



**BENICIA CITY COUNCIL
REGULAR MEETING AGENDA**

**Benicia Community Center
370 East L Street
Program Room 2**

**April 24, 2012
6:00 PM**

*Times set forth for the agenda items are estimates.
Items may be heard before or after the times designated.*

I. CALL TO ORDER (6:00 PM):

II. CLOSED SESSION:

III. CONVENE OPEN SESSION:

A. ROLL CALL.

B. PLEDGE OF ALLEGIANCE.

C. REFERENCE TO THE FUNDAMENTAL RIGHTS OF THE PUBLIC.

A plaque stating the fundamental rights of each member of the public is posted at the entrance to this meeting room per section 4.04.030 of the City of Benicia's Open Government Ordinance.

IV. ANNOUNCEMENTS/APPOINTMENTS/PRESENTATIONS/PROCLAMATIONS:

A. ANNOUNCEMENTS.

1. Announcement of action taken at Closed Session, if any.

2. Openings on Boards and Commissions:

Building Board of Appeals
2 full terms
Open Until Filled

SolTrans Public Advisory Committee
1 full term
Open Until Filled

Benicia Community Sustainability Commission
1 unexpired term
Open Until Filled

Open Government Commission
1 unexpired term
Application Due Date: April 20, 2012

Benicia Human Services Board
1 unexpired term
Application Due Date: May 4, 2012

3. Mayor's Office Hours:

Mayor Patterson will maintain an open office every Monday (except holidays) in the Mayor's Office of City Hall from 6:00 p.m. to 7:00 p.m. No appointment is necessary. Other meeting times may be scheduled through the City Hall office at 746-4200.

B. APPOINTMENTS.

C. PRESENTATIONS.

D. PROCLAMATIONS.

V. ADOPTION OF AGENDA:

VI. OPPORTUNITY FOR PUBLIC COMMENT:

This portion of the meeting is reserved for persons wishing to address the Council on any matter not on the agenda that is within the subject matter jurisdiction of the City Council. State law prohibits the City Council from responding to or acting upon matters not listed on the agenda. Each speaker has a maximum of five minutes for public comment. If others have already expressed your position, you may simply indicate that you agree with a previous speaker. If appropriate, a spokesperson may present the views of your entire group. Speakers may not make personal attacks on council members, staff or members of the public, or make comments

which are slanderous or which may invade an individual's personal privacy.

A. WRITTEN COMMENT.

B. PUBLIC COMMENT.

VII. BUSINESS ITEMS (6:10 PM):

Items listed on the Consent Calendar are considered routine and will be enacted, approved or adopted by one motion unless a request for removal or explanation is received from a Council Member, staff or member of the public. Items removed from the Consent Calendar shall be considered immediately following the adoption of the Consent Calendar.

A. PURCHASE OF LAND FROM VALERO FOR PUMP STATION 3 SOLAR PROJECT. (Public Works and Community Development Director)

In April 2011, the City Council approved, and bonds were issued for, a Renewable Energy and Conservation Project that includes installation of solar photovoltaic arrays to provide power at ten City-operations sites. The only one of these sites left to construct is adjacent to Pump Station 3 at the northwest corner of East 2nd Street and Rose Drive. This action will allow the City to buy the needed land to build the solar arrays at Pump Station 3.

Recommendation: Adopt a resolution approving the purchase of 76,815 square feet (1.76 acres) from Valero Refining Company in the amount of \$556,909 for the installation of solar photovoltaic panels to power water system Pump Station 3 and authorizing the City Manager to execute the purchase documents; and

Determine funding sources for the purchase; staff recommends loaning the needed \$256,909 (beyond the \$300,000 in bond financing already designated for this purpose) from the Valero/Good Neighbor Steering Committee Settlement Agreement fund over a five-year period starting three years from now (see Budget Information section for alternatives).

VIII. STUDY SESSION (6:30 PM):

A. Priority Project List and Policy Calendar. (City Manager)

The Council will review and discuss policy items and priority projects work plan.

Recommendation: Provide direction to staff as needed.

IX. ADJOURNMENT (8:00 PM):

Public Participation

The Benicia City Council welcomes public participation.

Pursuant to the Brown Act, each public agency must provide the public with an opportunity to speak on any matter within the subject matter jurisdiction of the agency and which is not on the agency's agenda for that meeting. The City Council allows speakers to speak on non-agendized matters under public comment, and on agendized items at the time the agenda item is addressed at the meeting. Comments are limited to no more than five minutes per speaker. By law, no action may be taken on any item raised during the public comment period although informational answers to questions may be given and matters may be referred to staff for placement on a future agenda of the City Council.

Should you have material you wish to enter into the record, please submit it to the City Manager.

Disabled Access or Special Needs

In compliance with the Americans with Disabilities Act (ADA) and to accommodate any special needs, if you need special assistance to participate in this meeting, please contact Anne Cardwell, the ADA Coordinator, at (707) 746-4211. Notification 48 hours prior to the meeting will enable the City to make reasonable arrangements to ensure accessibility to the meeting.

Meeting Procedures

All items listed on this agenda are for Council discussion and/or action. In accordance with the Brown Act, each item is listed and includes, where appropriate, further description of the item and/or a recommended action. The posting of a recommended action does not limit, or necessarily indicate, what action may be taken by the City Council.

Pursuant to Government Code Section 65009, if you challenge a decision of the City Council in court, you may be limited to raising only those issues you or someone else raised at the public hearing described in this notice, or in written correspondence delivered to the City Council at, or prior to, the public hearing. You may also be limited by the ninety (90) day statute of limitations in which to challenge in court certain administrative decisions and orders (Code of Civil Procedure 1094.6) to file and serve a petition for administrative writ of mandate challenging any final City decisions regarding planning or zoning.

The decision of the City Council is final as of the date of its decision unless judicial review is initiated pursuant to California Code of Civil Procedures Section 1094.5. Any

such petition for judicial review is subject to the provisions of California Code of Civil Procedure Section 1094.6.

Public Records

The agenda packet for this meeting is available at the City Manager's Office and the Benicia Public Library during regular working hours. To the extent feasible, the packet is also available on the City's web page at www.ci.benicia.ca.us under the heading "Agendas and Minutes." Public records related to an open session agenda item that are distributed after the agenda packet is prepared are available before the meeting at the City Manager's Office located at 250 East L Street, Benicia, or at the meeting held in the Council Chambers. If you wish to submit written information on an agenda item, please submit to the City Clerk as soon as possible so that it may be distributed to the City Council. A complete proceeding of each meeting is also recorded and available through the City Clerk's Office.

AGENDA ITEM
CITY COUNCIL MEETING DATE - APRIL 24, 2012
BUSINESS ITEMS

DATE : April 18, 2012

TO : City Manager

FROM : Public Works and Community Development Director

SUBJECT : **PURCHASE OF LAND FROM VALERO FOR PUMP STATION 3 SOLAR PROJECT**

RECOMMENDATION:

1. Adopt a resolution approving the purchase of 76,815 square feet (1.76 acres) from Valero Refining Company in the amount of \$556,909 for the installation of solar photovoltaic panels to power water system Pump Station 3 and authorizing the City Manager to execute the purchase documents; and
2. Determine funding sources for the purchase; staff recommends loaning the needed \$256,909 (beyond the \$300,000 in bond financing already designated for this purpose) from the Valero/Good Neighbor Steering Committee Settlement Agreement fund over a five-year period starting three years from now (see Budget Information section for alternatives).

EXECUTIVE SUMMARY:

In April 2011, the City Council approved, and bonds were issued for, a Renewable Energy and Conservation Project that includes installation of solar photovoltaic arrays to provide power at ten City-operations sites. The only one of these sites left to construct is adjacent to Pump Station 3 at the northwest corner of East 2nd Street and Rose Drive. This action will allow the City to buy the needed land to build the solar arrays at Pump Station 3.

BUDGET INFORMATION:

The \$13,195,000 financing for the renewable energy project includes \$300,000 toward the purchase of the site. The remaining \$256,909 could be granted from the Valero/Good Neighbor Steering Committee Settlement fund, or loaned from the fund and repaid over a five-year period with energy savings and PG&E rebates from the Renewable Energy project starting three years from now. Alternatively, the entire purchase amount could be funded with a grant or loan from the Good Neighbor account and, if loaned, repaid over a different time period. There is no impact to the General Fund.

GENERAL PLAN:

This project contributes significantly to sustainability, which is the overarching goal of the General Plan.

STRATEGIC PLAN:

The project fulfills the following Strategic Plan issues, strategies and actions:

Relevant Strategic Plan Issues and Strategies:

- Strategic Issue 2 Protecting and Enhancing the Environment
 - Strategy 2.1 Reduce greenhouse gas emissions and energy consumption
 - Action 2.1(d) Facilitate private construction of at least one alternative energy project

CLIMATE ACTION PLAN:

Solar power for Pump Station 3 supports the following Climate Action Plan objective and strategy:

- Objective E-2 Increase Amount of Renewable Energy in Benicia
 - Strategy E-2.3 Renewable Energy for City Facilities
- Objective E-3 Increase Amount of Solar Energy Production in Benicia

SUMMARY:

In October 2010, the City Council approved a contract with Chevron Energy Solutions for installation of renewable energy generation equipment at City facilities.

The bulk of the Renewable Energy and Conservation project includes installation of photovoltaic arrays to convert 1,674 megawatts of City electrical use to solar (about 30 –40% of City operations power). The panels were mounted atop shade- and light-providing carports at City Hall, the Community Center, the Community Park and the Corporation Yard; on shade-and-light structures at the pool; on the roof of Fire Station 12, and on the ground at the Water Treatment Plant, and Pump Stations 1 and 2, and also will be ground-mounted at Pump Station 3.

In addition to energy and cost savings, the project includes improvements to the City Hall parking lot to demonstrate use of low-impact development techniques, such as permeable pavers and bioswales.

Summary of Photovoltaic Systems

Location	Structure Type	Arrays	Capacity (kW DC)
City Hall	Parking Canopy	2	172
Community Center	Parking Canopy	3	127
Community Park	Parking Canopy	2	69
Corporation Yard	Parking Canopy	2	84
Water Treatment Plant	Ground-mounted	1	289
Pump Station #1	Ground-mounted	1	140
Pump Station #2	Ground-mounted	1	256
Aquatics Center	Shade Canopy	2	86
Fire Station #12	Roof Mounted	1	24
Pump Station #3	Ground-mounted	1	427
Total			1,674

The project was presented to the Community Sustainability Commission on July 19, 2010, and the City Hall improvements received approval by the Historic Preservation Review Commission on July 22, 2010.

In April 2011, the Council approved a bond financing package for the project, which was issued in the form of public participation certificates of participation that same month. During the financing process it was estimated that one acre would be necessary to for the solar arrays at Pump Station 3. It was later determined that the needed area was 76,815 sq. ft., almost two acres. The financing estimated \$7 per square foot and therefore budgeted \$300,000 for the land. Two appraisals were completed for the subject property between July and November 2011, with an average value of \$7.25 per square foot. The proposed purchase price is based on \$7.25 per square foot for the property. Since the acreage has increased as well as the price per square foot, additional funds in the amount of \$256,909 are needed to complete the purchase.

Options for the City Council to consider are:

- Use the \$300,000 from the bond financing to purchase the property and supplement that with Valero/Good Neighbor Steering Committee funds.
- Use all Valero/Good Neighbor Steering Committee funds.

It is recommended that the Council use the \$300,000 from the bond financing and \$256,909 of the Valero/Good Neighbor Steering Committee funds.

Use of Valero/Good Neighbor Steering Committee funds: Because the Valero/Good Neighbor Steering Committee funds are to be used for water conservation or other energy conservation projects, the use of the funds to

purchase the land for the solar arrays is an appropriate use. As noted above, the solar arrays at Pump Station 3 are expected to generate the largest amount of electricity of any of the City sites. This will contribute significantly to the energy savings.

When considering the use of Valero/Good Neighbor Steering Committee funds, Council should also consider whether the use of the funds should be a grant or a loan. If a grant is used the funds would not be paid back to the Valero/Good Neighbor Steering Committee fund. If a loan is used the funds would be paid back to the Valero/Good Neighbor Steering Committee fund. A loan would be repaid using savings expected from the entire Renewable Energy and Conservation project. Due to the need to get the energy savings from Pump Station 3 on line as soon as possible to meet the financing commitments, there is not enough time to take the loan/grant question to the Sustainability Commission for a recommendation prior to Council's action tonight.

The purchase agreement provides that the City will deposit \$1000 upon execution of the purchase agreement. This starts the clock on a review period for the City to review the property and determine whether it is suitable or not. This period is 60 days. Because PWCD staff has already reviewed the land it is not expected that the full 60 days will be needed. Once the City completes its review the escrow may be completed. The last day for the closing on the property is 30 days after the expiration of the review period. It is expected that neither the full 60 days nor the full 30 days will be used because of the advance work that has been done and because of the need to close escrow as soon as practical.

Although the sale needs to be completed well before the 90 days noted here, if Valero/Good Neighbor Steering Committee funds are to be used, the Sustainability Commission could theoretically be consulted at a special meeting during this period for a recommendation. This is not recommended because of the need to complete the installation of the solar arrays as soon as possible. The City's contractor will not enter the property for construction until the City has the deed to the property.

If Valero/Good Neighbor Steering Committee funds are used entirely on the purchase of the land, the \$300,000 in the bond financing must be used for other energy efficiency projects.

In conclusion, it is staffs' recommendation that the property be purchased with the \$300,000 of bond proceeds and with the remaining balance of \$256,909 as a loan from the Valero/Good Neighbor Steering Committee Settlement fund. The loan will be interest free and repaid within five years with energy savings and PG&E rebates from the Renewable Energy and Conservation project.

VII.A.4

Attachments:

- ❑ Proposed Resolution
- ❑ Purchase and Sale Agreement
- ❑ Property Map
- ❑ Property Description

RESOLUTION NO. 12-

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BENICIA APPROVING A REAL PROPERTY PURCHASE IN THE AMOUNT OF \$556,909 FROM VALERO REFINING COMPANY TO FACILITATE CONSTRUCTION OF A SOLAR ARRAY TO POWER WATER SYSTEM PUMP STATION 3, AND AUTHORIZING THE CITY MANAGER TO EXECUTE THE PURCHASE DOCUMENTS

WHEREAS, on October 10, 2010, the City Council approved a contract with Chevron Energy Solutions for construction of the City Renewable Energy and Conservation Project; and

WHEREAS, on April 5, 2011, the City Council approved the financial documents for construction of the 2010-11 Renewable Energy Project; and

WHEREAS, on April 15, 2011, \$13,195,000 in public placement Certificates of Participation were issued for the Renewable Energy and Conservation Project; and

WHEREAS, the project includes installation of solar photovoltaic arrays to provide power at ten City-operations sites, and the only one of these sites left to construct is adjacent to Pump Station 3 at the northwest corner of East 2nd Street and Rose Drive; and

WHEREAS, two appraisals were completed for the subject property between July and November 2011, with an average value of \$7.25 per square foot.

NOW, THEREFORE, BE IT RESOLVED THAT the City Council of the City of Benicia hereby approves a real property purchase in the amount of \$556,909 with Valero Refining Company to facility construction of the alternate P-3 Pump Station solar array of the City Renewable and Conservation project.

BE IT FURTHER RESOLVED THAT \$300,000 of the purchase price will be drawn from the financing for the Renewable Energy and Conservation Project, and the remaining \$256,909 will be loaned interest-free from the Valero/Good Neighbor Steering Committee Settlement fund and repaid over a five-year period with energy savings and PG&E rebates from the Renewable Energy and Conservation project starting in Fiscal Year 2014-15.

BE IT FURTHER RESOLVED THAT the City Manager is hereby authorized to execute the purchase documents on behalf of the City, subject to approval by the City Attorney.

On a motion of Council Member _____, seconded by Council Member _____, the foregoing Resolution was introduced and passed by the City Council of the City of Benicia at a regular meeting of said Council held on the 24th day of April, 2012, and adopted by the following vote:

Ayes:

Noes:

Absent:

Attest:

Elizabeth Patterson, Mayor

Lisa Wolfe, City Clerk

Sale and Purchase Agreement
(Northwest Corner of Rose Drive and East Second Street)

THIS CONTRACT OF SALE (“*Contract*”) is entered into by and between VALERO REFINING COMPANY-CALIFORNIA, a Delaware corporation (“*Seller*”), whose address is One Valero Way, San Antonio, Texas 78249-1616, Attention: Property Assets, and whose fax number is 210-370-4417; and THE CITY OF BENICIA, California municipality (“*Buyer*”), whose address is 250 East L Street, Benicia, Solano County, California, 94510; and whose fax number is 707-747-8120.

For and in consideration of the mutual covenants and agreements herein contained, the parties hereto agree as follows:

ARTICLE I
CERTAIN DEFINED TERMS

In addition to other capitalized terms defined elsewhere in this Contract, the following terms, when used herein, shall have the following respective meanings, unless the context clearly requires otherwise:

“*Buyer’s Broker*” means None – Buyer has not retained the services of a broker in connection with the transactions contemplated by this Contract .

“*Earnest Money*” means \$1,000.00.

“*Effective Date*” means the date that a fully-executed copy of this Contract, together with the Earnest Money, is received for by the Escrow Company.

“*Environmental Authority*” means the California Regional Water Quality Control Board and any successor thereto.

“*Escrow Company*” means Escrow Department of North American Title Company, 560 First Street, # B150, Benicia CA 94510.

“*Expiration Date*” means September 30, 2012.

“*Governmental Requirements*” means all applicable governmental requirements relating to the Property, and includes, without limitation, the following: the Comprehensive Environmental Response, Compensation And Liability Act (“*CERCLA*”), the Superfund Amendment and Reauthorization Act, the Resource Conservation Recovery Act, the Federal Water Pollution Control Act, the Federal Insecticide, Fungicide and Rodenticide Act, the Clean Water Act, the Safe Drinking Water Act, the Clean Air Act, any comparable or related State or local laws, any amendments or successor laws to the foregoing, any so-called federal, state or local “superfund” or “superlien” statutes, and any other statute, law, ordinance, code, rule, regulation, order or decree regulating, relating to or imposing liability (including strict liability) or standards of conduct concerning any Hazardous Substances (collectively, the “*Hazardous Substance Laws*”), where the term “Hazardous Substances” means and includes those elements or compounds which are contained on the list of hazardous substances adopted by the United States Environmental Protection Agency and the list of toxic pollutants designated by Congress, the

Environmental Protection Agency, the Environmental Authority, or under any Hazardous Substance Laws, and includes, without limitation: (i) asbestos, (ii) petroleum or petroleum products, (iii) MTBE and any other oxygenates typically added to gasoline, or their degradation byproducts, (iv) hazardous substances as defined by or pursuant to §101(14) of CERCLA, and (v) any other chemical, substance or waste that is regulated by any local, state, federal or other governmental or quasi-governmental authority including specifically, but without limitation, the Environmental Authority.

“**Outside Closing Date**” means 30 days from and after the expiration of the Review Period.

“**Property**” means the real property located at the corner of Rose Drive and East Second Street, Benicia, CA , and which is more particularly described in **Exhibit A** attached hereto and made a part hereof, together with all improvements and fixtures located thereon and all rights and appurtenances thereto in anywise belonging.

“**Purchase Price**” means \$556,909.00.

“**Review Period**” means the period of time commencing on the Effective Date and expiring at 11:59 p.m. on the date that is 60 days from and after the Effective Date.

