

**AGREEMENT FOR CONSULTING SERVICES**

This Agreement for Consulting Services (“Agreement”) is made and entered into in the County of San Bernardino, State of California, this 5th day of November, 2014, by and between the Town of Apple Valley, a municipal corporation (“Town”), and Hayward Consulting Group (“Consultant”).

WHEREAS, Town desires to hire Consultant to perform certain consulting services specified herein; and

WHEREAS, Consultant represents that Consultant and/or Consultant’s personnel have the qualifications and experience to properly perform such services:

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

1. Scope of Services

Consultant shall furnish Town with professional consulting services as specified in Exhibit A.

2. Method of Performing Services

Subject to the terms and conditions of this Agreement, Consultant may determine the method, details, and means of performing the services described herein. The Town is interested only in the results obtained by or through Consultant’s services, and Consultant shall have sole control of the manner and means of performing under this Agreement. All materials and equipment needed by Consultant to carry out the work to be performed under this Agreement shall be furnished by Consultant. The Town shall not have the right to require the Consultant do anything which would jeopardize the relationship of independent contractor status between the Town and the Consultant.

3. Standard of Performance

Consultant agrees to undertake and complete these services to conclusion, using that standard of care, skill, and diligence normally provided by a professional person in performance of similar consulting services.

4. Nonexclusive Services

This Agreement shall not be interpreted to prevent or preclude Consultant from rendering any services for Consultant’s own account or to any other person or entity as Consultant in its sole discretion shall determine. Consultant agrees that performing such services will not materially interfere with services to be performed for the Town.

5. Coordination of Services

All services are to be coordinated with the Project Manager (Manager), subject to the direction of the Town Manager or Assistant Town Manager.

6. Place of Work

Consultant shall perform the services provided for in this Agreement at any place or location and at such times as the Consultant shall determine.

7. Correction of Errors

Consultant agrees to correct, at its expense, all errors which may be disclosed during review of Consultant's services. Should Consultant fail to make such correction in a reasonably timely manner, such correction shall be made by Town, and the cost thereof shall be paid by Consultant.

8. Time for Performance

All services performed under this Agreement shall be completed pursuant to the schedule provided in Exhibit B attached hereto and incorporated by this reference in full herein. Town agrees to amend the performance termination date whenever Consultant is delayed by action or inaction of Town and Consultant promptly notifies Manager of such delays.

9. Principal in Charge

Consultant hereby designates David L. Hayward, Principal, Hayward Consulting Group as its principal-in-charge and person responsible for necessary coordination with Manager.

10. Permits, Licenses, Certificates

Not Applicable.

11. Town's Responsibility

Town shall cooperate with Consultant as may be reasonably necessary for Consultant to perform its services. Manager agrees to provide direction to Consultant as requested regarding particular project requirements.

12. Term of Agreement

This Agreement shall begin on November 5, 2014, and expire on December 31, 2015.

13. Termination

- a. This Agreement may be terminated by the Town if Manager notifies the Consultant, in writing, of the Manager's desire to terminate the Agreement. Such termination shall be effective ten calendar days from the date of delivery or mailing of such notice. Town agrees to pay Consultant in full for all amounts due Consultant as of the effective date of termination, including any expenditures incurred on Town's behalf, whether for the employment of third parties or otherwise.

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- b. This Agreement may be terminated by Consultant if Consultant notifies Manager, in writing, of Consultant's desire to terminate the Agreement. Such termination shall be effective ten calendar days from the date of delivery or mailing of such notice and only if all assignments accepted by Consultant have been completed prior to the date of termination.

#### 14. Compensation

The Town shall pay the Consultant the fees and expenses for services listed in Exhibit C under the following schedule.

- a. Ten thousand dollars (US\$10,000) shall be paid, via wire transfer, contemporaneously with the execution of the Agreement, and failure to tender payment at the time the Town signs the Agreement shall not bind Consultant to undertake services until the required payment is tendered;
- b. Each month Consultant will furnish the Town with an invoice specifying the time spent on consulting services and reasonable expenses identified in Exhibit C. The invoices may be sent via email. The Town shall have fifteen (15) days to pay the invoice in full; and
- c. All final fees and expenses are to be paid by wire transfer prior to delivery of the valuation report (report) (if requested by the Town), and the final report will be delivered upon receipt of payment.

#### 15. Method of Payment

- a. The Town agrees to pay the Consultant via wire transfer to Consultant's bank within fifteen (15) days of receipt of a monthly invoice, subject to completion of the services satisfactory to the Manager. The invoice shall identify services as specified by the Manager.
- b. Consultant agrees to maintain current monthly records, books, documents, papers, accounts and other evidence pertaining to the services performed and costs incurred. Such items shall be adequate to reflect the time involved and cost of performing the services. Consultant shall provide Manager with copies of payroll distribution, receipted bills and other documents requested for justification of the invoice.

#### 16. Responsibility for Expenses

The Consultant may request reimbursement for reasonable expenses identified in Exhibit C. Consultant shall, at its own cost and expense, supply all personal property necessary or appropriate to perform the services provided for under this Agreement, including, but not limited to any personal property used by employees and agents of Consultant in the performance of such services.

#### 17. Non-Appropriation of Funds

Payments to be made to Consultant by Town for services performed within the current fiscal year are within the current fiscal budget and within an available, unexhausted and unencumbered

appropriation of Town. In the event Town does not appropriate sufficient funds for payment of Consultant's services beyond the current fiscal year, this Agreement shall cover payment for Consultant's services only up to the conclusion of the last fiscal year in which Town appropriates sufficient funds and shall automatically terminate at the conclusion of such fiscal year.

