

**TOWN OF
APPLE VALLEY, CALIFORNIA**

AGENDA MATTER

Subject Item:

**PROFESSIONAL SERVICES AGREEMENT BETWEEN THE TOWN OF APPLE VALLEY
AND EDWARD HENNING AND ASSOCIATES**

Summary Statement:

For the past six years, Edward Henning and Associates has provided consulting services to the Apple Valley Business Improvement District, formerly the Apple Valley Village Merchants Association - Property Based Business Improvement District (PBID) Committee. Mr. Henning has provided a step-by-step process, including a Phase I Feasibility Analysis, development of a District Management Plan, and guided the Village through both the petitioning and balloting process that led to the successful formation of the District. On May 8, 2007, the Council adopted a resolution establishing the Apple Valley Village PBID based upon a weighted majority of votes in support of the formation.

Since the beginning of 2008, the PBID property owners began meeting on a regular basis. Although a board of directors was elected, the group currently has no legal status until it fully incorporates and files for non-profit exemptions. The Consultant would assist the organization with the following primary tasks:

1. Incorporation - Prepare and process Articles of Incorporation.
2. Bylaws – Prepare non-profit PBID related corporation bylaws.
3. Federal Tax Exemption – Prepare and process federal tax forms necessary to obtain tax exempt status.
4. State Tax Exemption - Prepare and process federal tax forms necessary to obtain tax exempt status.
5. Provide any additional technical assistance, but only as directed by the Board of Directors of the PBID.

The Apple Valley PBID Board of Directors voted (8-1-0-2) in favor of hiring Ed Henning and Associates to carry out the aforementioned tasks and requested that the Town enter into this contract on its behalf. From time to time, the Board may request that the Town enter into contracts on its behalf until it has formally incorporated or in cases where the Town must be the

Recommended Action:

That the Town Council authorize the Town Manager to enter into a contract between the Town of Apple Valley and Ed Henning and Associates in an amount not to exceed \$7,500 for the purpose of providing technical assistance to the Apple Valley Village Business Improvement District.

Proposed by: Director of Economic & Community Development **Item Number** _____

T. M. Approval: _____ **Budgeted Item** **Yes** **No**

Summary Statement (Continued):
Page Two

administrator of the contract, i.e., public works projects, police services, etc.

The fee for services will be paid out of PBID assessments collected. As of February 28, 2008, the fund balance is an estimated \$186,973.

A copy of the agreement is attached for your review and approval.

PROFESSIONAL SERVICES AGREEMENT

THIS AGREEMENT is made and entered into this 8th day of March, 2008, by and between THE TOWN OF APPLE VALLEY (hereinafter referred to as "TOWN") and EDWARD HENNING & ASSOCIATES., a sole proprietor (hereinafter referred to as "CONSULTANT").

WHEREAS, Town, desires to retain Consultant for the purpose of providing technical support services to the Apple Valley Village Business Improvement District; and

WHEREAS, Consultant has represented to Town that Consultant has the knowledge, skills, resources and experience that qualify consultant to provide said services for the Town, including related and accompanying studies, reports and all other matters described herein and any attachments hereto, including, but not limited to, the matters described in the proposal (including but not limited to the Scope of Services), contained in Exhibit A, attached hereto and incorporated herein by this reference; and

WHEREAS, based upon the representations of Consultant, Town desires to retain the services of Consultant to perform the activities herein described in consideration for payment to Consultant of the fees herein described, contained in Exhibit A, attached hereto and incorporated herein by this reference and in consideration of the further covenants, conditions and provisions hereinafter set forth.

NOW, THEREFORE, Town and Consultant mutually agree as follows:

1. The Town hereby retains Consultant to provide the services herein described, and Consultant hereby agrees to perform and be responsible for the performance of the professional services as set forth in the scope of services in Exhibit A hereto.
2. This Agreement shall commence as of the day and year first above shown and shall remain in full force and effect for a period of nine (9) months, unless terminated sooner as provided herein. Consultant acknowledges, and the parties specifically agree that time is of the essence in the performance of the services required to be performed under this Agreement. Consultant will complete the task requirements to meet the Estimated Timeline Schedule referenced in the proposal included in Exhibit A, subject to such schedule alterations by the Director of Economic and Community Development (hereinafter referred to as "Director") as are permitted herein.
3. Payment to Consultant by the Town for the work described in the scope of services shall be billed on a monthly basis. The Town will pay Consultant a fixed fee of Five Thousand Five Hundred Dollars (\$5,500.00), billable at \$100 per hour. An additional contingency fee of up to \$2,000 may be billed should additional time be required but must be approved by the Board of Directors of the Apple Valley Village Business Improvement District. In total, the Town may pay the Consultant a not-to-exceed fee of a maximum of Seven Thousand Five Hundred Dollars (\$7,500.00). Payment requested for work not within the scope of this Agreement will not be honored or paid unless such extra work and payment is authorized in writing by the Director, subject to the provisions of Paragraph 6, hereof. Increases or decreases in task requirements, changes in product format or detail, or new task requirements shall be approved in advance in writing by the Director. The Town, through the Director, reserves the right to direct any changes in the order of performance of any of the task requirements referenced or set forth in the proposal and/or scope of services; and

where deemed to be in the best interests of the Town, the Director may direct termination of the performance of any task, or any portion thereof; in the event of such termination, Consultant shall be paid only for the work performed prior to the effective date of said termination. The provision in this paragraph shall not be construed to authorize the Director to approve payments for extra work which result in exceeding the total sum authorized by this contract without the prior approval of the Town.

4. Consultant shall invoice the Town monthly in accordance with a work and payment schedule, approved in advance by the Director. Said monthly invoices shall include the work performed by task, rate, and a task progress status report in a form and with such additional information satisfactory to said Director. Payments to consultant for approved work and accepted submitted products shall not be unreasonably withheld and under no circumstance shall be delayed for work performed beyond 60 days from receipt of invoices without prior notification to Consultant of the reasons for withheld payments.
5. The Town has an interest in the qualifications of and capability of the person and entities that will fulfill the duties and obligations imposed upon Consultant by this Agreement. No assignment of this Agreement or of any rights hereunder, and no delegation of any performance or obligation of performance hereunder shall be made, either in whole or in part, by Consultant without the prior written consent of the Town. Consultant has or will provide all personnel required to perform services under this Agreement. All subcontractors or sub-consultants to be secured by Consultant must have the prior written approval of the Town through the Director. All of the services will be performed by Consultant or under its supervision, and all personnel engaged in the work shall be fully qualified and shall be authorized and permitted under State and local laws to perform such services, and shall be subject to the written acceptance of the Director.
6. Upon completion of each phase of work, Consultant shall submit to the Town a status report on the services performed thus far. Consultant will also timely provide any "deliverables" completed during that phase.
7. Town may request Consultant to perform additional services not contemplated by the scope of services. Prior to the commencement of such additional services, the exact nature of such services and the cost to the Town thereof shall be set forth in a written agreement signed by the parties hereto.
8. Consultant shall complete the scope of services so as to allow for completion for the entire project. Consultant acknowledges, and the parties specifically agree that time is of the essence in the performance of the services required to be performed under this Agreement. Consultant will complete the task requirements to meet the schedule referenced in the proposal schedule, included in Exhibit A, attached hereto, subject to such schedule alterations by the Director as are permitted herein.
9. At the completion or termination of this Agreement, all data, studies, and any other information, work products, memoranda, documents or writings, created or generated in

connection with the performance of this Agreement belong to and shall be delivered to the Town for its keeping, by delivery of same to the Director. Consultant may retain copies of these materials for its use or purposes.

10. Consultant will perform the services set out in this Agreement or will cause performance of said services to occur, as contemplated herein, in accordance with the generally accepted standards for performing similar professional services within the State. Town has relied on Consultant's representations for quality and professional work as an inducement to enter into this Agreement.
11. In the event Consultant defaults in the performance of any of the terms of conditions of this Agreement, and said default is not cured within seven days after notice thereof by the Town, then Town at its option, shall have the right to terminate this Agreement, without waiving any other rights it may have against Consultant for damages or other relief as permitted by law.
12. The failure of the Town to insist upon the strict performance of any of the provisions of this Agreement, or failure to exercise any other right, option or remedy hereby reserved or as permitted by law, shall not be construed as a waiver for the future of any such provisions, right, option, or remedy, or as a waiver of any subsequent breach thereof.
13. This Agreement may be terminated by the Town by seven days written notice for any reason. If this Agreement is terminated by the Town, and provided Consultant is not then in breach, Consultant shall be paid for services performed to the termination notice date.
14. Consultant, and each of its employees, agents, subcontractors and representatives, is and shall act hereunder as an independent contractor, and is not an employee of the Town for any purpose.
15. All notices to be given hereunder shall be in writing and shall be deemed to have been given, if delivered in person, or two days after mailing if properly addressed and mailed, with full postage prepaid, by certified or registered mail with return receipt requested. Notice to the Town shall be sufficient if sent to:

Director of Economic and Community Development
Town of Apple Valley
14955 Dale Evans Parkway
Apple Valley, CA 92307

Notice to Consultant shall be sufficient if sent to:

Edward Henning
Edward Henning & Associates
13330 Buttemere Road
Phelan, CA 92371

Each party hereto may change the address at which it receives written notice by so notifying the other party in writing.

16. The Director, or representative, shall represent the Town in all matters pertaining to the administration of this Agreement, including without limitation, attending all necessary meetings and conferences, and review and approval of all products submitted by Consultant, but not including the authority to enlarge the scope of work or increase the compensation due Consultant; although Consultant shall be responsible for attendance at all necessary meetings and hearings, and will prepare the public hearing notice and necessary staff report and resolution.
17. Consultant shall keep separate books of accounts in connection with the work to be performed under this Agreement. These books shall be subject to audit by the auditor, controller, accountant manager, or other financial officer of the Town or that officer's designate. All such books and records shall be retained for such periods of time as required by law, provided, however, notwithstanding any shorter periods of retention, all books, records and supporting details shall be retained for a period of at least three years after the expiration of the term or of the termination of this Agreement.
18. No information, including photographs, public announcements or confirmation of same, or any part of the subject matter of this Agreement or any phase of any program hereunder shall be made public without prior approval of the Director.
19. It is agreed and understood that Consultant will not be engaged in private work projects in the project work area while Consultant is employed by the Town. The "project work area" for purposes of this paragraph includes the area of the proposed project and the surrounding vicinity which may be significantly impacted by the proposed work hereunder. In any event, Consultant shall not engage in any private work which would constitute a conflict of interest with respect to the services performed under this Agreement.
20. Consultant shall defend (with attorneys approved by Town), hold harmless and indemnify the Town, its officers, employees and agents against liability (whether bodily injury, including death, and/or property damage and/or any other losses, claims, damages, actions or judgments) arising or alleged to arise out of the wrongful or negligent acts or omission of Consultant or its officers, agents, employees, subcontractors or representatives in the performance of this Agreement.
21. As a condition precedent to the effectiveness of this Agreement and in partial performance of Consultant's obligations hereunder, Consultant, at its expense, shall deliver to Town for approval, certificates or policies of insurance as required in Exhibit B, attached hereto.

The Town shall also be named as an additional insured under said policy or policies of liability insurance, which insurance shall be primary and not contributing with any other liability insurance available to the Town. Consultant and its insurance carrier shall be required to inform the Town in writing of any change, expiration, cancellation or renewal of

any insurance policy or policies within 30 days prior to the effective date thereof, and where applicable, an appropriate rider or addition shall be made to said policy relating thereto acceptable to the Town; and if any insurance required herein is cancelled or reduced in coverage, Consultant shall promptly provide replacement coverage acceptable to the Town.

22. Should any section or any part of this Agreement be rendered void, invalid or unenforceable by any court of law, any such final determination shall not render void, invalid or unenforceable any other sections or portions of this Agreement unless the Town determines in writing that its purpose cannot be accomplished by the remaining provisions not so invalidated.
23. This Agreement has been made and entered into in the State of California, and the laws of the State of California shall govern the validity and interpretation hereof and the performance hereunder.
24. This Agreement contains the entire understanding of the parties, and there are no further or other Agreements or understandings, written or oral, in effect between the parties hereto relating to the subject matter hereof, and any prior understanding or Agreement of the parties shall not be binding unless set forth herein, and, except to the extent expressly provided for herein, no amendments of this Agreement may be made without the written agreement signed by both parties hereto.
25. Should litigation or arbitration occur between the parties hereto relating to the provisions of this Agreement, all reasonable litigation or arbitration expenses and costs, including reasonable attorney's fees incurred by the prevailing party shall be paid by the non-prevailing party to the prevailing party.
26. Consultant represents that it has all personnel required in performing the services under this Agreement. All such personnel shall be fully qualified, and, where applicable, shall be licensed or otherwise authorized under State and local law to perform such services.
27. Consultant shall not be liable for delays in the performance of this Agreement caused solely by acts of God or similar events beyond the control of Consultant, unless said events could have been foreseen or said delay or any portion thereof could have been avoided.
28. Consultant shall not discriminate against any employee or applicant for employment because of race, religion, color, sex, age or national origin. Consultant shall take appropriate action to ensure that applicants are employed and that employees are treated during their employment without regard to their race, religion, color, sex, age or national origin. Such action shall include, but not be limited to, employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. Consultant shall comply with all applicable Federal laws and Executive Orders and relevant orders of the Secretary of Labor, with all State and local laws and affirmative