“**Right of First Refusal (“ROFR”)**” means in the event Buyer uses the Property in a manner or for a purpose that is inconsistent with a refinery buffer zone (industrial use with only City of Benicia employees or City of Benicia representatives present) or divests itself of the property, Seller shall have the right to reacquire the Property by purchase. The ROFR purchase price shall be the Purchase Price plus 5%. Upon written Notice by Buyer of its intent to divest the Property, Seller shall have 90 days to respond to Buyer and an additional 90 days to close the transaction.;

“**Seller’s Broker**” means – None - Seller has not retained the services of a broker in connection with the transactions contemplated by this Contract.

“**State**” means the State of California.

“**Title Company**” means North American Title Company, 560 First Street, # B150, benicia CA 94510.

“**USTs**” means the underground gasoline storage tanks and related underground piping and gas delivery systems at the Property, including above-ground dispensers.

ARTICLE II **PURCHASE AND SALE**

2.01 **Property.** Subject to the terms and provisions of this Contract, Seller agrees to sell the Property to Buyer, and Buyer agrees to purchase the Property from Seller.

2.02 **Matters to which Conveyance is Subject.** The Property shall be conveyed subject to: (a) all easements; rights-of-way; reservations; restrictions; covenants; conditions; mineral leases, reservations, conveyances, severances and royalty interests, as well as all other mineral rights and interests of record; maintenance charges and special assessments and liens securing the same; and all other matters of record, to the extent any of the foregoing are still valid and subsisting and affect all or any portion of the Property; (b) all zoning laws, regulations and ordinances of

municipal and/or other governmental authorities, if any, affecting the use of the Property; (c) taxes and assessments for the current year and subsequent years not yet due and payable; (d) any facts, encroachments, or overlapping of improvements that an accurate survey or personal inspection of the Property by a prudent purchaser would reveal; and (e) the Remediation Easement (as defined in Section 8.03 of this Contract).

- 2.03 Restrictions. The Property will be deed restricted at the Closing to permanently prohibit the installation of water wells thereon (excluding monitoring, extraction and similar wells used for environmental testing, monitoring and/or remediation purposes) and to prohibit any use for any purpose inconsistent with a refinery buffer zone where use is restricted to industrial use involving minimal personnel physically located on the Property
- 2.04 Resale or Inconsistent Use of Property. In the event Buyer uses the Property in a manner or for a purpose that is inconsistent with a refinery buffer zone (industrial use with only City of Benicia employees or City of Benicia representatives present) or divests itself of the property, Seller shall have the right to reacquire the Property by purchase. The ROFR purchase price shall be the Purchase Price plus 5%. Upon written Notice by Buyer of its intent to divest the Property, Seller shall have 90 days to respond to Buyer and an additional 90 days to close the transaction. If Seller gives Buyer written Notice of an inconsistent use of the Property, Buyer shall have 60 days to remedy the use or Seller may exercise its ROFR. In the event the parties do not agree that Seller may exercise its ROFR, either party may notify the other of its intent to arbitrate and submit this agreement with the underlying facts to an arbitration service recognized by the State of California for final arbitration by a panel of 3 arbiters, selected one each respectively by the parties and the third by the two selected arbiters. The decision whether the ROFR may be invoked shall be final. Each party to pay its own legal costs and fees.

ARTICLE III **PURCHASE PRICE**

- 3.01 Purchase Price. Buyer shall “pay” to Seller the Purchase Price for the Property acquired hereunder by offsetting the difference Seller is obligated to pay Buyer under 2010 Amendments to the 2008 VIP Settlement Agreement (attached hereto as Exhibit __) or paying cash or a combination thereof.
- 3.02 Earnest Money. Upon executing this Contract, Buyer will tender to Seller a cashier’s check in the amount of the Earnest Money. Such check will be made payable to the Title Company. Seller will deliver the check and an executed copy of this Contract to the Title Company. At the Closing, the Earnest Money shall be applied toward the Purchase Price.

ARTICLE IV **REVIEW PERIOD**

- 4.01 Review Period. Seller hereby grants to Buyer the right during the Review Period to determine whether the Property is suitable for Buyer’s proposed use. Seller agrees to provide Buyer access to all information relating to the Property and its condition in Seller’s possession, including environmental site assessments, studies, tests and other reports, *but specifically excluding* income and expense statements, confidential and/or proprietary information (the “***Historical Information***”) as follows: Seller will furnish Buyer, within fifteen (15) days after the Effective

Date, copies of certain Historical Information, and to the extent that Buyer does not, in its sole discretion, deem the provided information to be sufficient, Seller agrees to make available at Seller's offices for review by Buyer and photocopying at Buyer's expense all other Historical Information in Seller's possession. Seller does not make, and hereby expressly disclaims, any representations or warranties of any nature as to the accuracy, completeness or reliability of any Historical Information. During the Review Period, Buyer shall have the right, at Buyer's sole risk and expense, to enter onto the Property to examine the Property and to conduct such studies, examinations and tests, including, without limitation, environmental site assessments and soil and groundwater tests, as Buyer shall deem necessary. Prior to entering upon the Property or performing any tests at the Property, Buyer shall provide Seller with reasonable advance notice and shall coordinate all of its activities at the Property with Seller in order to minimize disruption to any activities being conducted by Seller or any third party at the Property. Seller shall have the right to have one or more of its representatives present to observe Buyer's and its agents', contractors' and representatives' activities at the Property. No invasive studies or tests may be performed at the Property except by properly qualified and licensed (if applicable) professionals acceptable to Seller in its reasonable discretion, and Seller may require any persons performing any invasive studies or tests at the Property to provide proof of commercial liability insurance with coverage in the amount of at least \$1,000,000, combined single limit, with an insurance company reasonably acceptable to Seller and naming Seller as an additional insured thereunder. Furthermore, all protocols and methodologies utilized by Buyer and its consultants for soil sampling and other environmental testing at the Property shall be subject to prior review and approval by Seller, such approval not to be unreasonably withheld so long as such protocols and methodologies adhere to recognized standards and practices. If Seller fails to respond to Buyer within 5 business days after receiving a written request from Buyer for approval of any methodologies, protocols and/or testing professions that contains sufficient explanation and/or supporting documentation for an informed decision to be made by Seller (an "**Approval Request**"), then Seller shall be deemed to have approved the matters set forth in the Approval Request. Buyer shall not permit any mechanic's, materialman's or other lien to attach to the Property as a result of Buyer's exercise of its right of entry, and Buyer, at its sole cost, shall cause any such lien to be removed to the satisfaction of Seller within five (5) days after recording. Buyer, as a covenant to survive the termination of this Contract, agrees that it will, at its sole cost and expense, promptly repair any damage to the Property caused by it or any of its agents, contractors or representatives and will promptly restore the Property as nearly as is reasonably possible to the same or better condition than that in which it existed immediately prior to such persons' activities thereon.

- 4.02 Termination Right. If, prior to the expiration of the Review Period, Buyer determines that it does not wish to purchase the Property for any reason whatsoever or no reason at all, then Buyer may terminate this Contract by written notice to Seller, with a copy to the Escrow Company, given prior to the expiration of the Review Period. Upon receipt of the written notice timely given as aforesaid, the Escrow Company shall refund the Earnest Money, and both Seller and Buyer shall be released from any further obligations under this Contract except those which, by their express terms, survive the termination hereof. If Buyer fails to deliver written notice of termination to Seller prior to the expiration of the Review Period, Buyer shall be deemed to have determined the Property is suitable for Buyer's proposed use and to have waived the right to terminate this Contract, except as may otherwise be expressly permitted hereunder.
- 4.03 Confidentiality; Disposition of Reports. As used herein, the term "**Confidential Materials**" refers to all materials and information regarding the Property that are either provided by Seller or

obtained by or for Buyer, except to the extent the same are otherwise publicly available or Buyer is compelled to disclose them by a court of competent jurisdiction. Buyer may disclose the Confidential Materials only to its employees, attorneys, real estate brokers and agents, consultants, lenders, and equity sources (the “*Permitted Disclosees*”) and to no other party without the prior written consent of Seller. Buyer shall, and Buyer shall cause the Permitted Disclosees (and any other party to whom Buyer discloses any Confidential Materials, whether or not in violation of this section) to, hold in confidence the Confidential Materials. In addition, Buyer agrees to: (a) provide Seller (without recourse, representation or warranty) copies of all environmental reports regarding the Property commissioned or prepared by Buyer, (b) immediately notify Seller of any potential violations of applicable environmental laws or the presence of any hazardous or toxic substances or conditions discovered by Buyer or any of its agents, employees, representatives or contractors at the Property, and (c) in the event this Contract terminates for any reason, immediately return to Seller (or, at Seller’s option, destroy) all studies, reports, information and materials regarding the Property previously provided by Seller to Buyer.

- 4.04 Indemnity. Buyer agrees to indemnify, defend (with counsel selected by Seller and reasonably acceptable to Buyer) and hold harmless Seller and its affiliates and their respective officers, directors, agents and employees (collectively, the “*Seller Parties*”) from, against and with respect to any and all losses, costs, expenses, claims, demands and causes of action of any nature whatsoever (collectively, “*Losses*”) caused by or arising out of Buyer’s or any of its agents’, contractors’ or representatives’ activities at or with respect to Property prior to the date on which Closing occurs. THE FOREGOING INDEMNITY SHALL APPLY EVEN WITH RESPECT TO LOSSES ALLEGED OR PROVED TO HAVE BEEN CAUSED BY THE JOINT, CONTRIBUTORY OR CONCURRENT NEGLIGENCE OR STRICT LIABILITY OF SELLER, BUT NOT TO LOSSES CAUSED BY THE SOLE SIMPLE NEGLIGENCE, GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF SELLER.

ARTICLE V TITLE AND SURVEY

- 5.01 Title Commitment. Seller will, at Buyer’s expense, deliver to Buyer a standard commitment for title insurance, or, at Seller’s option, a preliminary title report, either of which is referred to herein as the (“*Commitment*”) covering the Property, issued by the Title Company. The Commitment shall commit the Title Company to issue to Buyer a standard Owner Title Insurance Policy (the “*Policy*”) covering the Property, on the basic form of policy then commonly in use by the Title Company in the State. Seller shall pay the basic premium for the Policy. If Buyer requires any so-called “comprehensive” or “extended coverage” endorsement (if available), the deletion of any exception from the Policy or the issuance of any other endorsements to the Policy, any additional premium charged therefor shall also be borne by Buyer. Seller shall be under no obligation to make any payments, assume any liabilities or take any additional actions beyond those required in this Contract in order to facilitate the issuance of any endorsements or the making of any modifications to the Policy. The Commitment and the Policy shall be issued in the amount of the Purchase Price.
- 5.02 Survey. Within 15 days after the Effective Date, Seller will provide Buyer copies of any existing surveys of the Property in Seller’s possession. Seller does not make, and hereby expressly disclaims, any and all representations or warranties that the information contained on any surveys provided by Seller will be true, accurate, complete or up to date. Buyer shall have the right, at its

sole cost and expense, to obtain a current new or re-certified survey of the Property. As used herein, the term “**Survey**” means, collectively, any surveys of the Property provided to Buyer by Seller as well as any surveys of the Property separately obtained by Buyer. If Buyer elects to obtain its own Survey (a “**New Survey**”), Buyer shall cause the New Survey to be completed and copies delivered to both Buyer and Seller within 45 days after the Effective Date, and regardless when or if any New Survey is obtained by Buyer, it shall be deemed to have received the New Survey on the earlier of the date on which Buyer actually receives the New Survey or the 45th day after the Effective Date. If Buyer elects not to obtain a New Survey, Buyer shall be deemed to have approved any fact, circumstance, or condition which reasonably could have been discovered by the making of a New Survey.

- 5.03 **Objections.** Notwithstanding anything contained in this Contract to the contrary, Seller shall not be obligated to convey to Buyer any greater interest in, or title to, all or any portion of the Property beyond that which Seller owns and has a right to convey. Buyer shall have 30 days from its receipt of the last to be received of: (a) the Commitment, (b) the best available copies of all documents listed therein as constituting exceptions to or reservations from Seller’s title to the Property (collectively, the “**Exception Documents**”), and (c) any New Survey (subject to the provisions of Section 5.02 above capping the time to receive any New Survey to 45 days after the Effective Date), within which to examine same and give Seller written notice setting forth any objections Buyer has to anything contained therein or to such title as Seller has a right to convey; **provided however**, that Buyer shall have no right to object to the existence of and/or encumbrance of the Property by the Remediation Easement (as defined in Section 8.03). Any item contained in the Survey, the Commitment or the Exception Documents shall be deemed approved by Buyer unless Buyer notifies Seller of Buyer’s objection to same within said 30 day period. Seller shall have the right, but not the duty, to cure any such objection of Buyer. If any such objection is not cured within 15 days from Seller’s receipt of notice of such objection, Buyer may, at Buyer’s option and as Buyer’s sole remedy, terminate this Contract by giving written notice of termination to Seller within three (3) days from and after the expiration date of such 15 day period, and, in such event, the parties hereto will be relieved of all further liabilities hereunder (except those which, by their express terms, survive the termination hereof) and the Earnest Money will be refunded to Buyer. If Buyer does not so notify Seller of termination within such three (3) day period, Buyer shall be deemed to have approved any objectionable item not cured. **Notwithstanding anything to the contrary contained in this Contract, Buyer shall have the right to terminate this Contract without cause at any time prior to the end of the Review Period in accordance with the provisions of Section 4.03 of this Contract, and the terms of this Section 5.03 do not limit or affect that right in any way.**

ARTICLE VI CLOSING

- 6.01 **Closing.** The Closing of the sale and purchase contemplated herein (the “**Closing**”) shall be held at the offices of the Escrow Company at a date and time mutually acceptable to the parties occurring on or before the Outside Closing Date; **provided however**, that the parties agree that neither party is required to be physically present at the offices of the Escrow Company so long as they have delivered all documents required by this **Article VI** to the Escrow Company and the Escrow Company has confirmed that the closing deliveries of both parties (including the wiring by the Buyer to the Escrow Company of the Purchase Price as required by Section 6.02(a)), are completed by 10:00am (local time at the offices of the Escrow Company as set forth in **Article I**) on the date on which Closing is scheduled. **Buyer acknowledges that Seller shall have no**

obligation whatsoever to extend the date of Closing beyond the Outside Closing Date, and that if Buyer fails to close on or before the date prescribed in this Section 6.01 (other than by reason of Seller's default hereunder), Buyer shall be in default hereunder.

6.02 Buyer Deliveries at Closing. At the Closing, Buyer shall deliver to Seller:

- a. In immediately available funds, an amount equal to the total Purchase Price (less credit for Earnest Money held by the Escrow Company, and subject to any adjustments and prorations as expressly set forth herein).

6.03 Seller Deliveries at Closing. At the Closing and upon the funding of the Purchase Price, Seller shall deliver to Buyer:

- a. One original of the *Grant Deed* for the Property substantially in the form attached hereto as **Exhibit B** (the "*Deed*"), executed by Seller and acknowledged.
- b. A fully executed *Certificate of Non-Foreign Status* substantially in the form attached hereto as **Exhibit C**.
- c. The Title Company's unconditional commitment to issue to Buyer within a reasonable period of time following Closing, the Policy in the amount of the Purchase Price insuring title to the Property in the name of Buyer, subject to all matters disclosed by the Commitment except for those, if any, to which Buyer timely objected and Seller cured in accordance with the provisions of **Article V** hereof.

6.04 Closing Costs and Proration. All real property taxes and assessments for the year of Closing shall be prorated to the date of Closing, and Buyer shall be responsible for paying all unpaid real property taxes and assessments as and when they come due. Except as otherwise expressly provided herein, all transfer and similar taxes, if any, relating to the transaction shall be borne by Buyer. Buyer shall pay all costs for the recording of the Deed, obtaining the Policy and any escrow fee charged by the Escrow Company. Buyer shall be solely responsible for any costs, fees, taxes or expenses incidental to any financing obtained by Buyer from third parties for the Purchase Price. Premiums for the issuance of the Policy shall be paid as set forth in Section 5.01 hereof. Except as otherwise provided herein, each party shall pay its own attorneys' fees and other expenses incidental to the preparation and carrying out of this Contract. The provisions of this Section shall survive Closing without limitation as to time.

ARTICLE VII **AS-IS**

BUYER: (A) ACCEPTS THE PROPERTY "AS IS", "WHERE IS" AND "WITH ALL FAULTS", AND (B) ACKNOWLEDGES THAT, EXCEPT AS EXPRESSLY SET FORTH HEREIN AND EXCEPT FOR THE SPECIAL WARRANTY OF TITLE TO BE CONTAINED IN THE DEED, SELLER HAS NOT MADE, DOES NOT MAKE AND HEREBY EXPRESSLY DISCLAIMS, AND BUYER HAS NOT RELIED UPON AND WILL NOT RELY UPON, EITHER DIRECTLY OR INDIRECTLY, ANY EXPRESS OR IMPLIED WARRANTIES, STATEMENTS, ASSERTIONS, NON-ASSERTIONS, DISCLOSURES OR REPRESENTATIONS TO BUYER CONCERNING ANY ASPECT OF THE PROPERTY, INCLUDING, BUT NOT LIMITED TO: (i) THE PHYSICAL, ENVIRONMENTAL, STRUCTURAL OR GEOLOGICAL CONDITION OF THE PROPERTY, (ii) THE HABITABILITY,

SUITABILITY OR FITNESS OF THE PROPERTY FOR ANY PARTICULAR PURPOSE OR USE, (iii) INCOME TO BE PRODUCED FROM THE PROPERTY, (iv) THE COMPLIANCE OR NONCOMPLIANCE OF THE PROPERTY WITH ANY LAWS, RULES, REGULATIONS, JUDICIAL OR ADMINISTRATIVE ORDERS, ORDINANCES, DECREES OR OTHER REQUIREMENTS OF ANY NATURE WHATSOEVER IMPOSED OR ENFORCED BY ANY LOCAL, STATE, FEDERAL OR OTHER GOVERNMENTAL OR QUASI-GOVERNMENTAL AUTHORITY (COLLECTIVELY, “**GOVERNMENTAL REQUIREMENTS**”), OR (v) THE PRESENCE OR ABSENCE OF ANY LATENT OR PATENT DEFECTS AT, IN OR WITH RESPECT TO THE PROPERTY. TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, BUYER FOREVER WAIVES AND RELEASES THE SELLER PARTIES FROM ALL LIABILITY AND RESPONSIBILITY FOR, AND COVENANTS NOT TO SUE ANY OF THE SELLER PARTIES UPON OR IN CONNECTION WITH, ANY AND ALL CLAIMS, DEMANDS, ACTIONS, CAUSES OF ACTION, LOSSES, DAMAGES, LIABILITIES, COSTS, EXPENSES, AND COMPENSATION OF WHATEVER KIND, DIRECT OR INDIRECT, KNOWN OR UNKNOWN, FORESEEN OR UNFORESEEN, CONTINGENT OR OTHERWISE, THAT BUYER NOW HAS OR IS ENTITLED TO OR MAY HAVE OR BE ENTITLED TO IN THE FUTURE ARISING FROM OR IN CONNECTION WITH THE CONDITION OR USE OF THE PROPERTY, INCLUDING BUT NOT LIMITED TO ANY ASSERTED OR ACTUAL VIOLATION, WHETHER OCCURRING PRIOR TO, ON OR AFTER THE DATE OF CLOSING, OF ANY APPLICABLE GOVERNMENTAL REQUIREMENTS RELATING TO HEALTH, SAFETY OR THE ENVIRONMENT. Buyer acknowledges that the Purchase Price was set taking into consideration the agreements of Buyer in this **Article VII**. The provisions of this **Article VII** shall survive the Closing without limit as to time and may, at Seller’s election, be incorporated in whole or in part into the Deed.

