulevard
Los Angeles, CA 90004
(323) 466-3445

19.0 GENERAL PROVISIONS

19.1 Waiver of a breach or default under this Agreement shall not constitute a continuing waiver of a subsequent breach of the same or any other provision under this Agreement.

19.2 If any term or portion of this Agreement is held to be invalid, illegal, or otherwise unenforceable by a court of competent jurisdiction, the remaining provisions of this Agreement shall continue in full force and effect.

19.3 This Agreement and all matters relating to it shall be governed by the laws of the State of California and any action brought relating to this Agreement shall be held exclusively in a State Court in the County of San Diego.

20.0 CONSULTANT'S CERTIFICATION OF AWARENESS OF IMMIGRATION REFORM AND CONTROL ACT OF 1986

Consultant certifies that Consultant is aware of the requirements of the Immigration Reform and Control Act of 1986 (8 USC §§ 1101-1525) and has complied and will comply with these requirements, including but not limited to verifying the eligibility for employment of all agents, employees, subcontractors and consultants that are included in this Agreement.

21.0 CONSULTANT'S AWARENESS AND COMPLIANCE WITH THE AMERICANS WITH DISABILITIES ACT OF 1990 AND SECTION 504 REHABILITATION ACT of 1973

Consultant certifies that Consultant is aware of the requirements of the Americans with Disabilities Act of 1990 (42 USC §§ 12101) and SECTION 504 REHABILITATION ACT of 1973 and has complied with and will comply with these requirements, included but not limited to verifying compliance of their contractors, consultants, agents, and employees.

22.0 EXECUTION OF AGREEMENT

Consultant

City

City of Encinitas

by _____
Steve Bullock Date

by _____
City Manager Date

APPROVED AS TO FORM:

Glenn Sabine, City Attorney Date

ATTACHMENT A
(Manner of Performing the Services)

Consultant shall perform the services in the following manner:

(Scope of Work attached)

ATTACHMENT B

(Payment For Services)

The CITY shall pay CONSULTANT for the DESCRIBED SERVICES as follows:

The CITY hereby agrees to pay the CONSULTANT, as full compensation for the CONSULTANT'S services upon this project, a fixed fee not to exceed \$70,000. Compensation for services provided under this Contract shall be provided for the following:

- Two Focus Groups - \$17,800 (\$8,900 each)
- 35-Question Telephone Survey (300 respondents, +/-5.6% margin of error) - \$26,500
- Ongoing Strategic Counsel, Message and Material Development, External Engagement and Education, Ballot Language and Materials Creation - \$25,700

The total fixed fee for each task is a not to exceed amount, unless a transfer to another task or sub-task is mutually agreed to by both parties in writing, provided the total contract value is not exceeded.

Direct costs and other reimbursable expenses associated with this project are included in the basis of compensation.

CITY and CONSULTANT will work together to ensure invoicing is accompanied by satisfactory documentation of expenses. All services shall be performed to the satisfaction of the City Manager and CITY shall not be liable for any payment under this AGREEMENT for services which are unsatisfactory and which have not been approved by the City Manager.

ATTACHMENT D

ESTIMATED PROJECT SCHEDULE AND COMPLETION DATE

The Cerrell team understands the significant time constraints the City is under in order to move forward with a housing plan ballot measure. The City's Planning Commission will be discussing the housing element options in May, and the Council is tentatively scheduled to discuss how to proceed in June.

Understanding the immediacy of providing the City Council and staff with the information necessary to make an appropriate and well-informed decision on how to proceed, we will conduct all of our activities based on this timeline.

All activities will be wrapped up by mid-May.