action compliance programs and other applicable rules and regulations of all government and administrative agencies relating to any and all performance under this Agreement.

29. This Agreement binds Consultant, and its successors and assigns, although this paragraph shall not be construed as permitting any assignment, subletting or transfer of any interest, rights or obligations of Consultant under this Agreement without the prior written consent of the Town.

30. The Town and Consultant shall act in a reasonable manner to ensure the timely and efficient completion of this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement at Apple Valley, California, effective the day and year first above written.

TOWN OF APPLE VALLEY, CALIFORNIA

BY: _____
James L. Cox, Town Manager

ATTEST:

Ms. La Vonda M. Pearson Town Clerk

APPROVED AS TO FORM:

Mr. Neal Singer, Town Counsel

CONSULTANT
Edward Henning & Associates.

Edward Henning, Principal

Exhibit A

Edward Henning & Associates

URBAN REVITALIZATION + FUNDING

February 20, 2008

Mr. Richard Cambridge, Chair
Apple Valley Village Property Owner's Association
Apple Valley CA 92307

Re: Consulting Services Proposal - Owner's Association Incorporation/Non-Profit Exemption

Dear Mr. Cambridge:

I am pleased to submit this proposal for professional consulting services to incorporate the Apple Valley Village Property Owner's Association with the California Secretary of State and to obtain non-profit exemption status with the Federal Internal Revenue Service and the California Franchise Tax Board.

In the way of background, I have been involved with community development and business district revitalization programs and projects for over 30 years, having worked directly in management capacities for Southern California municipalities inclusive of Pasadena, Whittier, Barstow and Santa Ana. As a freelance consultant for the past 20 plus years, I have worked directly on BID/PBID studies, formations and modifications in Pasadena, Oxnard, Culver City, Monterey Park, Huntington Beach, Whittier, Santa Ana, Buena Park, Apple Valley, Visalia, Huntington Park, Berkeley, San Francisco, Vacaville and Tahoe City as well as a dozen or more business districts throughout the City of Los Angeles. Specific non-profit advisory services include business districts in Pasadena, Santa Ana, Glendale, Whittier, Oxnard, Ontario, Pomona, Tustin, Montebello and Monterey Park.

My understanding is that the primary purposes of this new organization are as follows:

1. Develop an annual detailed work program and budget for the recently formed five year Apple Valley Village Property and Business Improvement District (Village PBID);
2. Oversee the expenditure of Village PBID funds via directives to the Town of Apple Valley; and
3. Seek matching grants and funds for the revitalization of the Village area from the Town of Apple Valley and other available sources.

The incorporation and non-profit exemption is divided into four primary tasks and subtasks as follows:

Task 1. Incorporation - 30 days - \$1,000 flat fee (includes 9.5 hrs plus filing fees and certified copy fees)

This task involves meeting with the Board to name the group, identify a street mailing address, prepare State endorsed articles of incorporation, identify signatories - either all Board Members, only officers or a single person, identify an agent for service of process, expedite (hand carry/pickup) review/processing of incorporation with Downtown LA branch State Office, process SS-4 to obtain Federal Tax ID #, prepare/file State Form SI-100 for Domestic Non-Profit Corps.

Task 2. Bylaws - 30-45 days - \$1,000 flat fee (includes 10 hrs) plus \$1,000 contingency @ \$100/hr if extra time is required to gain Board consensus)

This task involves providing a draft set of comparable non-profit PBID related corporation bylaws and meeting with Board for section by section review and approval. The Board could appoint a smaller Committee to work with Consultant to finalize document. Approved bylaws are required before filing paperwork in Tasks 3 and 4.