ARTICLE VIII **ENVIRONMENTAL MATTERS**

- 8.01 **Prior Use.** The Property was previously used by Seller and prior owners as a buffer zone related to refinery operations. The Property also contains evidence of prior use in a governmental capacity as it there may be evidence of arsenal type use (as example but not limited to shell casings, munitions, grenades or grenade parts) on the Property.
- 8.02 **Termination Right.** If, prior to Closing, Buyer determines the property will not be useful for its intended purpose, then Buyer shall have the right to terminate this Contract without forfeiture of its earnest money deposit.
- 8.03 **Environmental Remediation.** To the extent Seller determines the Property is subject to environmental remediation in or investigation related to any type of environmental concern in the future which is the obligation of Seller (such as migration onto the Property or arsenal related investigation or remediation), **Buyer shall work amicably with Seller, Sellers’ representatives or governmental authorities to allow appropriate access to the Property.**
- 8.04 **Release.** BUYER SHALL BE DEEMED TO HAVE DETERMINED, AFTER PERFORMING ITS OWN DUE DILIGENCE AND IN ITS SOLE JUDGMENT AND DISCRETION, THAT SUBJECT TO THE PROVISIONS OF THE REMDIATION EASEMENT AND ANY APPLICABLE FEDERAL, STATE AND LOCAL STATUTORY PROVISIONS, BUYER SHALL BE DEEMED TO HAVE ASSUMED ALL RISK AND RESPONSIBILITY WITH RESPECT TO THE PRESENCE OF PETROLEUM HYDROCARBONS AND THEIR DERIVATIVES AT THE PROPERTY. Furthermore, Buyer expressly **RELEASES** the Seller Parties from all liability for, and **COVENANTS NOT TO SUE** any of the Seller Parties for or in

connection with, any Losses related to the existence of petroleum hydrocarbons and/or their derivatives in, on, at or under the Property at levels which are below the Environmental Authority's applicable corrective action levels.

Buyer acknowledges that it is familiar with Section 1542 of the California Civil Code, which reads:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

Buyer waives and relinquishes any right or benefit which it has or may have under California Civil Code Section 1542 or any similar provision of the statutory or non-statutory law of any other jurisdiction, pertaining to the Property including without limitation petroleum hydrocarbons in, on, at or under the Property at levels which are below the Environmental Authority's corrective action levels.

INITIALS: Seller _____ Buyer _____

The provisions of this Section 8.04 shall survive Closing without limit as to time.

ARTICLE IX
DEFAULTS; REMEDIES; DAMAGES

- 9.01 Pre-Closing Seller Default. Subject to the provisions of Section 9.04 hereof, in the event of default hereunder on the part of Seller prior to Closing, then Buyer shall be entitled, **as its sole and exclusive remedies in such event** (Buyer hereby waiving all others), to either: (a) terminate this Contract, recover the Earnest Money, and receive reimbursement from Seller of all out-of-pocket expenses incurred by Buyer in connection with its investigation of the Property (including, without limitation, any survey costs), up to an aggregate maximum amount not to exceed the amount of the Earnest Money, or (b) enforce the remedy of specific performance against Seller.
- 9.02 Pre-Closing Buyer Default. Subject to the provisions of Section 9.04 hereof, in the event of default hereunder on the part of Buyer prior to Closing, then Seller shall be entitled, **as its sole and exclusive remedies in such event** (Seller hereby waiving all others), to either: (a) terminate this Contract and receive reimbursement from Buyer of all out-of-pocket expenses incurred by Seller in connection with its investigation of the Property (including, without limitation, any survey costs), up to an aggregate maximum amount not to exceed the amount of the Earnest Money, or (b) enforce the remedy of specific performance against Buyer.
- 9.03 Waiver of Certain Damages. **Subject to the provisions of Section 9.04 hereof, each party hereby waives the right to seek and to recover any lost profits, incidental, consequential, exemplary, extraordinary, indirect or punitive damages as a result of the breach by the other party of any of the provisions hereof.**
- 9.04 Indemnification Obligations; Attorneys' Fees. The foregoing provisions of this Article shall not limit any of the express indemnification obligations of the parties hereunder, nor shall they limit

the rights of any prevailing party in litigation brought in connection with this Contract to recover its reasonable attorneys' fees and court costs from the other party.

ARTICLE X CONDEMNATION/CASUALTY

- 10.01 Major Condemnation/Casualty. If after the Effective Date, but prior to the Closing, there should be: (a) a taking or condemnation of greater than twenty five percent (25%) of the area of the Property, or (b) damage to the Property by fire or other casualty which would cost \$50,000 or more to repair, then either Seller or Buyer may terminate this Contract upon written notice to the other party hereto within ten (10) days after receiving notice from any source of such taking or damage, whereupon the Escrow Company shall return the Earnest Money to Buyer and neither party hereto shall have any further obligations hereunder except those which, by their express terms, survive termination hereof. If neither party so terminates this Contract, then the Closing shall take place as provided herein with no abatement of the Purchase Price, and Seller shall assign to Buyer at the Closing, subject to confirmation by Seller that such assignment will not impair Seller's insurance, all interest of Seller in and to any insurance proceeds or condemnation awards which may be payable to Seller on account of such occurrence; ***provided, however,*** that: (i) with respect to a condemnation award, Seller will retain the right to make a claim for any costs incurred regarding its signage or other retained assets on the Property, and (ii) if Seller is self-insured for the damage to the Property, then in lieu of assigning insurance proceeds to Buyer as aforesaid, Seller shall reduce the Purchase Price payable at Closing by an amount equal to the cost of repairing the damage, as determined by Seller based upon a quote obtained from a qualified contractor selected by Seller (but if such amount exceeds \$50,000, Seller may terminate this Contract as aforesaid).
- 10.02 Minor Condemnation/Casualty. If after the Effective Date but prior to the Closing, there should be: (a) a taking or condemnation of twenty five percent (25%) or less of the area of the Property, or (b) damage to the Property by fire or other casualty which would cost less than \$50,000 to repair, then Buyer shall have no right to terminate its obligations under this Contract, but Seller shall assign to Buyer at the Closing, subject to confirmation by Seller that such assignment will not impair Seller's insurance, all interest of Seller in and to any insurance proceeds or condemnation awards which may be payable to Seller on account of such occurrence; ***provided, however,*** that: (i) with respect to a condemnation award, Seller will retain the right to make a claim for any costs incurred regarding its signage or other retained assets on the Real Property, and (ii) if Seller is self-insured for the damage to the Property, then in lieu of assigning insurance proceeds to Buyer as aforesaid, Seller shall reduce the Purchase Price payable at Closing by an amount equal to the cost of repairing the damage, as determined by Seller based upon a quote obtained from a qualified contractor selected by Seller (but if such amount exceeds \$50,000, Seller may terminate this Contract as aforesaid).

ARTICLE XI MISCELLANEOUS

- 11.01 Notices. Notices shall be sent to the address of the relevant party set forth in the introduction to this Contract, and must be sent by one of the following methods: (a) by certified mail, return receipt requested, in which case notice shall be deemed delivered three business days after deposit, postage prepaid in the U.S. Mail, (b) by overnight delivery using a nationally recognized overnight courier, in which case it shall be deemed delivered one business day after deposit with

such courier, (c) by fax with confirmation of transmission, in which case notice shall be deemed delivered upon transmission of such notice, or (d) by personal delivery, in which case notice shall be deemed delivered upon delivery. Each party may change its address for notice by delivering written notice to the other party in accordance with this provision.

- 11.02 Marks. Seller reserves from this sale any and all price sign modules, point of sale signs, identification signs, and trademarks and logos, and Seller will cause them to be removed from the Property on or before Closing. Buyer warrants that it will not use trade names, trademarks, logos, designs, branded advertising or exterior or interior color schemes identical or similar to those of Seller. Any breach of this Section will be considered an infringement of Seller's trademarks and Buyer agrees, as a covenant to survive Closing, to pay damages of not less than \$1,000 per day for each day of infringement.
- 11.03 Authority; Binding Effect. Each person executing this Contract represents that he or she has been duly authorized to do so by all requisite action on the part of the party on whose behalf he or she is signing, and that in so doing, he or she shall bind such party to all of the terms, provisions, conditions and covenants hereof. Each party hereto represents that: (a) its execution, delivery and performance of this Contract are within its corporate, limited liability, partnership or individual powers, have been duly authorized, and do not and will not with the passage of time or giving of notice constitute a default under any agreement to which it is a party or by which it is bound, (b) this Contract and the documents to be executed and delivered in connection herewith constitute legal, valid and binding obligations of such party, enforceable in accordance with their terms, and (c) to the current actual knowledge of the signatory for such party hereon, there is no pending or threatened litigation involving the party which would affect its ability to honor and perform its obligations under this Contract.
- 11.04 Headings. The headings and section references found herein are for convenience only and shall not be considered a part of this Contract for any purpose, or be considered as in any way interpreting, constituting, varying, altering, or modifying this Contract or any of the provisions hereof.
- 11.05 Integration; Amendments. This Contract embodies the entire agreement between the parties hereto and supersedes all prior agreements and understandings, whether oral or written, relating to the subject matter hereof. This Contract may be amended or modified only by a written instrument executed by the parties hereto.
- 11.06 Successors and Assigns. Buyer shall not be entitled to assign this Contract or to delegate any of its responsibilities under this Contract to any other person or entity without the prior written consent of Seller, which consent Seller may grant or withhold in its sole discretion. Subject to the immediately preceding sentence, this Contract shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, legal representatives, successors and permitted assigns.
- 11.07 Brokers. Except for Seller's Broker (if any is listed above) and Buyer's Broker (if any is listed above), no brokers have been involved in this transaction. Seller agrees to indemnify Buyer against any and all claims for brokerage fees, commissions, finder's fees or other similar payments made by Seller's Broker (if any) and any other persons claiming by, through or under Seller. Buyer agrees to indemnify Seller against any and all claims for brokerage fees,

commissions, finder's fees or other similar payments made by Buyer's Broker (if any) and any other persons claiming by, through or under Buyer.

- 11.08 Counterparts. This Contract may be executed in multiple counterparts, each of which shall be deemed to be an original, and all of which together shall constitute but one and the same instrument.
- 11.09 Construction. Each party acknowledges that it has had the opportunity to be represented by counsel of its choice in connection with the negotiation of this Contract and that it has read and fully understands the import of this Contract and, as such, each party hereby waives the application of any rule which would require that any ambiguities in this Contract be construed against the party who drafted it or in favor of the party who did not draft it.
- 11.10 Time of the Essence. TIME IS OF THE ESSENCE OF THIS CONTRACT.
- 11.11 No Public Statements. Buyer shall obtain Seller's consent before issuing any public written statement concerning this Contract.
- 11.12 Further Actions. Buyer and Seller agree to take such actions and execute and deliver such documents as are necessary to consummate the transaction contemplated herein, and shall cooperate with one another as may be reasonably necessary to effectuate the terms of this Contract and any instrument or agreement delivered pursuant hereto.
- 11.13 Attorney's Fees. In the event either party hereto finds it necessary to bring suit against the other party as a result of any dispute arising out of this Contract, the prevailing party in such dispute shall be entitled to recover, in addition to such other damages and relief as it may be awarded by the court or other forum of competent jurisdiction, its reasonable attorneys' fees, court costs and other reasonable costs of litigation.
- 11.14 Savings Clause. If one or more provisions of this Contract is held unenforceable, invalid, or illegal in any respect, such unenforceability, invalidity, or illegality will not affect any other provision of this Contract, which will be construed as if such unenforceable, invalid, or illegal provision had never been a part hereof.
- 11.15 Expiration. This Contract shall, at Seller's option, become void and of no force or effect if it has not been executed by Buyer and delivered, together with the Earnest Money, to either the Escrow Company or Seller on or before the Expiration Date.

[signatures on following page]

**Signature Page
to
Sale and Purchase Agreement**

EXECUTED to be effective as of the Effective Date.

Seller:

VALERO REFINING COMPANY-CALIFORNIA,
a Delaware corporation

By: _____
Name: _____
Title: _____

Date: _____

Buyer:

City of Benicia, a California Municipality

by _____
City Manager for the City of Benicia

Date: _____

Escrow Company Receipt:

A fully executed copy of this Contract, together with the Earnest Money in the amount of \$_____, has been received by us on this the _____ day of _____, 2010, and we agree to perform the duties of the Escrow Company hereunder.
North American Title Company

By: _____
Name: _____
Title: _____

EXHIBIT A

Property Description

[End of Description]

EXHIBIT B

FORM OF DEED

RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:

CHRIS HOWE, DIRECTOR HEALTH, SAFETY AND ENVIRONMENT
VALERO REFINING COMPANY-CALIFORNIA
3400 EAST SECOND STREET
BENICIA, CA 94510-1097

MAIL TAX STATEMENTS TO:

CITY CLERK
CITY OF BENICIA
250 EAST L STREET
BENICIA, CA 94510

APN:

-----Space Above This Line For Recorder’s Use-----

**GRANT DEED
(Restricted Use Deed)**

DOCUMENTARY TRANSFER TAX IS SHOWN BY AN UNRECORDED SEPARATE AFFIDAVIT PURSUANT TO REVENUE AND TAXATION CODE SECTION 11932.

FOR A VALUABLE CONSIDERATION, receipt of which is acknowledged, VALERO REFINING COMPANY-CALIFORNIA, a Delaware corporation (“*Grantor*”) hereby GRANTS to the City of Benicia, a California municipality (“*Grantee*”) the real property more particularly described in Exhibit A hereto, together with all of Grantor’s right, title and interest in and to all structures and improvements, if any, affixed thereto (the “*Property*”).

This conveyance is made subject to: (a) liens for property taxes and assessments that are not due and payable as of the date of execution of this instrument, (b) all matters shown in the public records, (c) all matters that can be ascertained by a reasonable inspection or survey of the Property; and (d) the following restrictions, which Grantor imposes as covenants running with the land and binding upon Grantee and all successor owners of the Property, their tenants, and all other persons having any right, title or interest in or to the Property: (i) no water wells shall be drilled or placed on the Property (excluding monitoring, extraction and similar wells used for environmental testing, monitoring and/or remediation purposes); (ii) the Property may not be used for any purpose inconsistent with a refinery buffer zone where use is restricted to industrial use involving minimal personnel physically located on the Property; and (iii) after giving reasonable notice to Grantee, Grantor may enter the Property for purposes consistent with environmental investigation or remediation which may the responsibility of Grantor or a

Sale and Purchase Agreement – VRC-C and City of Benicia
Corner of Rose Drive and East Second Street

EXHIBIT B

V:\LglCorp\Commercial Law\Real Estate\Sales Contracts-SaleK-VRC-CAandCity of Benicia 2012

governmental agency. In the exercise of its easement rights hereunder, Grantor shall use reasonable efforts to minimize disruption of activities at the Property by the owner thereof and its tenants and other legitimate occupants thereof, and, following any activities undertaken by Grantor on the Property pursuant to this easement, Grantor shall repair and restore the surface of the Property as nearly as is reasonably possible to the condition in which it existed immediately prior to such activities.

The restrictions contained in item (d) above is for the benefit of Grantor, its successors and assigns, who shall have the right to enforce them by all legal and equitable means (including, without limitation, by way of injunction and suit for damages).

Dated to be effective _____, 20____.

Grantor:

VALERO REFINING COMPANY-CALIFORNIA,
a Delaware corporation

By: _____ [EXHIBIT ONLY] _____
Name: _____
Title: _____

ACKNOWLEDGMENT

State of _____)
County of _____)

On this ____ day of ____, 2012, before me, a Notary Public in and for the State of California, personally appeared _____,
Known to me to be the _____, of _____ and who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature: _____

Name: _____

Title or Type of Document: Sale and Purchase Agreement VRC-C and City of Benicia
Document Date: _____ No. of pages: ____w/ Acknowledgment
Signer: _____, VRC-C corporate officer

County Recorder, Solano County

**STATEMENT OF DOCUMENTARY TRANSFER TAX
DUE AND REQUEST THAT AMOUNT OF TAX NOT BE
MADE A PART OF THE PERMANENT RECORD IN THE
OFFICE OF THE COUNTY RECORDER**

To Alameda County Recorder:

In accordance with California Revenue and Taxation Code Section 11932, it is requested that this statement of documentary transfer tax due not be recorded with the attached deed but be affixed to the deed after recordation and before return as directed on the deed.

The deed names VALERO REFINING COMPANY-CALIFORNIA, a Delaware corporation as "Grantor" and City of Benicia, a California municipality, as "Grantee." The property being transferred is located in the City of Benicia, County of Solano. The Assessor's Parcel Number is _____.

The amount of documentary transfer tax due on the attached deed is \$_____, computed on the full value of the property conveyed.

Grantor:

VALERO REFINING COMPANY-CALIFORNIA,
a Delaware corporation

By: _____ [EXHIBIT ONLY]
Name: _____
Title: _____

Grantee:

City of Benicia, a California Municipality

by _____
City Manager for the City of Benicia

Date: _____

EXHIBIT C

Form of Certificate of Non-Foreign Status

CERTIFICATE OF NON-FOREIGN STATUS

[Pursuant to 26 U.S.C. §1445 and 26 C.F.R. §1.1445-2(b)(2)(iv)(B)]

Section 1445 of the Internal Revenue Code provides that a transferee of a U.S. real property interest must withhold tax if the transferor is a foreign person. For U.S. tax purposes (including §1445), the owner of a disregarded entity (which has legal title to a U.S. real property interest under local law) will be the transferor of the property and not the disregarded entity. To inform the transferee that withholding of tax is not required upon the disposition of a U.S. real property interest by VALERO REFINING COMPANY-CALIFORNIA, a Delaware corporation (“*Transferor*”), the undersigned hereby certifies the following on behalf of Transferor:

1. Transferor is not a foreign corporation, foreign partnership, foreign trust, or foreign estate (as those terms are defined in the Internal Revenue Code and Income Tax Regulations);
2. Transferor is not a disregarded entity as defined in § 1.1445-2(b)(2)(iii);
3. Transferor’s U.S. employer identification number is 74-2651789; and
4. Transferor’s office address is: P.O. Box 696000, San Antonio, Texas, 78269-6000.

Transferor understands that this certification may be disclosed to the Internal Revenue Service by transferee and that any false statement contained herein could be punished by fine, imprisonment, or both.

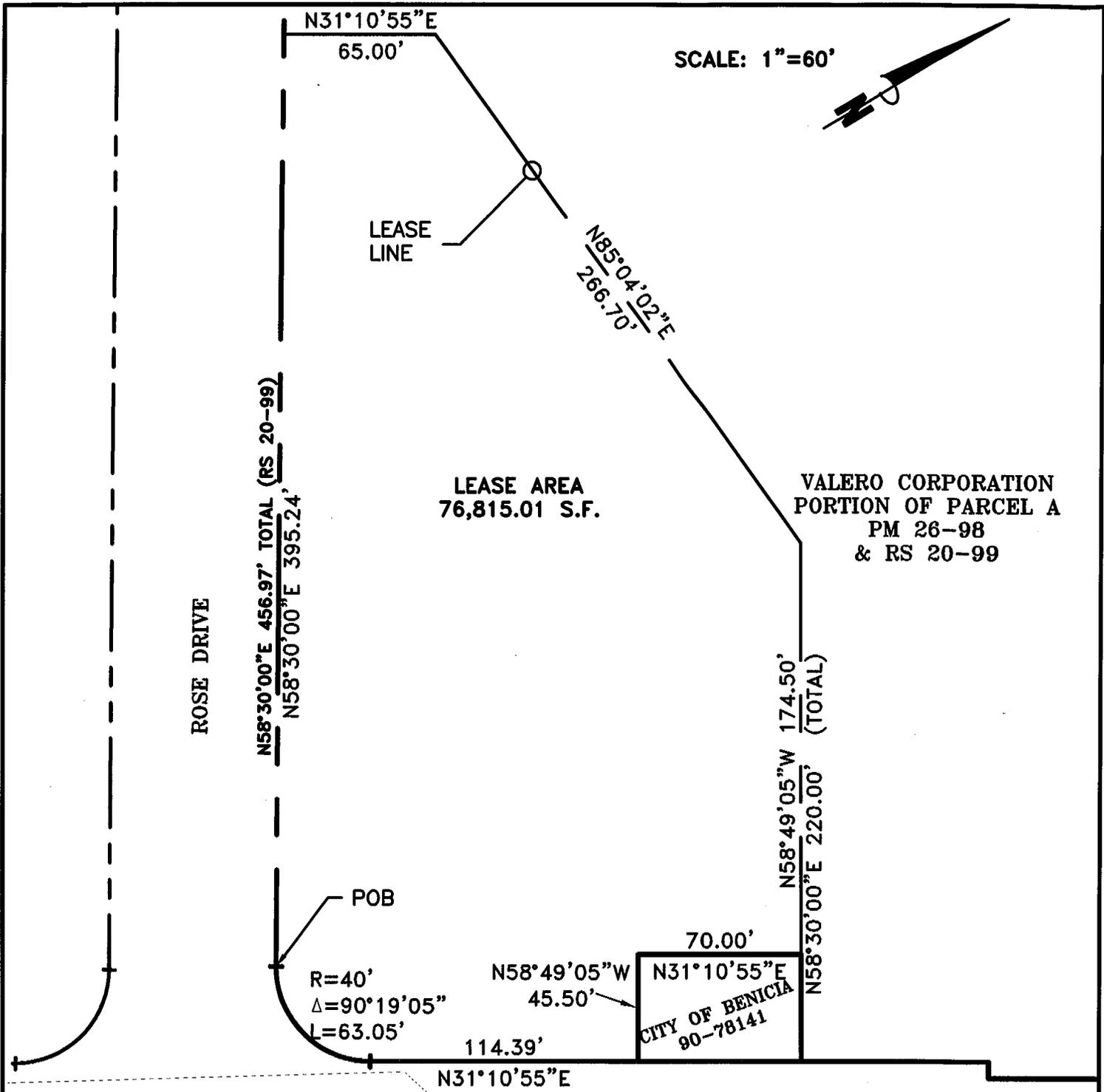
Under penalties of perjury I declare that I have examined this certification and to the best of my knowledge and belief it is true, correct, and complete, and I further declare that I have authority to sign this document on behalf of Transferor.

TRANSFEROR:

VALERO REFINING COMPANY-CALIFORNIA,
a Delaware corporation

By: _____ [EXHIBIT ONLY]
Name: _____
Title: _____

Dated: _____, 20____



GENERAL NOTES & LEGEND:

- POB POINT OF BEGINNING
- PM PARCEL MAP, SOLANO COUNTY REFERENCE
- RS RECORD OF SURVEY, SOLANO COUNTY REFERENCE

THIS PLAT IS NOT INTENDED TO BE A RECORD OF A SURVEY.
IT IS BASED UPON RECORD INFORMATION ONLY, AND THE REFERENCED RECORD MAPS
AND/OR DEEDS.

EXHIBIT B

LEASE LINES

GENERAL NORTHWEST CORNER:
EAST SECOND ST. & ROSE DRIVE, BENICIA, CA.

CSA

Cullen-Sherry & Associates, Inc.
Civil Engineering - Surveying

1090 Adams Street, Suite A - P.O. Box 591
Benicia, California 94610
(707) 745-3219 Fax (707) 745-9456 csa-engineers.com

SCALE:	AS NOTED
DATE:	8-08-2011
DRAWN BY:	DC
CHECKED BY:	DC
PR	

EXHIBIT A

DESCRIPTION OF LEASE AREA

A PORTION OF PARCEL A AS SHOWN ON THE PARCEL MAP FILED SEPTEMBER 21, 1984 IN BOOK 26 OF PARCEL MAPS AT PAGES 95 TO 99, SOLANO COUNTY RECORDS, MORE PARTICULARLY DESCRIBED AS FOLLOWS (SAID COURSES HAVE BEEN ROTATED TO AGREE WITH THE COURSES THAT ARE SHOWN THESE SAME LANDS PER THE RECORD OF SURVEY FILED FEBRUARY 25, 1993 IN BOOK 20, PAGE 99, SOLANO COUNTY RECORDS):

BEGINNING AT THE MOST EASTERLY TERMINUS OF THE COURSE THAT BEARS N58°30'00"W 456.97' (RS 20-99), ALSO BEING A POINT ON THE GENERAL RIGHT OF WAY LINE OF ROSE DRIVE AS SHOWN ON DOCUMENT RECORDED AT SERIES NO. 90-78140, SOLANO COUNTY RECORDS; THENCE N58°30'00"W 395.24'; THENCE N 31°10'55" E 65.00'; THENCE N 85°04'02" E 266.70'; THENCE S 58°49'05" E 174.50' TO THE GENERAL NORTHWEST CORNER OF THE LANDS DEEDED TO THE CITY OF BENICIA PER DOCUMENT SERIES NUMBER 90-78141, SOLANO COUNTY RECORDS; THENCE S 31°10'55"W 70.00'; THENCE S 58°49'05"E 45.50'; THENCE S 31°10'55" W 114.39' TO THE BEGINNING OF CURVE CONCAVE TO THE NORTH HAVING A RADIUS OF 40.00'; THENCE SOUTHERLY AND WESTERLY ALONG THE CURVE 63.05' THROUGH A CENTRAL ANGLE OF 90°19'05" TO THE POINT OF BEGINNING.

CONTAINING 76,815.01 SQUARE FEET, MORE OR LESS.

SEE EXHIBIT B ATTACHED HERETO AND MADE A PART HEREOF.

AGENDA
CITY COUNCIL MEETING DATE - APRIL 24, 2012
BUSINESS ITEMS

DATE : April 19, 2012

TO : City Council

FROM : City Manager

SUBJECT : **SUPPLEMENTAL REPORT ON THE PURCHASE OF LAND FROM VALERO FOR PUMP STATION 3 SOLAR PROJECT**

RECOMMENDATION:

Direct that the property be purchased with the \$300,000 of bond proceeds and with the remaining balance of \$256,909 as a loan from the Valero/Good Neighbor Steering Committee Settlement fund, if approved by the Sustainability Commission. If use of the Valero/Good Neighbor Steering Committee Settlement fund is not endorsed by the Sustainability Commission or if Council desires to obtain the loan elsewhere, it is recommended the loan be from the Wastewater fund. To do this, the following actions are required.

1. Send the item to the Sustainability Commission to determine if the project provides a greater value than proposed water reduction projects.
2. Adopt the resolution approving the purchase of 76,815 square feet (1.76 acres) from Valero Refining Company in the amount of \$556,909 for the installation of solar photovoltaic panels to power water system Pump Station 3, authorizing the City Manager to execute the purchase documents, and authorizing a loan from either the wastewater fund OR from Valero/Good Neighbor Steering Committee funds, contingent upon Sustainability Commissions approval of the use of the funds.

EXECUTIVE SUMMARY:

In April 2011, the City Council approved, and bonds were issued for, a Renewable Energy and Conservation Project that includes installation of solar photovoltaic arrays to provide power at ten City-operations sites. The only one of these sites left to construct is adjacent to Pump Station 3 at the northwest corner of East 2nd Street and Rose Drive. This action will allow the City to buy the needed land to build the solar arrays at Pump Station 3. Approval of the use of Valero/Good Neighbor Steering Committee funds requires the Sustainability Commission make a finding about the project.

BUDGET INFORMATION:

The \$13,195,000 financing for the renewable energy project includes \$300,000 toward the purchase of the site. The remaining \$256,909 could be granted from the Valero/Good Neighbor Steering Committee Settlement fund, or loaned from the fund and repaid over a five-year period with energy savings and PG&E rebates from the Renewable Energy project starting three years from now. Alternatively, the entire purchase amount could be funded with a grant or loan from the Good Neighbor account and, if loaned, repaid over a different time period. If the remaining \$256,909 is not paid using Valero/Good Neighbor Steering Committee funds, a loan with interest equal to the average rate of return (on all City investments) which is currently 1.6% from the Wastewater Enterprise Fund would be made and repaid as noted above.

SUMMARY:

The staff report for the purchase of the property for the Pump Station 3 solar arrays discusses using Valero/Good Neighbor Steering Committee funds. To use these funds for a project that was not listed in the 2010 Valero/Good Neighbor Steering Committee Agreement ("Agreement"), the project must go the Sustainability Commission to make a finding per paragraph H of the Agreement. Paragraph H provides:

"Future Projects The City's Sustainability Commission shall review and recommend to the City Council for approval additional projects for funding which provide verifiable water reduction by the City, community residents, BUSD, Valero and businesses in Benicia Any proposed Valero water conservation projects must be discretionary and not regulatorily mandated. Priority shall be given to water reduction projects but additional projects that are greenhouse gas reducing, sustainable or energy efficient and support the City's Climate Action Plan may be considered and recommended for approval if the Sustainability Commission finds that the project will provide a greater value than proposed water reduction projects."

Thus, the Sustainability Commission must make a finding that the proposed project provides a greater value than proposed water reduction projects and is sustainable or energy efficient and supports the City's Climate Action Plan.

As noted in original staff report, staff believes the findings can be made since the project will contribute significant sustainable energy savings to the City which is in line with the General Plan's overarching goal. The Pump Station 3 project also supports the City's Climate Action Plan by increasing the amount of renewable energy in Benicia and for City facilities (Objective E-2 and Strategy E-2.3). It also meets Objective E-3 by increasing the amount of solar energy production in Benicia.

In order to allow the Sustainability Commission to consider the project and to allow the project to remain on time, the Sustainability Commission will need to have a special meeting so that the purchase of the property is not delayed and we can begin achieving maximum energy savings.

Attachments:

- Valero/Good Neighbor Steering Committee Agreement
- Revised Resolution

AMENDMENT OF AGREEMENT

This Amendment of the Agreement ("Amendment"), entered into this 4TH day of May, 2010, by and between the City of Benicia, a municipal corporation ("City"), the Good Neighbor Steering Committee, an unincorporated association ("GNSC"), and Valero Refining Company-California, a California corporation ("Valero"), (collectively the "parties") is made with reference to the following:

RECITALS:

A. On July 10, 2008, GNSC and Valero entered into the "2008 VIP Agreement" ("Agreement") in order to resolve their disputes about preparing an Addendum to the Valero Improvement Project ("VIP") Certified Environmental Impact Report for the VIP Amendments.

B. On July 10, 2008, the City's Planning Commission incorporated the terms of the Agreement, along with its Exhibit A, into the conditions of approval for the VIP Amendments use permit.

C. The City, GNSC, and Valero now desire to modify the Agreement, particularly Exhibit A, on the terms and conditions set forth herein to provide more clarity about the uses of the funds.

D. The City, GNSC, and Valero disagree on the interpretation of certain terms of the Agreement including, but not limited to (1) the methodology for interest calculation and distribution and (2) timing of performance related to air quality monitoring requirements. However, the parties now wish to resolve and settle their differences through this Amendment.

E. Since the interpretation of the City's conditions of approval for the VIP Amendments regarding the payment of funds is at issue, the City Council is the proper body to approve this Amendment on behalf of the City.

NOW, THEREFORE, it is mutually agreed by and between and undersigned parties as follows:

1. The Introductory Paragraph and Paragraphs 1 and 2 of the Commitment to Air Quality Monitoring Section of Exhibit A of the Agreement are replaced as follows:

"1. The Two Hundred and Fifty Thousand Dollars (\$250,000.00) for air monitoring equipment, its maintenance and upkeep, etc. shall be expended for air monitoring equipment and services as detailed in the purchase order and the contract for services attached as Attachment A and Attachment B. Such expenditure shall be completed no later than February 20, 2010. These additional expenditures shall be prioritized by Argos Scientific Inc. ("Argos") and shall include data management, analysis of the data, and a payment for Argos' services as detailed in Attachment A and Attachment B. These additional expenditures shall be completed by May 3, 2010 and any equipment shall be in operation by June 1, 2010."

2. Paragraph 5 of the Commitment to GHG Reduction Initiatives Section of Exhibit A of the Agreement is replaced as follows:

“5. Provide a total not to exceed Four Hundred Thousand Dollars (\$400,000.00) to the Benicia Unified School District (BUSD) for BUSD GHG reduction measures. Such funds shall be paid by Valero to BUSD within thirty (30) days written notice from BUSD District Administration that said funds will be expended for energy conservation projects and costs as identified by BUSD Board of Trustees.”

As of the date of this agreement, \$136,937 has been paid by Valero to BUSD for energy conservation projects and costs as identified by BUSD Board of Trustees as described in Paragraph 5 above.

3. Paragraph 1 of the Commitment to Water Conservation Section of Exhibit A of the Agreement is replaced as follows:

“A. Ten Million Dollar Commitment

Valero shall pay to the City of Benicia Ten Million Dollars (\$10,000,000.00) for water conservation and climate action plan projects as detailed in this Paragraph. These climate action plan projects are in addition to those contemplated in Paragraph 4 of the Commitment to GHG Reduction Initiatives. It is anticipated by the Parties that payment will be made in installments over a 5-year period beginning with the execution of this Amendment. The 5-year period may be more or less in time depending on the funding of projects as specified below.

B. Initial Deposit

Within ten (10) days written notice from the City or BUSD that a separate account (“City VIP Water Fund Account,” “City VIP Account,” or “BUSD Account,” as the case may be) has been established and shall be maintained for the purposes set out herein, Valero shall deliver an initial deposit of One Million One Hundred and Forty-Five Thousand Dollars (\$1,145,000.00) for immediate distribution by the City or BUSD for the following expenditures identified and agreed to by Valero, GNCS, and the City:

• Community Center LEED Design	\$158,000.00
• Hearthstone Solar Panels	30,000.00
• Sustainability Staff Support	75,000.00
• Elementary Education	10,000.00
• BUSD BHS Sage Program	40,000.00
• Public Education on Sustainability	10,000.00
• CAP efficiency/renewable projects	85,000.00
• Solar Installation Incentives for residential properties in Benicia	185,000.00
• Energy/Water Audits for residential properties in Benicia	100,000.00
• Renewable Energy Manager	15,000.00
• BUSD BHS Green Academy	240,000.00
• BUSD BHS On-Site Healthy Lunch	197,000.00
Initial Total	\$1,145,000.00

The parties acknowledge that Valero has already deposited Two Hundred Fifty Thousand Dollars (\$250,000.00) of the above Initial Total with the City for the Solar Panels, Staff Support, Elementary Education, Sage Program, Public Education, and Efficiency/renewable projects.

Upon the required notice, Valero shall deposit Four Hundred Thirty Seven Thousand Dollars (\$437,000.00) with BUSD for the BHS Green Academy and the BHS On-Site Healthy Lunch Program and Four Hundred Fifty Eight Thousand Dollars (\$458,000.00) with the City for the remainder of the projects identified above.

C. Draw Down and Replenishment of City VIP Account

It is anticipated that the City will draw down the City VIP Account to pay for projects and expenses in accordance with this Amendment. Upon thirty (30) days notice from the City that the City VIP Account has declined to Three Hundred Thousand Dollars (\$300,000.00) or less, Valero shall deliver to the City funds sufficient to raise the City VIP Account balance to at least Six Hundred Thousand Dollars (\$600,000.00) until such time that Valero has paid Ten Million Dollars (\$10,000,000.00) into the account.

D. Costs Exceeding City Account Thresholds

It is anticipated by the Parties that from time to time approved projects and costs will exceed the regular City VIP Account threshold of Six Hundred Thousand Dollars (\$600,000.00). In that event and upon thirty (30) days written notice, Valero shall pay to the City good funds sufficient to meet the additional approved project costs and replenish the City VIP Account to at least Six Hundred Thousand Dollars (\$600,000.00). Except as detailed in Sections E, F, and G below, such payments shall not exceed Two Million Dollars (\$2,000,000.00) annually.

The estimated annual spending is set forth in this chart:

Year	Funds	Reserved	Available	Spent	Total Spent/Reserved
2009	\$250,000	N/A		\$250,000	\$250,000
2010	\$2,000,000	\$2,000,000 ¹	\$0.0	TBD	\$2,000,000
2011	\$2,000,000	\$1,750,000 ²	\$250,000	TBD	\$2,000,000
2012	\$2,000,000	\$1,545,000 ³	\$455,000	TBD	\$2,000,000
2013	\$2,000,000	\$1,000,000 ⁴	\$1,000,000	TBD	\$2,000,000
2014	\$1,750,000	\$1,600,000 ⁵	\$150,000	TBD	\$1,750,000
				Total	10,000,000

¹ \$850,000 available for the BCC, \$895,000 available for initial projects \$150,000 for attorney fee in lieu payments identified in §31, and \$105,000 available for the BUSD campus projects.

² \$1,400,000 available for the CRP I and \$350,000 available for BUSD campus projects.

³ \$1,000,000 available for the BCC and \$545,000 available for the BUSD campus projects.

⁴ \$1,000,000 available for the BCC.

⁵ \$1,600,000 available for CRP II only if terms of §3F are met.

Except for funds reserved for the Condensate Project, if funds have been reserved for a project but not been spent in the calendar year for which they are reserved, the funds may be rolled to the next calendar year only. Unless otherwise agreed to in writing by the parties, any reserved funds not spent by next calendar year are forfeited and go into the total funds available for consideration for future projects pursuant to Section H of this Agreement.

E. Anticipated Annual Threshold

It is anticipated that the payment and distribution of funds will not generally exceed Two Million Dollars (\$2,000,000.00) per year as originally agreed to by the Parties in the Agreement. However, the parties anticipate that projects may come forward for consideration that require payment that exceeds the anticipated annual threshold of Two Million Dollars (\$2,000,000.00). The Parties agree that in such an event and upon written approval from each of the parties, funds shall be advanced from subsequent anticipated annual thresholds.

F. Valero Condensate Recovery Project

Paragraph 1 of the Commitment to Water Conservation Section of Exhibit A of the Agreement provided that Valero could submit projects to receive some of the Water Conservation funding if the projects were discretionary and not regulatorily mandated. Valero has identified projects, known as Condensate Recovery Projects ("CRP I" and "CRP II"). Within five years, these projects, estimated to cost Ten Million Dollars, are expected to recover at least 40,000,000 gallons of water per year for reuse in the Valero Benicia Refinery. The Condensate Recovery Project – Phase I -is anticipated to save 23,652,000 gallons of water per year or the equivalent of the water used by 192 households based on the Benicia average for water usage. The resulting water savings will also result in energy savings since the water will not have to be reheated when the water is reused to make steam.

The parties, therefore, agree that if: (1) Valero commits to construction of Condensate Recovery Project – Phase I ("CRP I"); (2) CRP I has a demonstrable and verifiable water reduction of at least 23,000,000 gallons of water per year; and (3) CRP I is reviewed by the Sustainability Commission; and (4) Valero has secured all permits and approvals necessary to operate CRP I by 12/31/2012, then Valero shall receive a credit toward payment required under paragraph 3(A) above of One Million Four Hundred Thousand Dollars (\$1,400,000.00) to be expended on construction of CRP I. In addition, the disputed interest earnings on the funds held by Valero for the Agreement may be used for this project.

The parties also agree that completion of the Condensate Recovery Projects is valuable to the community. Accordingly, if CRP I is constructed or is in the process of being constructed and (1) Condensate Recovery Project – Phase II ("CRP II") has a demonstrable and verifiable water reduction of at least 17,000,000 gallons of water per year; (2) CRP II is reviewed by the Sustainability Commission; and (3) has received all necessary permits and approvals; and (4) funds have not been used for other water conservation projects identified, reviewed, and approved by the City prior to the Sustainability Commission review of CRP II, then Valero shall receive a credit toward payment required under Paragraph 3(A) above of One Million Six Hundred Thousand Dollars (\$1,600,000.00) to be expended on the construction of the CRP II.