Task 3. Federal Tax Exemption - 120-180 days - \$2,500 flat fee (includes 17 hrs plus \$800 filing fee) plus \$1,000 contingency @ \$100/hr if extra time is required to obtain IRS approval)

This task involves completing Federal Tax Form 1024 and Form 8718 (recommend seeking tax exemption under Section 501 (c) (6) – Mutual Benefit Corp), getting Board approval of written details and filing paperwork including approved Bylaws with IRS branch office in Cincinnati. Monitor status and provide supplemental materials/data upon IRS request.

Task 4. State Tax Exemption - 60 days - \$1,000 flat fee (includes 10 hrs)

This task involves completing State Tax Form 3500 (recommend seeking tax exemption under Section 23701(e) – Mutual Benefit Corp), getting Board approval of written details and following IRS tax exemption approval - filing paperwork including approved Bylaws with FTB branch office in Sacramento. Monitor status and provide supplemental materials/data upon FTB request.

Summary

The total fixed fee portion of the proposal is \$5,500 which includes approximately \$850 in filing fees. There is also a \$2,000 contingency at \$100/hr should additional time be required for the sometimes labor intensive bylaws approval by the Board and the tax exempt processing through the IRS.

Tasks 1, 2 and 3 can all be started immediately. Task 4 must wait until Task 3 is completed and IRS tax exempt approval is obtained. Taking into account the tax exempt processing through the IRS and FTB (in succession), the minimum completion time for all tasks is approximately 180 days/6 months. It could take longer.

Thank you for this opportunity. I look forward to working with you on this project.

Respectfully submitted,

Ed Henning

Edward V. Henning, Principal
EVLAVY@GMAIL.COM

Exhibit B

INSURANCE REQUIREMENTS FOR CONSULTANTS

Consultant shall procure and maintain for the duration of the contract insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work hereunder by the Consultant, its agents, representatives, or employees.

Minimum Scope of Insurance

Coverage shall be at least as broad as:

1. Insurance Services Office Commercial General Liability coverage (occurrence form CO 0001).
2. Insurance Services Office form number CA 0001 (Ed. 1187) covering Automobile liability, code 1 (any auto).
3. Workers' Compensation insurance as required by the State of California and Employer's Liability.
4. Errors and omissions liability insurance appropriate to the consultant's profession.

Minimum Limits of Insurance

Consultant shall maintain limits no less than:

1. General Liability: \$1,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.
2. Automobile Liability: \$1,000,000 per accident for bodily injury and property damage.

Deductibles and Self-Insured Retentions

Any deductibles or self-insured retentions must be declared to and approved by the Town. Except with respect to professional liability coverage, at the option of the Town, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the Town, its officers, officials, employees and volunteers; or the Consultant shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses.

Other Insurance Provisions

The general liability and automobile liability policies are to contain, or be endorsed to contain, the following provisions:

1. The Town, its officers, officials, employees and volunteers are to be covered as insureds as respects: liability arising out of activities performed by or on behalf of the Consultant; products and completed operations of the Consultant; premises owned, occupied or used by the Consultant; or automobiles owned, leased, hired or borrowed by the Consultant. The coverage shall contain no special limitations on the scope of protection afforded to the Town, its officers, officials, employees or volunteers.
2. For any claims related to this project, the Consultant's insurance coverage shall be primary insurance as respects the Town, its officers, officials, employees and volunteers. Any insurance or self-insurance maintained by the Town, its officers, officials, employees or volunteers shall be excess of the Consultant's insurance and shall not contribute with it.
3. Any failure to comply with reporting or other provisions of the policies including breaches of warranties shall not affect coverage provided to the Town, its officers, officials, employees or volunteers.
4. The Consultant's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
5. Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, cancelled by either party, reduced in coverage or in limits except after thirty (30) days' prior written notice by certified mail return receipt requested, has been given to the Town.

Acceptability of Insurers

Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A:VII, unless otherwise acceptable to the Town.

Verification of Coverage

Consultant shall furnish the Town with original endorsements effecting coverage required by this clause. The endorsements are to be signed by a person authorized by that insurer to bind coverage on its behalf. The endorsements are to be on forms provided by the Town. All endorsements are to be received and approved by the Town before work commences. As an alternative to the Town's forms, the Consultant's insurer may provide complete, certified copies of all required insurance policies, including endorsements effecting the coverage required by these specifications, or endorsement/certificates approved by the Town.