G. Benicia Community Center Construction

The construction of the new Benicia Community Center ("BCC") at the former Mills School site will be another project that (1) will be energy efficient and use techniques and materials in accordance with the City's Climate Action Plan; (2) to the extent permissible under public contracting laws will utilize BUSD's CTE program members, Green Academy, Pathways or similar BUSD technical training pre-apprenticeship program for the construction of the project; (3) will provide a demonstration or model of water conservation, energy efficiency and sustainability; and (4) will be designed and constructed with the objective of LEED certification. To assist in the timely construction of this project, the parties agree that Two Million, Eight Hundred and Fifty Thousand Dollars (\$2,850,000.00) of the Ten Million Dollars (\$10,000,000.00) shall be designated for this project and drawn down in accordance with Paragraph C above. The City has agreed to accept the Two Million, Eight Hundred and Fifty Thousand Dollars (\$2,850,000.00) over time to allow the Two Million Dollar (\$2,000,000.00) annual threshold to remain in effect.

In addition, One Million Dollars (\$1,000,000.00) shall be designated and drawn down in a manner consistent with Paragraph 2 above for upgrades to the BUSD District Offices/Liberty High School campus for projects that (1) will be designed and constructed with the objective of LEED certification; (2) to the extent permissible under public contracting laws will utilize BUSD's CTE program members Green Academy, Pathways or similar technical training pre-apprenticeship program for the design and construction of the project; (3) will provide a demonstration or model of water conservation, energy efficiency and sustainability; and (4) will help integrate the District/Liberty campus with the BCC.

H. Future Projects

The City's Sustainability Commission shall review and recommend to the City Council for approval additional projects for funding which provide verifiable water reduction by the City, community residents, BUSD, Valero and businesses in Benicia. Any proposed Valero water conservation projects must be discretionary and not regulatorily mandated. Priority shall be given to water reduction projects but additional projects that are greenhouse gas reducing, sustainable or energy efficient and support the City's Climate Action Plan may be considered and recommended for approval if the Sustainability Commission finds that the project will provide a greater value than proposed water reduction projects."

I. Attorneys Fees

In lieu of payment of Attorneys Fees to GNCS, Valero shall, within ten (10) day of full execution of this agreement, pay One Hundred and Fifty Thousand Dollars (\$150,000) on GNCS's behalf as follows:

(a) \$20,000.00 to the Benicia Community Gardens, Inc. a 501(C) 3, for use in their efforts to promote locally produced food;

(b) \$20,000.00 to the City of Benicia to be used to augment the \$15,000.00 already allocated to the Renewable Energy Manager;

(c) \$40,000.00 to the Benicia Community Action Council ("CAC") for installation of solar panels at its Military East location and for implementation of any additional energy conservation measures CAC should choose;

(d) \$40,000.00 to the BUSD to support the horticulture program at Liberty High School, including but not limited to payment of staff salary, benefits; and other costs BUSD deems necessary to maintain and enhance the program.

(e) \$30,000.00 to the City of Benicia for the purchase and installation of bicycle racks (or other appropriate bicycle storage mechanism) throughout the City in order to promote the use of bicycles in the City of Benicia; Each bicycle rack or storage unit shall include a placard indicating the unit is made possible by the efforts of the Good Neighbor Steering Committee. The City agrees that such installation shall occur within 6 months of the execution of this Amendment.

Said payments shall be designated clearly as "on Good Neighbor Steering Committee's behalf."

4. A new Section "Interest on Funds" is added after the Section "Commitment to Water Conservation" Section to Exhibit A of the Agreement as follows:

"Interest on Funds

All interest on funds held by a party shall remain the property of that party. Interest that accrues in the City or BUSD funds such as the City Water Fund Account or the BUSD GHG Reduction Fund, etc. shall become a part of that identified fund and be made available for projects and costs that meet the criteria for expenditures from said fund. Interest earned shall not be credited against payments due from Valero under this or any other agreement and shall not be considered a part of Valero's obligations for such payments. Interest earned shall not be used for projects or costs that do not meet the criteria for expenditures from said funds."

5. Except as expressly modified herein, all other terms and covenants set forth in the Agreement and its Exhibit A shall remain the same and shall be in full force and effect.

6. Consideration

The Parties acknowledge that the commitments and promises made herein are material to each Party's determination to enter into this Amendment and in particular GNSC's determination to forgo action against the City and/or Valero at this time.

Valero expressly acknowledges that performance required under this Agreement is a condition of approval of the VIP Use Permit as originally issued in 2003 and amended in 2008 and as a result, the City has authority to enforce the Agreement and Amendment through the Benicia Municipal Code ("BMC"), including imposition of civil penalties (BMC § 17.128.080) or suspension or revocation the VIP Amendments use permit (BMC § 17.128.060), if Valero materially fails to perform its obligations under the Agreement and Amendment.

The City agrees that in consideration for GNSC's forbearance, beginning on July 7, 2010 and continuing until all funds available to the City under the Agreement are expended, the City shall produce and deliver to GNSC, Valero, and the Sustainability Commission a detailed annual accounting of all expenditures made by the City pursuant to the terms of the Agreement ("the Accounting".) Additionally, within 60 days of the referenced delivery, the Accounting shall be agendized and reported out at a regularly scheduled and agendized City Council meeting.

7. Recognition

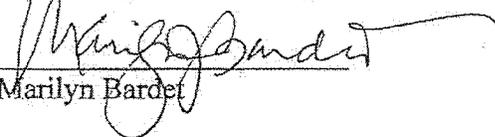
The Agreement and all Amendments to it shall from hereafter be referred to by the Parties as the **Valero/Good Neighbor Steering Committee Agreement, Settlement or Amendments**, as the case may be.

IN WITNESS WHEREOF, the parties hereto have caused this modification of Agreement to be executed on the day and year first above written.

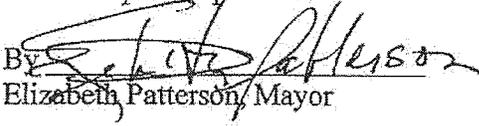
Valero Refining Company-California

By 
Doug Comeau
Vice President of Operations and
General Manager

Good Neighbor Steering Committee


Marilyn Bardet

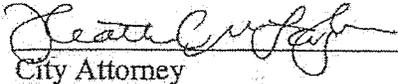
**City of Benicia,
A Municipal Corporation**

By 
Elizabeth Patterson, Mayor

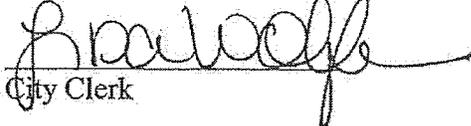
RECOMMENDED FOR APPROVAL:


City Manager

APPROVED AS TO FORM:


City Attorney

ATTEST:


City Clerk

VALERO
REFINING COMPANY-CALIFORNIA

To:
 CEREX SCIENTIFIC
 DBA ARGOS SCIENTIFIC INC
 416 NE 153RD AVE
 VANCOUVER WA 98684-3379

Purchase Order
 4501868836

Date
 02/19/2010

Page
 2 of 2

Item	Material#	Description	Quantity	U/M	Unit Price	Net Value	
		Non-Deductible Tax				2,512.50	USD
		Net incl. tax			32,512.50	32,512.50	USD
00020		Maintenance & Calibration Support					
		1.000 Perf. unit					
		Gross Price			32,400.00	32,400.00	USD
		Non-Deductible Tax				2,713.50	USD
		Net incl. tax			35,113.50	35,113.50	USD
00030		Canister Sampling Analytic Support					
		1.000 Perf. unit					
		Gross Price			9,960.00	9,960.00	USD
		Non-Deductible Tax				834.15	USD
		Net incl. tax			10,794.15	10,794.15	USD
00040		Educational Outreach Program					
		1.000 Perf. unit					
		Gross Price			10,200.00	10,200.00	USD
		Non-Deductible Tax				854.25	USD
		Net incl. tax			11,054.25	11,054.25	USD
Total Purchase Order Value:						82,560.00	USD

VALERO
REFINING COMPANY-CALIFORNIA

To:
 CEREX SCIENTIFIC
 DBA ARGOS SCIENTIFIC INC
 416 NE 153RD AVE
 VANCOUVER WA 98684-3379

Purchase Order Date Page
 4501863918 02/12/2010 2 of 4

Item	Material#	Description	Quantity	U/M	Unit Price	Net Value
00010		Entech TO-14 Canister Sampling Hardware	16.000	each		
		Gross Price			120.00	1,920.00 USD
		Non-Deductible Tax				160.80 USD
		Net incl. tax			130.05	2,080.80 USD
00020		OdaLogger Portable H2S Monitor	1.000	each		
		Gross Price			4,875.00	4,875.00 USD
		Non-Deductible Tax				408.28 USD
		Net incl. tax			5,283.28	5,283.28 USD
00030		RM Young Meteorological Station	1.000	each		
		Gross Price			4,000.00	4,000.00 USD
		Non-Deductible Tax				335.00 USD
		Net incl. tax			4,335.00	4,335.00 USD
00040		Met One PM 2.5 Sampling System	1.000	each		
		Gross Price			14,128.00	14,128.00 USD
		Non-Deductible Tax				1,183.22 USD
		Net incl. tax			15,311.22	15,311.22 USD

To:
 CEREX SCIENTIFIC
 DBA ARGOS SCIENTIFIC INC
 416 NE 153RD AVE
 VANCOUVER WA 98684-3379

Purchase Order Date Page
 4501863918 02/12/2010 3 of 4

Item	Material#	Description	Quantity	U/M	Unit Price	Net Value
00050		Ozone Monitor - 2B Tech Model #202	1.000	each		
		Gross Price			7,900.00	7,900.00 USD
		Non-Deductible Tax				661.63 USD
		Net incl. tax			8,561.63	8,561.63 USD
00060		Black Carbon Monitor - Model #AB42	1.000	each		
		Gross Price			24,800.00	24,800.00 USD
		Non-Deductible Tax				2,077.00 USD
		Net incl. tax			26,877.00	26,877.00 USD
00070		Open-Path UV Fence/line Monitor	1.000	each		
		Gross Price			45,640.00	45,640.00 USD
		Non-Deductible Tax				3,822.35 USD
		Net incl. tax			49,462.35	49,462.35 USD
00080		Automated GC Analysis System Model	1.000	each		
		Gross Price			47,470.00	47,470.00 USD
		Non-Deductible Tax				3,975.61 USD
		Net incl. tax			51,445.61	51,445.61 USD
Total Purchase Order Value:						150,733.00 USD

RESOLUTION NO. 12-

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BENICIA APPROVING A REAL PROPERTY PURCHASE IN THE AMOUNT OF \$556,909 FROM VALERO REFINING COMPANY TO FACILITATE CONSTRUCTION OF A SOLAR ARRAY TO POWER WATER SYSTEM PUMP STATION 3, AUTHORIZING THE CITY MANAGER TO EXECUTE THE PURCHASE DOCUMENTS, AND APPROVING A LOAN FOR A PORTION OF THE PURCHASE

WHEREAS, on October 10, 2010, the City Council approved a contract with Chevron Energy Solutions for construction of the City Renewable Energy and Conservation Project; and

WHEREAS, on April 5, 2011, the City Council approved the financial documents for construction of the 2010-11 Renewable Energy Project; and

WHEREAS, on April 15, 2011, \$13,195,000 in public placement Certificates of Participation were issued for the Renewable Energy and Conservation Project; and

WHEREAS, the project includes installation of solar photovoltaic arrays to provide power at ten City-operations sites, and the only one of these sites left to construct is adjacent to Pump Station 3 at the northwest corner of East 2nd Street and Rose Drive; and

WHEREAS, two appraisals were completed for the subject property between July and November 2011, with an average value of \$7.25 per square foot; and

WHEREAS, if Valero/Good Neighbor Steering Committee funds are used for a portion of the loan, the Sustainability Commission is required to review the project and consider whether the project will provide a greater value than proposed water reduction projects; and *(use this paragraph if V/GNSC \$ is to be used)*

WHEREAS, there are sufficient funds in the Wastewater Enterprise Fund for a loan of \$256,909 if Valero/Good Neighbor Steering Committee funds are not used.

NOW, THEREFORE, BE IT RESOLVED THAT the City Council of the City of Benicia hereby approves a real property purchase in the amount of \$556,909 with Valero Refining Company to facility construction of the alternate P-3 Pump Station solar array of the City Renewable and Conservation project.

BE IT FURTHER RESOLVED THAT \$300,000 of the purchase price will be drawn from the financing for the Renewable Energy and Conservation Project, and the remaining \$256,909 will be loaned interest-free from the Valero/Good Neighbor Steering Committee Settlement fund, contingent upon the Sustainability Commission

finding that the project will provide a greater value than proposed water reduction projects or the Wastewater Enterprise Fund with interest at the average rate of return (on all City investment) which is currently 1.6%. The loan will be repaid within five years with energy savings and PG&E rebates from the Renewable Energy and Conservation project

BE IT FURTHER RESOLVED THAT the City Manager is hereby authorized to execute the purchase documents and related documents on behalf of the City, subject to approval by the City Attorney.

On a motion of Council Member _____, seconded by Council Member _____, the foregoing Resolution was introduced and passed by the City Council of the City of Benicia at a regular meeting of said Council held on the 24th day of April, 2012, and adopted by the following vote:

Ayes:

Noes:

Absent:

Attest:

Elizabeth Patterson, Mayor

Lisa Wolfe, City Clerk



City Manager's Office
MEMORANDUM

Date: April 18, 2012
To: Mayor & City Council
From: Brad Kilger, City Manager
Re: April 24th Council Study Session - Priority Project List and Policy Calendar

On September 6, 2006, the Council gave staff direction to pursue a process by which policy-related requests could be periodically reviewed and scheduled for consideration based on Council priorities, interest and time available for study. As a result, a process was developed to achieve this goal, and that process has since been further refined, once in 2008, and then again in January of 2011. Below is a summary of the current process.

Two Step Process: Requests for consideration of policy matters are submitted in writing as agenda requests to the City Manager's office at any time. The requestor indicates on the form the scheduling preference for the "first step" at a regular Council meeting.

Policy requests are then placed on a Council Regular Agenda via the Agenda Request Form to determine degree of interest for pursuing study or action. If there is majority interest of the Council, the policy proposal is directed to the list of City Council Policy Items for scheduling at a study session, which will now be held on the fourth Tuesday of each month, per the recently amended Meeting Ordinance. Following that "second step," and based on factors such as relationship to the City's Strategic Plan, budget impacts, staff time required, etc., the Council will give staff direction as to whether this policy item will be added to the City's list of current projects, or some alternate direction, depending on the content of the policy issue.

This two-step process is incorporated into the Council's Rules of Procedure, which is included as an attachment to this report.

Review of City Council Policy Items: At the Council's February 11th study session on project priorities, members of Council expressed a desire to spend some dedicated time in a study session environment to review the Council's current pending policy items and prioritize future discussions on those topics. As previously noted, the City Council Policy Items list is comprised of those items that the Council has brought forward for Council consideration under the "two-step process." At the April 24th study session, Council will be asked to review the current City Council Policy Items and provide direction to staff relative to the priority of each so that the various items can be scheduled for discussion at future study sessions. Attached for Council's reference is the current City Council Policy Items list and related attachments, as well as the various Council Member Requested Agenda Item forms for each of the items on the list.

Once the Council has provided direction as to prioritization of the policy items, staff will schedule the policy items for a fourth Tuesday study sessions accordingly. Following those study sessions, it may be directed by Council that certain policy items become a project and thus may transition over to the City's Priority Projects Work Plan.

Priority Projects Work Plan: On February 11, 2012, the Council held a study session to discuss their top priorities for the year. At that session, the Council reviewed a number of priority projects as identified by the City department heads, as well as identifying several additional priorities for consideration. These projects were then reviewed and discussed in light of six agreed upon Priority Project Selection Criteria, which are as follows:

- The work is mandated by the State (or other agency); the City could be fined or face similar consequences if the work is not done
- The work would generate revenue, grants or other funding
- The work would prevent higher costs from deferred maintenance
- The work would protect public health or safety
- The work would create the foundation for operational efficiencies
- The City is significantly committed financially to the project

As a result of that review, the Council was able to identify six top priorities for the current year:

- Implement the Business Development Action Plan with primary focus on enhancing the economic competitiveness of the Benicia Industrial Park
- Develop a funding strategy for improving Internet technology in the BIP sufficient to meet the needs of existing and desired businesses
- Conduct an inventory and feasibility study for use of City vacant buildings and land
- Conduct an analysis of key departments and functions within the organization to determine if there are operational and/or fiscal efficiency opportunities
- Complete an employee compensation study
- Seek alternative funding mechanisms for road maintenance

Following this prioritization process, it was agreed that staff would return with a draft work plan, which would organize the above-noted priority projects, along with other key City projects for the current year. Attached please find a draft Priority Projects Work Plan, which identifies the priority project selection criteria and categories, and then organizes projects accordingly under four separate tiers, based on priority, as well as by the responsible department. The Council's study session on April 24th will be an opportunity to review this plan, along with the City Council Policy Items, and provide feedback to staff.

Attachments:

- ❑ City Council Rules of Procedure
- ❑ City Council Policy Items list and attachments
- ❑ Completed Council Member Requested Agenda Item forms
- ❑ DRAFT City of Benicia Priority Projects Work Plan

D. CONDUCT AT MEETINGS.

In addition to complying with the Code of Conduct, City Council members shall refrain from electronic communications during a meeting in order to avoid potential Brown Act or due process issues.

E. ADJOURNMENT.

It is the desire of the City Council to adjourn their meetings by 11 p.m. Therefore, no new business will be taken up by the Council after 11 p.m. unless the City Council adopts a motion to continue. The remaining items will be placed on the next regular Council meeting in the appropriate section of the agenda, unless the City Council calls for a special meeting to consider one or more of the continued items. The Council shall review the agenda at approximately 9 p.m. to see if it is likely the agenda items will be completed by 11 p.m. or if items will probably be continued to the next regular meeting. If it appears items will be continued, the Council will let the audience know as soon as is practical. The Open Government Ordinance requirement for public comment on the item will occur when the item is scheduled unless a majority agrees to move it up.

II. AGENDAS.

A. PREPARATION.

The Mayor and the City Manager shall prepare an agenda for each meeting of the Council. Items to be included on the agenda must be submitted to the City Manager in writing by noon on the 79th working day preceding the regular meeting and on the 5th working day preceding a special meeting.

B. TWO-STEP PROCESS.

City Council Members may request that a policy matter be considered by the City Council using the Two-Step Process. A Council Member submits the Council Member Requested Agenda Item form ([Appendix A](#)) to the City Manager. The Council Member shall fill out the form as completely as possible and indicate a desired date for agendaization of Step 1 and for Step 2. Once Step 1 is agendaized, the City Council shall vote whether or not to pursue study or action on the policy matter. If there is interest by a majority of the City Council, the policy proposal shall be directed to the Policy Calendar Process for scheduling a study session (see Section II.E below) or to an upcoming agenda for action if the subject of the request is time sensitive (Step 2). The Council Member submitting the request shall inform the Council if the item is time-sensitive.

C. LEGISLATIVE SUPPORT OR OPPOSITION.

The City Manager, or City Attorney in the case of legal issues, is authorized to provide support or opposition on legislative matters provided that the support or opposition is

APPENDIX A: COUNCIL MEMBER REQUESTED AGENDA ITEM

Requested by: _____

Desired Initial Council Meeting Date: _____

Desired Date for Second Step or Policy Calendar Review: _____

Deadline for Action, if any: _____

Problem/Issue/Idea Name: _____

Description of Problem/Issue/Idea: _____

COUNCIL DIRECTION

- No Further Action
- Schedule for Second Step on _____
- Schedule for Policy Calendar Review on _____
- Refer to: Staff _____
 Commission _____
 Board _____
 Committee _____

Date Due: _____

City Council Policy Items				
Policy Calendar Item (Requesting Council Member)	Date of Council Step 1 Approval	Department	Status/Next Action	Study Session Date
Vesting Tentative Map Review (Mayor Patterson)	11/18/2008	CAO/ PWCD	Consider proposal to add criteria for Council consideration of major development proposals, such as on Seeno and Port property. See attached memo from City Attorney.	
Local Purchasing Policy (Council Member Schwartzman)	9/15/2009	Finance	Finance Department staff has begun the process of re-evaluating the current Purchasing Policy. A revised policy will be presented to the Finance Committee on April 27th and then to the City Council.	
Anti-Smoking Ordinance (Mayor Patterson)	10/20/2009	CAO	See attached memo from City Attorney.	
Tourism Event Policy (Mayor Patterson)	11/17/2009	ED	Staff is working with Benicia Main Street to better coordinate events. No present plans to develop a separate Event Calendar or policy.	
Port Tax (Council Member Campbell)	8/17/2010	CAO	See attached memo from City Attorney.	
Request to agendize consideration of a Benicia Industrial Park Information Technology Needs Feasibility Options (Mayor Patterson)	6/21/2011	ED	Staff is working with Chablin Concepts and recently contracted with Tellus Associates to develop a Broadband plan/strategy. Goal is to have Council review options in summer of 2012.	
A request to consider amending Chapter 1.40 of the Benicia Municipal Code to prohibit contacting a contributor by someone other than the candidate or campaign treasurer (Council Member Schwartzman)	1/17/2012	CAO	See attached memo from City Attorney.	

City Council Policy Items				
A request to consider an amendment that would add a provision to the voluntary Code of Fair Campaign Practices allowing soliciting at the Farmer's Market no closer than 50 feet from any of the entrances to the market (Council Member Schwartzman)	1/17/2012	CAO	See attached memo from City Attorney.	
A request to review and discuss each board and commission's mission, compliance with their respective mission, make up, possible changes, potential consolidations, adherence to codes, policies and Council expectations to include consideration of the current budget constraints and staff resources (Council Member Schwartzman)	1/17/2012	CMO	Identify timeline and process for this review.	
A request to discuss revisiting the design review duties and powers of the Historic Preservation Review Commission. (Council Member Campbell)	2/7/2012	PWCDD	Proposal to transfer design review duties outside historic districts to staff and/or Planning Commission.	



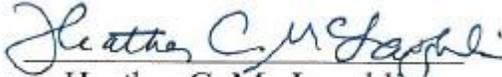
City Attorney's Office
MEMORANDUM

Date: April 10, 2012
To: Brad Kilger, City Manager
Anne Cardwell, Administrative Services Director
From: Heather C. Mc Laughlin, City Attorney
Re: Policy Calendar Items

Here are the descriptions of my items.

1. Vesting Tentative Map (VTM): Review the City's current application process to make sure the criteria for application completeness is clear and to prevent staff from waiving certain requirements for application completeness. This includes reviewing and updating, if needed the "master plan" requirements in BMC Section 17.68.060 that are required for a VTM.
2. Smoking Ordinance: This is a revision to the smoking ordinance. We drafted a fairly complete revision to the ordinance. We shopped it to the Youth Action Coalition, Parks, Recreation and Cemeteries Commission, Main Street, and the Chamber. It needs some more work. It is too restrictive for First Street area since there are a mix of homes and businesses in the area. Direction is needed from Council on how restrictive the ordinance should be. The previous draft is attached.
3. Port Tax: This is a request to review the prior opinion on the Port Tax. The opinion concluded that you could fashion a tax that would be legal but the companies impacted by the tax would sue. The opinion is attached.
4. Amending Chapter 1.40 of the Benicia Municipal Code to prohibit contacting a contributor by someone other than the candidate or campaign treasurer: This item is to prevent people from contacting contributors to local campaigns.
5. Adding a provision to the voluntary Code of Fair Campaign Practices allowing soliciting at the Farmer's Market no closer than 50 feet from any of the entrances to the market: This item would establish a free speech area for the market.

Please let me know if you have any questions.


Heather C. Mc Laughlin

Attachments:
Draft Smoking Ordinance (June 2010 Redlined)
Port Tax Opinion

AN ORDINANCE OF THE CITY OF BENICIA
AMENDING CHAPTER 9.06 OF THE BENICIA MUNICIPAL CODE TO
REGULATE SMOKING IN INDOOR AND OUTDOOR PLACES

The City Council of the City of Benicia does ordain as follows:

SECTION I. FINDINGS.

The City Council of the City of Benicia hereby finds and declares as follows:

WHEREAS, tobacco use causes death and disease and continues to be an urgent public health challenge, as evidenced by the following:

- Tobacco-related illness is the leading cause of preventable death in the United States,¹ accounting for about 443,000 deaths each year;² and
- Scientific studies have concluded that tobacco use can cause chronic lung disease, coronary heart disease, and stroke, in addition to cancer of the lungs, larynx, esophagus, and mouth;³ and
- Some of the most common types of cancers including stomach, liver, uterine cervix, and kidney are related to tobacco use;⁴ and

WHEREAS, secondhand smoke has been repeatedly identified as a health hazard, as evidenced by the following:

- The U.S. Surgeon General concluded that there is no risk-free level of exposure to secondhand smoke;⁵ and
- The California Air Resources Board placed secondhand smoke in the same category as the most toxic automotive and industrial air pollutants by categorizing it as a toxic air contaminant for which there is no safe level of exposure;⁶ and

¹ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Targeting Tobacco Use: The Nation's Leading Cause of Preventable Death*. 2008, p. 2. Available at: www.cdc.gov/nccdphp/publications/aag/pdf/osh.pdf.

² US Department of Health and Human Services, Centers for Disease Control and Prevention. "Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses — United States, 2000-2004." *Morbidity and Mortality Weekly Report*, 57(45): 1226-1228, 2008. Available at: www.cdc.gov/mmwr/preview/mmwrhtml/mm5745a3.htm.

³ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Targeting Tobacco Use: The Nation's Leading Cause of Preventable Death*. 2008, p. 2. Available at: www.cdc.gov/nccdphp/publications/aag/pdf/osh.pdf.

⁴ Leistikow B, Zubair K, et al. "Male Tobacco Smoke Load and Non-Lung Cancer Mortality Associations in Massachusetts." *BMC Cancer*, 8:341, 2008. Available at: www.biomedcentral.com/1471-2407/8/341.

⁵ US Department of Health and Human Services, Office of the Surgeon General. *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General*. 2007. Report highlights available at: www.surgeongeneral.gov/library/secondhandsmoke/factsheets/factsheet7.html.

⁶ Resolution 06-01, Cal. Air Resources Bd. (2006) at 5. Available at: www.arb.ca.gov/regact/ets2006/res0601.pdf; See California Environmental Protection Agency, Air

- The California Environmental Protection Agency included secondhand smoke on the Proposition 65 list of chemicals known to the state of California to cause cancer, birth defects, and other reproductive harm;⁷ and

Whereas exposure to secondhand smoke causes death and disease, as evidenced by the following:

- Secondhand smoke is responsible for as many as 73,000 deaths among nonsmokers each year in the United States;⁸ and
- Exposure to secondhand smoke increases the risk of coronary heart disease by approximately thirty percent;⁹ and
- Secondhand smoke exposure causes lower respiratory tract infections, such as pneumonia and bronchitis in as many as 300,000 children in the United States under the age of 18 months each year;¹⁰ and exacerbates childhood asthma;¹¹ and

WHEREAS, tobacco use and exposure to secondhand smoke impose great social and economic costs, as evidenced by the following:

- The total annual economic burden of smoking in the United States is \$193 billion;¹² and
- From 2001-2004, the average annual health care expenditures attributable to smoking were approximately \$96 billion;¹³ and
- The medical and other costs to nonsmokers due to exposure to secondhand smoke were estimated at over \$10 billion per year in the United States in

Resources Board. *News Release, California Identifies Secondhand Smoke as a “Toxic Air Contaminant.”* Jan. 26, 2006. Available at: www.arb.ca.gov/newsrel/nr012606.htm.

⁷ California Environmental Protection Agency, Office of Environmental Health Hazard Assessment. *Chemicals Known to the State to Cause Cancer or Reproductive Toxicity*. 2006, p. 8 & 17. Available at: www.oehha.ca.gov/prop65/prop65_list/files/P65single081106.pdf.

⁸ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Fact Sheet – Secondhand Smoke*. 2006. Available at: www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/general_facts/index.htm.

⁹ Barnoya J and Glantz S. “Cardiovascular Effects of Secondhand Smoke: Nearly as Large as Smoking.” *Circulation*, 111: 2684-2698, 2005. Available at: www.circ.ahajournals.org/cgi/content/full/111/20/2684.

¹⁰ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Targeting Tobacco Use: The Nation’s Leading Cause of Preventable Death*. 2008, p. 2. Available at: www.cdc.gov/nccdphp/publications/aag/pdf/osh.pdf.

¹¹ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Fact Sheet – Secondhand Smoke*. 2006. Available at: www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/general_facts/index.htm.

¹² Centers for Disease Control and Prevention. *News Release, Slightly Lower Adult Smoking Rates*. 2008. Available at: www.cdc.gov/media/pressrel/2008/r081113.htm.

¹³ Centers for Disease Control and Prevention. *News Release, Slightly Lower Adult Smoking Rates*. 2008. Available at: www.cdc.gov/media/pressrel/2008/r081113.htm.

2005;¹⁴ and

- The total annual cost of smoking in California was estimated at \$475 per resident or \$3,331 per smoker per year, for a total of nearly \$15.8 billion in smoking-related costs in 1999 alone;¹⁵ and
- California's Tobacco Control Program saved the state and its residents \$86 billion in health care expenditures between the year of its inception, 1989, and 2004, with savings growing yearly;¹⁶ and

WHEREAS, exposure to secondhand smoke anywhere has negative health impacts, and exposure to secondhand smoke does occur at significant levels outdoors, as evidenced by the following:

- Levels of secondhand smoke exposure outdoors can reach levels attained indoors depending on direction and amount of wind and number and proximity of smokers;¹⁷ and
- Irritation from secondhand smoke begins at levels as low as 4 micrograms per cubic meter, and in some outdoor situations this level can be found as far away as 13 feet from the burning cigarette;¹⁸ and
- To be completely free from exposure to secondhand smoke in outdoor places, a person may have to move nearly 25 feet away from the source of the smoke, about the width of a two lane road;¹⁹ and

¹⁴ Behan DF, Eriksen MP and Lin, Y. *Economic Effects of Environmental Tobacco Smoke*. Schaumburg, IL: Society of Actuaries, 2005, p. 2. Available at: [www.soa.org/files/pdf/ETSReportFinalDraft\(Final%203\).pdf](http://www.soa.org/files/pdf/ETSReportFinalDraft(Final%203).pdf).

¹⁵ Max W, Rice DP, Zhang X, et al. *The Cost of Smoking in California, 1999*. Sacramento, CA: Tobacco Control Section, California Department of Health Services, 2002, p. 74. Available at: <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1026&context=ctcre>.

¹⁶ Lightwood JM, Dinno A and Glantz SA. "Effect of the California Tobacco Control Program on Personal Health Care Expenditures." *PLoS Med*, 5(8): e178, 2008. Available at: www.plosmedicine.org/article/info:doi/10.1371/journal.pmed.0050178.

¹⁷ Klepeis NE, Ott WR, and Switzer P. *Real-Time Monitoring of Outdoor Environmental Tobacco Smoke Concentrations: A Pilot Study*. San Francisco: University of California, San Francisco and Stanford University, 2004, p. 34, 80. Available at: http://exposurescience.org/pub/reports/Outdoor_ETS_Final.pdf; See also Klepeis NE, Ott WR and Switzer P. "Real-Time Measurement of Outdoor Tobacco Smoke Particles." *Journal of Air and Waste Management Association*, 57: 522-534, 2007. Available at: www.ashaust.org.au/pdfs/OutdoorSHS0705.pdf.

¹⁸ Junker MH, Danuser B, Monn C, et al. "Acute Sensory Responses of Nonsmokers at Very Low Environmental Tobacco Smoke Concentrations in Controlled Laboratory Settings." *Environmental Health Perspectives*, 109(10): 1046-1052, 2001. Available at: www.pubmedcentral.nih.gov/picrender.fcgi?artid=1242082&blobtype=pdf; Repace JL. "Benefits of Smoke-Free Regulations in Outdoor Settings: Beaches, Golf Courses, Parks, Patios, and in Motor Vehicles." *William Mitchell Law Review*, 34(4): 1621-1638, 2008. Available at: <http://tobacco.health.usyd.edu.au/site/supersite/contact/pdfs/WilliamMitchellRepape.pdf>.

¹⁹ Repace JL. "Benefits of Smoke-Free Regulations in Outdoor Settings: Beaches, Golf Courses, Parks, Patios, and in Motor Vehicles." *William Mitchell Law Review*, 34(4): 1621-1638, 2008. Available at: <http://tobacco.health.usyd.edu.au/site/supersite/contact/pdfs/WilliamMitchellRepape.pdf>.

WHEREAS, cigarette butts pose a health threat to young children, as evidenced by the following:

- In 2004, American poison control centers received nearly 8,000 reports of children poisoned by the ingestion of cigarettes, cigarette butts, and other tobacco products;²⁰ and
- Children who ingest cigarette butts can experience vomiting, nausea, lethargy, and gagging;²¹ and

WHEREAS, cigarette butts are a major and persistent source of litter, as evidenced by the following:

- It is estimated that over two billion cigarette butts are discarded every day worldwide, and that Americans alone discard more than 175 million pounds of cigarette butts every year;²² and
- Cigarette butts are often cast onto sidewalks and streets, and frequently end up in storm drains that flow into streams, rivers, bays, lagoons and ultimately the ocean;²³ and
- Cigarette filters, made of plastic cellulose acetate, take approximately 15 years to decompose;²⁴ and

WHEREAS, laws restricting the use of tobacco products have recognizable benefits to public health and medical costs, as evidenced by the following:

- Cities with smokefree laws see an appreciable reduction in hospital admittances for heart attacks in the months and years after such laws are passed;²⁵ and
- Smoking bans help people reduce the number of cigarettes they smoke or quit altogether;²⁶ and

²⁰ American Association of Poison Control Centers. *2004 Annual Report of the American Association of Poison Control Centers Toxic Exposure Surveillance System*. Elsevier Inc., 2004, p. 645. Available at: www.poisson.org/prevent/documents/TESS%20Annual%20Report%202004.pdf.

²¹ US Department of Health and Human Services, Centers for Disease Control and Prevention. "Ingestion of Cigarettes and Cigarette Butts by Children – Rhode Island, January 1994-July 1996." *Morbidity and Mortality Weekly Report*, 46(06): 125-128, 1997. Available at: www.cdc.gov/mmwr/preview/mmwrhtml/00046181.htm.

²² Surfrider Foundation, San Diego Chapter, Hold on to Your Butt, www.surfridersd.org/hotyb.php.

²³ Surfrider Foundation, San Diego Chapter, Hold on to Your Butt, www.surfridersd.org/hotyb.php.

²⁴ Surfrider Foundation, San Diego Chapter, Hold on to Your Butt, www.surfridersd.org/hotyb.php.

²⁵ US Department of Health and Human Services, Centers for Disease Control and Prevention. "Reduced Hospitalizations for Acute Myocardial Infarction After Implementation of a Smoke-Free Ordinance – City of Pueblo, Colorado, 2002 – 2006." *Morbidity and Mortality Weekly Report*, 57(51&52): 1373-1377, 2009. Available at: www.cdc.gov/mmwr/preview/mmwrhtml/mm5751a1.htm; Glantz SA. "Meta-Analysis of the Effects of Smokefree Laws on Acute Myocardial Infarction: An Update." *Preventive Medicine*, 47(4): 452-453, 2008.

²⁶ Neighmond P. "Smoking Bans Help People Quit, Research Shows." *National Public Radio*, October 25,

- Strong smoking regulations for restaurants decrease the number of children who transition from experimenting with smoking to becoming actual smokers;²⁷ and

WHEREAS, creating smokefree areas helps protect the health of the 86.7% of Californians who are nonsmokers;²⁸ and

WHEREAS, society is becoming less tolerant and less accepting of cigarette smoking, as evidenced by the following,

- A 2008 survey of California voters found that 75% thought that secondhand smoke is harmful, 64% were bothered by secondhand smoke, and 73% support laws restricting smoking in outdoor public places;²⁹ and
- People living in cities with strong smokefree air laws are more likely to believe smoking is not acceptable and that smokers should attempt to quit smoking;³⁰ and
- As of 2008, there are 187 California cities and counties with local laws restricting smoking in at least one outdoor area;³¹ and

WHEREAS, state law prohibits smoking within 25 feet of playgrounds and tot lots and expressly authorizes local communities to enact additional restrictions;³² and state law prohibits smoking within 20 feet of entryways and operable windows of government buildings;³³ and

WHEREAS, there is no Constitutional right to smoke;³⁴

2007. Available at: www.npr.org/templates/story/story.php?storyId=15610995.

²⁷ Siegel M, Albers AB, Cheng DM, et al. "Local Restaurant Smoking Regulations and the Adolescent Smoking Initiation Process: Results of a Multilevel Contextual Analysis Among Massachusetts Youth." *Archives of Pediatrics and Adolescent Medicine*, 162(5): 477-483, 2008. Available at: <http://archpedi.ama-assn.org/cgi/reprint/162/5/477.pdf>.

²⁸ Hong M, Barnes RL and Glantz SA. *Tobacco Control in California 2003-2007: Missed Opportunities*. San Francisco: Center for Tobacco Control Research and Education, 2007, p. 9. Available at: <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1074&context=ctcre>.

²⁹ Goodwin Simon Victoria Research. *Study of California Voters' Attitudes About Secondhand Smoke Exposure*. Sacramento: Center for Tobacco Policy & Organizing, 2008, p. 1-3. Available at: www.center4tobaccopolicy.org/files/files/Results%20of%20SHS%20Poll%20November%202008.pdf.

³⁰ Indiana University. *News Release, Indiana University Research at American Public Health Association Meeting*. October 27, 2008. Available at: <http://newsinfo.iu.edu/tips/page/normal/9085.html#3>.

³¹ California Clean Air Project, California Secondhand Smoke Policy Database, <http://ccap.etr.org/index.cfm?fuseaction=policydb.home>.

³² Cal. Health & Safety Code § 104495 (West 2008).

³³ Cal. Gov't Code § 7597 (West 2008).

³⁴ Public Health Law & Policy, Technical Assistance Legal Center. *There Is No Constitutional Right to Smoke*. 2005. Available at: http://talc.phlaw.org/pdf_files/0051.pdf.

NOW THEREFORE, it is the intent of the City Council of the City of Benicia, in enacting this ordinance, to provide for the public health, safety, and welfare by discouraging the inherently dangerous behavior of smoking around non-tobacco users, especially children; by protecting the public from exposure to secondhand smoke where they work and play; by reducing the potential for children to wrongly associate smoking with a healthy lifestyle; and by affirming and promoting a healthy environment in the City's indoor and outdoor places.

SECTION II. Chapter 9.06 of the Benicia Municipal Code is hereby amended to read as follows:

Chapter 9.06
REGULATION OF SMOKING IN ENCLOSED PUBLIC PLACES

Sections:

- 9.06.010 Definitions.
- 9.06.020 Regulation of smoking in city-owned facilities.
- 9.06.030 Prohibition of smoking ~~in designated enclosed places.~~
- 9.06.040 ~~Reasonable smoking distance required~~regulation of smoking in places of employment.
- 9.06.045 ~~Smoke and smoking generally.~~
- 9.06.050 ~~Other requirements and prohibitions~~Smoking – Optional areas.
- 9.06.060 Posting requirements.
- 9.06.070 Enforcement.
- 9.06.080 Penalties.
- 9.06.090 Nonretaliation.
- 9.06.100 Other applicable laws.
- 9.06.110 ~~Statutory construction and severability~~Prohibition of smoking in outdoor public places.

9.06.010 Definitions.

The following words and phrases, whenever used in this chapter, shall be construed as hereafter set out, unless it shall be apparent from the context that they have a different meaning.

A. ~~"Bar" means an area which is devoted to the serving of alcoholic beverages and in which the service of food is only incidental to the consumption of such beverages.~~

"Business" means any sole proprietorship, partnership, joint venture, corporation, association, or other entity formed for profit-making purposes.

B. "Dining Area" means any area, including streets and sidewalks, which is available to or customarily used by the general public or an Employee, and which is designed, established, or regularly used for consuming food or drink.

C. "Employee" means any person who is employed or retained as an independent contractor by any Employer or Nonprofit Entity in consideration for direct or indirect monetary wages or profit, or any person who volunteers his or her services for an Employer or Nonprofit Entity.

DC. "Employer" means any person, partnership, or corporation Business or Nonprofit Entity, including a municipal corporation, who that retains the service of one or more employees the services of more than three persons.

ED. "Enclosed" means closed in by a roof and four walls with appropriate openings for ingress and egress.

F. "Nonprofit Entity" means any entity that meets the requirements of California Corporations Code section 5003 as well as any corporation, unincorporated association or other entity created for charitable, religious, philanthropic, educational, political, social or similar purposes, the net proceeds of which are committed to the promotion of the objectives or purposes of the entity and not to private gain.

GE. "Place of Employment" means any enclosed area under the legal or de facto control of an public or private Employer, which that an Employees or the general public may have cause to enter in the normally frequent during the course of the operations, regardless of the hours of operation. Places of employment, including inges but are not limited to Enclosed and Unenclosed work areas, construction sites, vehicles used in employment or for business purposes, taxis, employee lounges, conference and banquet rooms, hotel and motel lobbies, hotel and motel guest rooms, bingo and gaming facilities, long-term health care facilities, warehouses, retail tobacco shops, and employee cafeterias. A private residence is not a Place of Employment unless it is used as a child care or a health care facility subject to licensing requirements.

The dining area of a restaurant is not a "place of employment."

H. "Public Place" means any place, publicly or privately owned, which is open to the general public regardless of any fee or age requirement.

I. "Reasonable Distance" means a distance of twenty-five (25) feet in any direction from an area in which Smoking is prohibited.

J. "Recreational Area" means any area that is publicly or privately owned and open to the general public for recreational purposes, regardless of any fee or age requirement. The term "Recreational Area" includes but is not limited to parks, picnic areas, playgrounds, sports fields, golf courses, walking paths, gardens, hiking trails, bike paths, horseback riding trails, swimming pools, roller- and ice-skating rinks, skateboard parks, amusement parks, and beaches.

K. "Service Area" means any publicly or privately owned area, including streets and sidewalks, that is designed to be used or is regularly used by one or more Persons to receive a service, wait to receive a service or to make a transaction, whether or not such service or transaction includes the exchange of money. The term "Service Area" includes but is not limited to information kiosks, automatic teller machines (ATMs), ticket lines, bus stops or shelters, mobile vendor lines or cab stands.

L. "Smoke" means the gases, particles, or vapors released into the air as a result of combustion, electrical ignition or vaporization, when the apparent or usual purpose of the combustion, electrical ignition or vaporization is human inhalation of the byproducts, except when the combusting or vaporizing material contains no tobacco or nicotine and the purpose of inhalation is solely olfactory, such as, for example, smoke from incense. The term "Smoke" includes, but is not limited to, tobacco smoke, electronic cigarette vapors, and marijuana smoke.

MF. "Smoking" means engaging in an act that generates Smoke, such as for example: the carrying or holding of a lighted pipe, lighted hookah pipe, an operating electronic cigarette, a lighted cigar, or a lighted cigarette of any kind, or any other lighted or igniting smoking equipment or the lighting or emitting or exhaling the smoke of a pipe, hookah pipe, cigar, or cigarette of any kind.

N. "Unenclosed" means any area that is not Enclosed.

~~G. "Sports arena" means a sports pavilion, gymnasium, health spa, boxing arena, swimming pool, roller and ice rink, bowling alley, and other similar place where members of the public assemble to engage in physical exercise, participate in athletic competition or witness sports events. (Ord. 87-10 N.S. § 3, 1987).~~

9.06.020 Regulation of smoking in city-owned facilities.

All ~~E~~nclosed ~~and Unenclosed~~ facilities ~~and all vehicles~~ owned, ~~operated, or leased~~ by the city of Benicia shall be subject to the provisions of this chapter. ~~(Ord. 87-10 N.S. § 3, 1987).~~

9.06.030 Prohibition of smoking in designated enclosed places.

Smoking shall be prohibited in the following places within the city:

~~A. All enclosed areas available to and customarily used by the general public and all businesses patronized by the public, including, but not limited to, retail stores, hotels and motels, pharmacies, banks, attorneys' offices and other offices; Enclosed Places. Smoking shall be prohibited in the following Enclosed places within the City of Benicia, except in places listed in subsection (C) below, and except in such places in which Smoking is already prohibited by state or federal law in which case the state or federal law applies:~~

- ~~1. Places of Employment;~~
- ~~2. Dining Areas;~~

- 3. Recreational Areas;
- 4. Service Areas; and
- 5. Other Public Places.

~~B. Within all restaurants having an occupied capacity of 50 or more persons; provided, however, that this prohibition does not prevent (1) the designating of a contiguous area within a restaurant that contains no more than 50 percent of the seating capacity of the restaurant as a smoking area, or (2) the providing of separate rooms designated as smoking rooms, so long as said rooms do not contain more than 50 percent of the seating capacity of the restaurant; Smoking is prohibited in the following Unenclosed places within the City of Benicia, except places where Smoking is already prohibited by state or federal law, in which case those laws apply:~~

- 1. Places of Employment;
- 2. Dining Areas;
- 3. Recreational Areas;
- 4. Service Areas;
- 5. Other Public Places, when being used for a public event, including a farmers' market, parade, craft fair, festival, or any other event which may be attended by the general public. When not being used for a public event, Smoking is permitted on streets and sidewalks when being used in a traditional capacity as pedestrian or vehicular thoroughfares, unless otherwise prohibited by this chapter or other law.

~~C. Waiting rooms, hallways, wards, and semiprivate rooms of health facilities, including, but not limited to, hospitals, clinics, physical therapy facilities, doctors' and dentists' offices, except that health facilities shall also be subject to the provisions of BMC 9.06.040 regulating smoking in places of employment; Unless otherwise prohibited by law, Smoking is permitted in the following Enclosed places:~~

- 1. By performers during theatrical productions, if Smoking is an integral part of the story in the theatrical production;
- 2. Private residential units, except those used as a child care or health care facility subject to licensing requirements; and

~~D. Elevators, public restrooms, indoor services lines, buses, taxicabs and other means of public transit under the authority of the city while within the boundaries of the county, and in ticket, boarding, and waiting areas of public transit (1) establishing separate waiting areas for smokers and nonsmokers, or (2) establishing at least 50 percent of a given waiting area as a nonsmoking area;~~

~~E. In public areas of museums and galleries;~~

~~F. Enclosed theaters, auditoriums, and halls which are used for motion pictures, stage dramas, and musical performances, ballets or other exhibitions, except when smoking is part of any such production;~~

~~G. Retail food marketing establishments, including grocery stores and supermarkets, except those areas of such establishments set aside for the purpose of serving food and drink, restrooms and offices, and areas thereof not open to the public, which may be otherwise regulated by this chapter;~~

~~H. Public schools and other public facilities under the control of another public agency, which are available to and are customarily used by the general public, to the extent that the same are subject to the jurisdiction of the city;~~

~~I. Sports arenas and convention halls, except in designated smoking areas;~~

~~J. Notwithstanding any other provision of Nothing in this section chapter, prohibits any owner person, operator Employer, manager or other person Nonprofit Entity who with legal controls over any establishment described in this section property may declare that entire establishment as a nonsmoking establishment from prohibiting Smoking on any part of such property, even if Smoking is not otherwise prohibited in that area.~~

~~(Ord. 87-10 N.S. § 3, 1987).~~

~~E.^{RS1} The Director of [] or his/her designee shall engage in an ongoing educational program to explain and clarify the purposes and requirements of this chapter, as well as providing guidance to persons, Employers, and Nonprofit Entities about compliance. However, lack of such education shall not be a defense to a violation of this chapter.~~

9.06.040 _Regulation of smoking in places of employment Reasonable smoking distance required.

~~A. It shall be the responsibility of employers to provide smoke-free areas for nonsmokers within existing facilities to the maximum extent possible, but employers are not required to incur any expense to make structural or other physical modifications in providing these areas. Smoking in all Unenclosed areas shall be prohibited within a Reasonable Distance from any doorway, window, opening, crack, or vent into an Enclosed area in which Smoking is prohibited, except while actively passing on the way to another destination and provided Smoke does not enter any Enclosed Area in which Smoking is prohibited.~~

~~B. Within 90 days of the effective date of the ordinance adopting this chapter, each employer and each place of employment located within the city shall adopt, implement, make known and maintain a written smoking policy, which shall contain at a minimum the following requirements: Smoking in Unenclosed areas shall be prohibited within a Reasonable Distance from any Unenclosed Areas in which Smoking is prohibited under Sec. 9.06.030 of this chapter, except while actively passing on the way to another destination and provided Smoke does not enter any Unenclosed area in which Smoking is prohibited.~~

~~1. Prohibition of smoking in conference and meeting rooms, restrooms, medical facilities, hallways and elevators.~~

~~2. Any employee in a place of employment shall be given the right to designate his or her immediate work area as a nonsmoking area and to post the same with an appropriate sign or signs, to be provided by the employer. The~~

policy adopted by the employer shall include a reasonable definition of the term "immediate work area."

3. In any dispute arising under this smoking policy, the rights of the nonsmoker shall be given precedence.

4. Provision and maintenance of a separate and contiguous nonsmoking area of not less than 50 percent of the seating capacity and floor space in cafeterias, lunchrooms and employee lounges.

C. The smoking policy shall be communicated to all employees within three weeks of its adoption, and at least annually thereafter. The prohibitions in subdivisions (A) and (B) shall not apply to Unenclosed areas of private residential properties.

D. Notwithstanding the provisions of subsection (A) of this section, every employer shall have the right to designate any place of employment, or portion thereof, as a nonsmoking area. (Ord. 87-10 N.S. § 3, 1987).

9.06.045 Smoke and smoking generally.

A. For all purposes within the jurisdiction of the City of Benicia, nonconsensual exposure to Smoke is a nuisance, and the uninvited presence of Smoke on the property is a nuisance and a trespass. Any person bringing a civil action to enforce the nuisance provision contained in this chapter need not prove an injury different in kind or in degree from injury to others to prove a violation of this chapter.

9.06.050 _ Smoking – Optional areasOther requirements and prohibitions.

Notwithstanding any other provisions of this chapter to the contrary, the following areas shall not be subject to the smoking restrictions of this chapter:

A. Private residences;

B. Bars;

C. Hotel and motel rooms rented to guests;

D. Retail stores that deal exclusively in the sale of tobacco and smoking paraphernalia;

E. Restaurants, hotel and motel conference or meeting rooms, and public and private assembly rooms while these places are being used for private functions;

F. A private residence which may serve as a place of employment except when used as a child care or a health care facility. Board and care facilities shall provide smoke-free living quarters for nonsmoking boarders;

G. A private enclosed place occupied exclusively by smokers, even though such a place may be visited by nonsmokers, and a private enclosed office, excepting places in which smoking is prohibited by the fire department or by any other law, ordinance or regulation. (Ord. 87-10 N.S. § 3, 1987).

A. No person shall engage in Smoking in any area where Smoking is restricted by the provisions of this chapter.

B. No person, Employer, or Nonprofit Entity shall knowingly permit Smoking in an area which is under the legal or de facto control of the person, Employer or Nonprofit Entity and in which Smoking is prohibited by law, unless otherwise required by state or federal law.

C. No person, Employer, or Nonprofit Entity shall knowingly or intentionally permit the presence or placement of ash receptacles, such as, for example, ash trays or ash cans, within an area under the legal or de facto control of the person, Employer or Nonprofit Entity and in which Smoking is prohibited by law, including, without limitation, within a Reasonable Distance required by this chapter from any area in which Smoking is prohibited. Notwithstanding the foregoing, the presence of ash receptacles in violation of this subsection shall not be a defense to a charge of Smoking in violation of any provision of this chapter.

D. No person shall dispose of used Smoking or tobacco product waste within the boundaries of an area in which Smoking is prohibited, including inside the perimeter of any Reasonable Distance required by this chapter.

9.06.060 Posting requirements.

A. "Smoking" or "No Smoking" signs, whichever are appropriate, with letters of not less than one inch in height or the international "No Smoking" symbol (consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it) shall be clearly, sufficiently and conspicuously posted in every building or other place where smoking is controlled by this chapter, by the owner, operator, manager or other person having control of such building or other place. A person, Employer, or Nonprofit Entity that has legal or de facto control of an area in which Smoking is prohibited by this chapter shall post a clear, conspicuous and unambiguous "No Smoking" or "Smokefree" sign at each point of ingress to the area, and in at least one other conspicuous point within the area. The signs shall have letters of no less than one inch in height and shall include the international "No Smoking" symbol (consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it). Signs posted on the exterior of buildings to comply with this section shall include the Reasonable Distance requirement set forth in Sec. 9.06.040. At least one sign with the City phone number where complaints can be directed must be conspicuously posted in each place in which Smoking is prohibited. [RS2] For purposes of this section, the City Manager or his/her designee shall be responsible for the posting of signs in regulated facilities owned or leased in whole or in part by the City. Notwithstanding this provision, the presence or absence of signs shall not be a defense to a charge of Smoking in violation of any other provision of this chapter.

B. Every restaurant regulated by this chapter will have posted at its entrance a sign clearly stating that a nonsmoking section is available, and every patron shall be asked as to his or her preference. (Ord. 87-10 N.S. § 3, 1987).

9.06.070 Enforcement.

A. Enforcement shall be implemented by the city manager or his/her designees. Enforcement of this chapter shall be the responsibility of [RS3] [REDACTED]. In addition, any peace officer or code enforcement official also may enforce this chapter.

B. Any citizen-person who desires to register a complaint under this chapter may initiate enforcement with the city manager or his/her designees.

C. Any owner, manager, operator or Employer of any establishment controlled-regulated by this chapter shall have the right to inform persons violating this chapter of the appropriate provisions thereof. (~~Ord. 87-10 N.S. § 3, 1987).~~

9.06.080 Penalties.

The remedies provided by this chapter are cumulative and in addition to any other remedies available at law or in equity.

~~A. It shall be unlawful for any person who owns, manages, operates or otherwise controls the use of any premises subject to the restrictions of this chapter to fail to: properly post signs required hereunder; to provide signs for the use of employees in designating their areas; to properly set aside "No Smoking" areas; to adopt a smoking restriction policy; or to comply with any other requirements of this chapter.~~

~~B. It shall be unlawful for any person to smoke in any area restricted by the provisions of this chapter.~~

~~C. Any person/business Each incident of Smoking in who violations subsections (A) or (B) of this sectionchapter is an infraction subject to a one hundred (\$100) fine or otherwise punishable pursuant to section [RS4] of this code.~~

B. Other violations of this chapter shall constitute ~~or any other provisions of this chapter, shall be guilty of~~ an infraction, punishable by:

1. A fine, not exceeding \$100.00 for first violation;
2. A fine, not exceeding \$200.00 for a second violation of this chapter within one year;
3. A fine, not exceeding \$500.00 for each additional violation of this chapter within one year.

C. Violations of this chapter are subject to a civil action brought by the City of Benicia, punishable by a civil fine not less than two hundred fifty dollars (\$250) and not exceeding one thousand dollars (\$1,000) per violation.

D. Causing, permitting, aiding, abetting, or concealing a violation of any provision of this chapter shall also constitute a violation of this chapter.

E. Any violation of this chapter is hereby declared to be a nuisance.

F. In addition to other remedies provided by this chapter or by other law, any violation of this chapter may be remedied by a civil action brought by the City Attorney, including, but not limited to, administrative or judicial nuisance

abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief.

GD. Each instance of Smoking in violation of this chapter shall constitute a separate violation. For violations other than for Smoking, eEach day during whichof a continuing violation of this chapter is violated shall constitute a separate and distinguishable violation of this chapter.

(Ord. 87-10 N.S. § 3, 1987).

H. Except as otherwise provided, enforcement of this chapter is at the sole discretion of the City. Nothing in this chapter shall create a right of action in any person against the City or its agents to compel public enforcement of this chapter against private parties.

9.06.090 Nonretaliation.

No person, or Employer or Nonprofit Entity shall discharge, refuse to hire, or in any manner retaliate against any employee or applicant for employment because such employee or applicant exercises any rights afforded by this chapter. (Ord. 87-10 N.S. § 3, 1987). intimidate, threaten any reprisal, or effect any reprisal, for the purpose of retaliating against another person who seeks to attain compliance with this chapter.

9.06.100 Other applicable laws.

This chapter shall not be interpreted or construed to permit Smoking where it is otherwise restricted by other applicable laws. (Ord. 87-10 N.S. § 3, 1987).

9.06.110 Prohibition of smoking in outdoor public places. Statutory construction and severability.

Smoking shall be prohibited within 20 feet of all entrance(s), exit(s), open windows, ventilation intake systems and covered entryways of any building that is (A) owned or leased by the city of Benicia and (B) used by the city of Benicia. All city of Benicia buildings will post "No Smoking Within 20 Feet" signs outside of all entrance(s), exit(s), and ventilation intake systems. (Ord. 03-1, 2003). It is the intent of the City Council of the City of Benicia to supplement applicable state and federal law and not to duplicate or contradict such law and this ordinance shall be construed consistently with that intention. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this ordinance, or its application to any person or circumstance, is for any reason held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases of this ordinance, or its application to any other person or circumstance. The City Council of the City of Benicia hereby declares that it would have adopted each section, subsection, subdivision, paragraph, sentence, clause or phrase hereof independently, irrespective of the fact that any one or more other sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases hereof be declared invalid or unenforceable.

MEMORANDUM

6/1/04
CONFIDENTIAL
~~ATTORNEY/CLIENT PRIVILEGE~~

To: City Council
From: City Attorney
Subject: Application of a Business License Tax to Port Activities
Date: May 12, 2004

Attached please find an opinion by Michael Colantuono discussing the application of Constitutional provisions in the context of a tax on port activities. Mr. Colantuono is assisting us in preparing a possible business license tax increase. He concludes that there is no Constitutional prohibition on a fairly apportioned business license tax.

The Constitutional provisions analyzed in the memo are the same ones that have previously been raised by Amports and Valero in discussions with them about a "Port Tax".



Attachment: May 11, 2004 Memo from Michael Colantuono

cc: City Manager
Assistant City Manager
Finance Director

Michael G. Colantuono
MColantuono@CLLAW.US
(213) 533-4146

Colantuono & Levin, PC
555 West 5th Street, 30th Floor
Los Angeles, CA 90013
Main: (213) 533-4155
FAX: (213) 533-4191
WWW.CLLAW.US

~~ATTORNEY/CLIENT~~
~~PRIVILEGE~~

MEMORANDUM

TO: Heather McLaughlin, City Attorney FILE NO: 12109.0002
City of Benicia
250 East "L" Street
Benicia, CA 94510

FROM: Michael G. Colantuono, Esq. DATE: May 11, 2004
Mark E. Mandell, Esq.

RE: Application of Business License Tax to Commerce-Related Activities

You have asked whether the City of Benicia is prevented by the Commerce Clause or Import-Export Clauses of the Federal and State Constitutions from levying a business license tax upon (i) a business that offloads new cars from vessels arriving at the Port of Benicia or (ii) a business that refines crude oil in the City for distribution throughout California and other western states.

As is more completely explained below, we conclude that the California and Federal Constitutions do not prohibit such taxes, so long as the taxes are fairly apportioned to business activity in the City. Furthermore, businesses that operate as contractors at the refinery and car offloading sites are also subject to any business license tax levied by the City.

Factual Background. The City is currently updating its business license tax. Two large businesses in the City have claimed, or may claim, that they are exempt from the business license tax because they are directly involved in interstate commerce. These businesses are (i) a business that offloads new cars from vessels arriving at the Port of Benicia and (ii) a business that refines crude oil in the City for distribution throughout California and other western states. In addition to their own, on-site, personnel, each of these businesses makes extensive use of contractors. The City has asked whether the federal or state Constitutions prevent it from imposing a business license tax on these businesses.

Legal Background. Two provisions of the United States Constitution directly impact the ability of a city to impose a tax upon a business involved in commerce.

The first of these, commonly referred to as the "Commerce Clause," grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." (Const. Art. I, Sec. 8, Cl. 2). Although the Commerce Clause is phrased as a grant of power to Congress, the clause also, "of its own force, protects free trade amongst the states."

(*Armco Inc. v. Hardesty* (1984) 467 U.S. 638, 642). Consequently, the courts have interpreted the Constitution to include a “dormant” Commerce Clause, which makes it impermissible for states (as well as cities and other political subdivisions)¹ “to impose taxes which burden or discriminate against interstate commerce, even if Congress has not affirmatively acted to protect interstate commerce.” (*Yamaha Corp. v. State Board of Equalization* (1999) 73 Cal.App.4th 338, 365).

The second clause, commonly referred to as the “Import-Export Clause,” provides that “No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws.” (Const. Art. I, Sec. 10, Cl. 2).

Until the 1970s, these two clauses were interpreted quite broadly. Consequently, the federal courts consistently invalidated state and local laws that taxed businesses involved in interstate commerce or trade-related activities. For example, in *Joseph v. Carter & Weekes Stevedoring Co.* (1947) 330 U.S. 422, the Supreme Court found the application of a gross receipts tax to stevedoring receipts to violate the Commerce Clause. Similarly, in *Richfield Oil Corp. v. State Board of Equalization* (1946) 329 U.S. 69, the Supreme Court held that the Import-Export Clause prohibited application of a state sales tax to sales of oil stored in Los Angeles Harbor in transit from New Zealand to Europe. In effect, these older court decisions barred “all taxes on imports and exports and on the importing and exporting processes.” (*Dept. of Revenue of the State of Washington v. Assoc. of Washington Stevedoring Companies* (1978) 435 U.S. 734, 752).

More recent cases, however, have substantially narrowed the application of both clauses. Commerce Clause. In *Complete Auto Transit Inc. v. Brady* (1978) 430 U.S. 274, 275, the U.S. Supreme Court considered a challenge to a Mississippi statute imposing a 5% tax on the gross income of “every person operating a pipeline, railroad, airplane, bus, truck, or any other transportation business for the transportation of persons or property for compensation or hire between points within this State.” The *Complete Auto Transit* plaintiff was a company that transported new cars from a railhead in Jackson, Mississippi to auto dealers throughout Mississippi. While the Court acknowledged that the plaintiff operated as one link in an interstate transaction, it held that “it was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business.” (*Id.* at 278). Consequently, the Court permitted application of tax, which it described as a tax on “the privilege of doing business,” to the plaintiff (*Id.* at 289). This case is significant because it recognized, for the first time, that state and local governments could lawfully tax businesses engaged in interstate commerce.

¹ The California Constitution does not include a provision parallel to the Commerce Clause. Nonetheless, California courts have held that a variety of constitutional provisions, acting in concert, “prohibit local taxes which unfairly discriminate against intercity business by subjecting such businesses to a measure of taxation which is not fairly apportioned to the quantum of business actually done in the jurisdiction.” (*General Motors Corp. v. City of Los Angeles* (1995) 35 Cal.App.4th 1737, 1743). As a result, even a tax that exempts interstate transactions must satisfy the requirements of the Dormant Commerce Clause with respect to intercity transactions within California.

Complete Auto established a four-point test to determine whether a tax is permissible under the Commerce Clause. Such a tax must: (i) apply to activity with a substantial nexus with the taxing jurisdiction, (ii) be fairly apportioned, (iii) not discriminate against interstate commerce, and (iv) fairly relate to the services provided by the taxing jurisdiction. (*Id.* at 287).

In *Department of Revenue of the State of Washington v. Assoc. of Washington Stevedoring Companies* (1978) 435 U.S. 734 (the "*Washington Stevedoring Case*"), the Court applied this test to uphold the application of Washington's state business and occupations tax to stevedoring businesses. Although stevedoring, "the business of loading and unloading cargo from ships," is clearly a part of interstate commerce, the Court held that the Washington's tax could be applied to it in the same manner as to other businesses. (*Id.* at 237). The Court reached this conclusion by noting that "when a general business tax levies only on the value of services performed within the State, the tax is properly apportioned and multiple burdens logically cannot occur." (*Id.* at 236).

Import-Export Clause. Over the last two decades, the Import-Export Clause has also been interpreted to permit state and local taxes upon many activities that are closely related to importing and exporting.

In *Michelin Tire Corp. v. Wages* (1976) 423 U.S. 276, 293, the Supreme Court reversed its former doctrine on the Import-Export Clause, holding that the Clause only prohibited taxes where prohibition would further one of the Import-Export Clause's objectives, which the Court identified as:

- (i) "the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power;"
- (ii) "import revenues [which] were to be the major source of revenue of the Federal Government ... should not be diverted to the States;" and
- (iii) "harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically" (*Id.* at 285).

Reviewing these goals, the *Michelin* court permitted a Georgia county to levy an *ad valorem* tax on tires held as inventory by a wholesaler. The Court held that such a tax did not interfere with the policies that the Import-Export Clause was designed to promote.

In the *Washington Stevedoring Case*, the Supreme Court applied these same principles and concluded that application of Washington's business and occupations tax to stevedoring did not

violate the Import-Export Clause. The Court determined that such a tax was permissible under *Michelin*. (*Washington Stevedoring Case*, at 754:

“First, the tax does not restrain the ability of the Federal Government to conduct foreign policy. As a general business tax that applies to virtually all businesses in the State, it has not created any special protective tariff. The assessments in this case are only upon business conducted entirely within Washington. No foreign business or vessel is taxed. Respondents, therefore, have demonstrated no impediment posed by the tax upon the regulation of foreign trade by the United States.

“Second, the effect of the Washington tax on federal import revenues is identical to the effect in *Michelin*. The tax merely compensates the State for services and protection extended by Washington to the stevedoring business. Any indirect effect on the demand for imported goods because of the tax on the value of loading and unloading them from their ships is even less substantial than the effect of the direct *ad valorem* property tax on the imported goods themselves.

“Third, the desire to prevent interstate rivalry and friction does not vary significantly from the primary purpose of the Commerce Clause. The third Import-Export Clause policy, therefore, is vindicated if the tax falls upon a taxpayer with reasonable nexus to the State, is properly apportioned, does not discriminate, and relates reasonably to services provided by the State.” (*Id.* at 755).

Furthermore, in permitting a tax upon stevedoring, the Court specifically held:

“the *Michelin* policy analysis should not be discarded merely because the goods are in transit, at least where the taxation falls upon a service distinct from the goods and their value.” (*Id.* at 757).

Analysis. The business of offloading cars from ships arriving at the Port of Benicia is, of course, stevedoring. Consequently, because the *Department of Revenue* decision held that Washington could subject a stevedoring business to a gross receipts tax, a court should hold that the City may apply a gross receipts or other business license tax to businesses that offload cars. However, such tax must satisfy the four-prong *Complete Auto* test.

The business of processing oil for further transport may also be taxed, as this activity, which is primarily a transformative activity, is quite distinct from mere transportation of goods. The fact that most of the goods so transformed might be destined for final sale outside of the City does not prohibit local taxation. (*Commonwealth Edison v. Montana* (1981) 453 U.S. 609, 618). This is true even if the result is that the bulk of the tax burden will ultimately be passed on to non-local consumers. (*Id.*)

The key issue for applying a business license tax to either stevedoring or oil refining is in the design of the tax. So long as the tax is non-discriminatory (*i.e.*, does not give local businesses an advantage over non-local businesses) and is properly apportioned (*i.e.*, is applied only to the portion of the business activity that takes place in the City), this should not be problematic.²

So long as the City does not create a credit against the tax that only a local company could enjoy, the City should not run afoul of the non-discrimination requirements. It is more difficult to properly apportion businesses activities between local and non-local activities. Consequently, while the City might want to adopt an apportionment rule, it may wish to create an appeals process under which a taxpayer may claim that its taxes would be more appropriately apportioned under some other rule. Of course, as applied to subcontractors and subsidiaries with operations solely in the City, apportionment will not be an issue.

Conclusion. In summary, though the City must take care to properly apportion its tax to activities occurring in the City, the City may impose a business license tax on both car offloading and oil refining businesses.

It has been a pleasure to assist you in this matter. If you need further assistance, please do not hesitate to contact Michael at (213) 533-4146 or Mark at (213) 533-4142. You may also contact us via email at MColantuono@CLLAW.US or MMandell@CLLAW.US.

² These two requirements, apportionment and non-discrimination, constitute the second and third prongs of the *Complete Auto* test. The first prong, the requirement that the taxed activity have a substantial nexus in the City, is clearly met with respect to any business that operates on a site in the City. As the business license tax is a tax for general government services, the fourth prong, requiring that a tax be fairly related to services provided by a taxing jurisdiction, is also not at issue. The Supreme Court has held that, with respect to a general tax, this prong only requires that the "measure of the tax must be reasonably related to the extent of the contact" with the jurisdiction, not that the tax be related to services provided to that industry. (*Commonwealth Edison v. Montana* (1981) 453 U.S. 609, 626). This "reasonable relationship" test can be met through the use of a measure, such as properly apportioned gross receipts, payroll, or total in-City jobs, that rises or falls with increased local activity.

REQUEST FOR ITEM ON COUNCIL AGENDA

Requested by:

Mayor Patterson

Requested Council Meeting Date:

November 18, 2008

Agenda Item Name:

Vesting Tentative Map application

This item is to amend existing subject procedures to add the requirement for Council approval of vesting tentative map application to deem application complete.

It is intended to link vesting tentative maps to development agreements.

REQUEST FOR ITEM ON COUNCIL AGENDA

Requested by:

Mayor Patterson

Requested Council Meeting Date:

November 18, 2008

Agenda Item Name:

Request to agendaize the discussion of the need for an ordinance regarding amending development agreement ordinance.

Existing city ordinance permissively allows development agreements. This request is to require vested tentative maps, master plan and/or rezoning for greater than 40 acres (per BMC 17.68.020) to execute development agreements prior to entitlements.

BMC Section XXXX Application.

Application for a development agreement shall be made by a person, or the authorized agent of a person, having a legal or equitable interest in the affected property. Application shall be made on a form prescribed by the planning and community development director and shall be filed with such department. The application shall be accompanied by a fee prescribed by the city council, and a project description, which shall include the following:

A. A legal description of the affected property, a listing of property owners, and the proposed parties to the agreement;

B. A description of the development project, indicating the permitted uses of the property, floor-area ratio or density, building height and size, phasing of development, provisions for the reservation and dedication of land for public purposes and such additional information as may be required to allow the applicable criterion and factors to be applied to the proposal. Such information may include, but is not limited to, site and building plans, elevations, relationships to adjacent properties, and operational data. Where appropriate, the description may distinguish between elements of the project that are proposed to be fixed under the agreement and those that may vary;

C. An identification of any planned unit development permit or other special zoning approval that has already been obtained for the development project;

REQUEST FOR ITEM ON COUNCIL AGENDA

Requested by:

Council Member Schwartzman

Requested Council Meeting Date:

September 15, 2009

Agenda Item Name:

Request to agendize consideration of a local purchasing policy

Council Member Schwartzman has requested that the Council consider agendizing a discussion regarding a local purchasing policy as regards to services.

REQUEST FOR ITEM ON COUNCIL AGENDA

Requested by:

Mayor Patterson

Requested Council Meeting Date:

November 17, 2009

Agenda Item Name:

Request to agendize an Anti Smoking in Public Places Ordinance modeled on City of Martinez and City of Richmond Ordinances.

Review and consider placement on a future agenda a proposal for a second hand smoking ordinance to ban smoking in public places, bus stops and where public events are held.

REQUEST FOR ITEM ON COUNCIL AGENDA

Requested by:

Mayor Patterson

Requested Council Meeting Date:

November 17, 2009

Agenda Item Name:

Request to form a Bicycle Tourism Event Ad Hoc Committee

Review and consider for placement on a future agenda the formation of an ad hoc committee to address the logistics of the bike race sponsored by Kimble Goodman, Peter Van Flyke and Lamorinda Cycling.

REQUEST FOR ITEM ON COUNCIL AGENDA

Requested by:

Council Member Campbell

Requested Council Meeting Date:

August 17, 2010

Agenda Item Name:

Request to agendize a discussion of Port Fees

Since 2007 Benicia has reduced its expenditures by \$3.5 million but is still facing structural deficits of \$1.2 million annually for the next several years if the economy doesn't improve. These annual deficits are in large part due to property tax revenue decreases that won't be quick to rebound. Future annual deficits may be less depending on the present labor contract negotiations and expenditure cuts but these strategies alone won't solve the budget deficits.

Benicia leases to Amports, a subsidiary of AIG's Highstar Capital, the port wharf and 235 acres commonly referred to as the Tidland leases that comprise most of the land accessing the Carquinez Strait south and east of Bayshore Road. Over the past 46 years Benicia has received a very small amount of money directly from the operation of the port even though it owns the land next to the water. This was in part due to the original 1964 Port Master Lease that gave 99½ % of all revenues generated in the Arsenal/Port to Benicia Industries, the previous port lessee, who Amports bought; and also in part from the 1975 Port Land Exchange Agreement. Given that Benicia will not rebound for many years from the severe loss in property tax revenues it's time to explore all potential sources of revenue for the City including Port Fees. For example, in the past up to 150,000 cars have annually passed through Benicia's Port and disproportionately used some of Benicia's Port/Arsenal streets. If the City were to charge only \$6 /car for the Port use, it would generate \$900,000 per year. While the present global economic recession has reduced Port activity, it is very likely Port activity will increase long before City Property tax revenues return to pre 2007 levels. Port Fees are extremely common among California port cities and after charging nothing for 46 years it may be time for Benicia to exam Port fees.

REQUEST FOR ITEM ON COUNCIL AGENDA

Requested by:

Mayor Patterson

Requested Council Meeting Date:

June 21, 2011

Agenda Item Name:

**Request to agendize consideration of a Benicia Industrial Park Information
Technology Needs Feasibility Options**

**Recommendation: Consider Mayor Patterson's request to agendize this topic for
a future City Council meeting.**

APPENDIX A: COUNCIL MEMBER REQUESTED AGENDA ITEM

Requested by: **Council Member Schwartzman**

Desired Initial Council Meeting Date: January 17, 2011

Desired Date for Second Step or Policy Calendar Review: _____

Deadline for Action, if any: _____

Problem/Issue/Idea Name: **Amendment to Chapter 1.40 of the Benicia Municipal Code Communications with Contributors.**

Description of Problem/Issue/Idea:

During this past election two monetary contributors were harassed by a member of the public. Agendizing this item is to allow council to discuss amending Chapter 1.40 of the Benicia Municipal Code to prohibit contacting a contributor by someone other than the candidate or campaign treasurer.

COUNCIL DIRECTION

- No Further Action
- Schedule for Second Step on _____
- Schedule for Policy Calendar Review on _____
- Refer to: Staff _____
Commission _____
Board _____
Committee _____

Date Due: _____

APPENDIX A: COUNCIL MEMBER REQUESTED AGENDA ITEM

Requested by: **Council Member Schwartzman**

Desired Initial Council Meeting Date: January 17, 2011

Desired Date for Second Step or Policy Calendar Review: _____

Deadline for Action, if any: _____

Problem/Issue/Idea Name: **Amendment to Chapter 1.36 of the Benicia Municipal Code- Political Free Zones.**

Description of Problem/Issue/Idea:

The weekly Farmer's Market is a time and place for citizens of Benicia to shop locally for organic and other locally grown foods. Many families visit the Farmer's Market on a regular basis not only for the produce but to purchase from the other vendors, shops and restaurants and to socialize. Campaigning inside the market is not allowed. During this past election a candidate and committee set up a booth and/or solicitor(s) at locations by both First Street entrances to the market virtually preventing unencumbered access to the market by citizens. These locations were technically outside the market, but just barely. Had more than one candidate opted to solicit in these locations the entrances would have been essentially blocked making visiting the market an uncomfortable experience for most Benicians. This amendment would add a provision to the Voluntary Code of Fair Campaign Practices allowing soliciting at the Farmer's Market no closer than 50 feet from any of the entrances to the market.

COUNCIL DIRECTION

- No Further Action
- Schedule for Second Step on _____
- Schedule for Policy Calendar Review on _____
- Refer to: Staff _____
Commission _____
Board _____
Committee _____

APPENDIX A: COUNCIL MEMBER REQUESTED AGENDA ITEM

Requested by: **Council Member Schwartzman**

Desired Initial Council Meeting Date: January 17, 2011

Desired Date for Second Step or Policy Calendar Review: _____

Deadline for Action, if any: _____

Problem/Issue/Idea Name: **Board, Commission, Committee review**

Description of Problem/Issue/Idea:

Review of City Boards, Commissions and Committees. It has been years since a review of the City's Boards, Commissions and Committees has been done. This request is for the review and discussion of each body's mission, compliance with their respective mission, make up, possible changes, potential consolidations, adherence to codes, policies and Council expectations to include consideration of the current budget constraints and staff resources.

COUNCIL DIRECTION

- No Further Action
- Schedule for Second Step on _____
- Schedule for Policy Calendar Review on _____
- Refer to: Staff _____
Commission _____
Board _____
Committee _____

Date Due: _____

APPENDIX A: COUNCIL MEMBER REQUESTED AGENDA ITEM

Requested by: **Council Member Campbell**

Desired Initial Council Meeting Date: February 7, 2012

Desired Date for Second Step or Policy Calendar Review: _____

Deadline for Action, if any: _____

Problem/Issue/Idea Name: **Revisit Design Review Duties and Powers of the Historic Preservation Review Commission**

Description of Problem/Issue/Idea:

After combining the duties of the Design Review Commission and Historic Preservation Commission the City Council was going to examine and evaluate how well it was working. Time to evaluate

COUNCIL DIRECTION

- No Further Action
- Schedule for Second Step on _____
- Schedule for Policy Calendar Review on _____
- Refer to: Staff _____
 Commission _____
 Board _____
 Committee _____

Date Due: _____