#### 18. Records

- a. Consultant agrees that all final computations, exhibits, files, plans, correspondence, reports, drawings, designs, data and photographs expressly required to be prepared by Consultant as part of the scope of services ("documents and materials") shall be the property of Town and shall, upon completion of the services or termination of this Agreement, be delivered to Manager.
- b. At Town's request, Town shall be entitled to immediate possession of, and Consultant shall furnish to Manager within ten days, all of the documents and materials. Consultant may retain copies of these documents and materials.
- c. Any substantive modification of the documents and materials by Town staff or any use of the completed documents and materials for other Town projects, or any use of uncompleted documents and materials, without the written consent of Consultant, shall be at Town's sole risk and without liability or legal exposure to Consultant. Town agrees to hold Consultant harmless from all damages, claims, expenses and losses arising out of any reuse of the documents and materials for purposes other than those described in this Agreement, unless Consultant consents in writing to such reuse.

#### 19. Maintenance and Inspection of Records

Consultant agrees that Town or its auditors shall have access to and the right to audit and reproduce any of Consultant's relevant records to ensure that Town is receiving all services to which Town is entitled under this Agreement or for other purposes relating to the Agreement. Consultant shall maintain and preserve all such records for a period of **one year** after the expiration of this Agreement, or until an audit has been completed and accepted by Town.

#### 20. Confidentiality of Information

Any documents and materials given to or prepared or assembled by Consultant under this Agreement shall be confidential and shall not be made available to any third person or organization by Consultant without prior written approval of the Manager.

#### 21. Indemnity

Consultant agrees to indemnify, hold harmless and defend Town, its Town Council, and each member thereof, and every officer, employee, representative or agent of Town, from any and all liability, claims, demands, actions, damages (whether in contract or tort, including personal injury, death at any time, or property damage), costs and financial loss, including all costs and expenses and fees of litigation or arbitration, that arise directly or indirectly from any acts or omissions related to this Agreement performed by Consultant or its agents, employees, sub-consultants, sub-contractors, consultants and other persons acting on Consultant's behalf. This agreement to indemnify, hold

harmless and defend shall apply whether such acts or omissions are the product of active negligence, passive negligence, or acts for which Consultant or its agents, employees, sub-consultants, sub-contractors, consultants and other persons acting on Consultant's behalf would be held strictly liable.

22. Insurance

Not Applicable.

23. Independent Contractor

- a. Town and Consultant agree that in the performance of the services, Consultant shall be, and is, an independent contractor, and that Consultant and its employees are not employees of Town. Consultant has and shall retain the right to exercise full control over the employment, direction, compensation and discharge of all persons assisting Consultant.
- b. Consultant shall be solely responsible for, and shall save Town harmless from, all matters relating to the payment of Consultant's employees, agents, subcontractors and subconsultants, including compliance with social security requirements, federal and State income tax withholding and all other regulations governing employer-employee relations.
- c. Consultant acknowledges that Consultant and Consultant's employees are not entitled to receive from Town any of the benefits or rights afforded employees of Town, including but not limited to reserve leave, sick leave, vacation leave, holiday leave, compensatory leave, Public Employees Retirement System benefits, or health, life, dental, long-term disability and workers' compensation insurance benefits.

24. Consultant Not Agent

Except as Manager may specify in writing, Consultant, and its agents, employees, subcontractors and subconsultants shall have no authority, expressed or implied, to act on behalf of Town in any capacity, as agents or otherwise, or to bind Town to any obligation.

25. Conflict of Interest

Consultant shall promptly inform Manager of any contract, agreement, arrangement, or interest that Consultant may enter into or have during the performance of this Agreement that may conflict with Town's interests. This requirement includes contracts, agreements and arrangements with manufacturers, suppliers, contractors or other clients whose interests might be served by the services performed under this Agreement and Consultant's or Consultant's clients' interest in land that might be affected by the services. Consultant shall take such measures as are necessary in the performance of this Agreement to prevent actual or appearances of conflicts of interest.

26. Assignability of Agreement

Consultant agrees that this Agreement contemplates personal performance by Consultant and is based upon a determination of Consultant's personnel's unique competence, experience and specialized

personal knowledge. Assignments of any or all rights, duties, or obligations of Consultant under this Agreement will be permitted only with the express written consent of Manager, which consent may be withheld for any reason.

### 27. Successors and Assigns

Consultant and Town agree that this Agreement shall be binding upon and inure to the benefit of the heirs, executors, administrators, successors and assigns of Consultant and Town.

### 28. Fair Employment Practices

- a. Consultant agrees that all persons employed by Consultant shall be treated equally by Consultant without regard to or because of race, color, religion, ancestry, national origin, disability, sex, marital status, age, or any other status protected by law, and in compliance with all antidiscrimination laws of the United States of America, the State of California, and Town.
- b. Consultant agrees that, during the performance of this Agreement, Consultant and any other parties with whom Consultant may subcontract shall adhere to equal opportunity employment practices to assure that applicants and employees are treated equally and are not discriminated against because of their race, color, religion, ancestry, national origin, disability, sex, marital status, age, or any other status protected by law.
- c. Consultant agrees to state in all of its solicitations or advertisements for applicants for employment that all qualified applicants shall receive consideration for employment without regard to their race, color, religion, ancestry, national origin, disability, sex, marital status, age, or any other status protected by law.
- d. Consultant shall provide Town staff with access to and, upon request by Manager, provide copies to Manager of all of Consultant's records pertaining or relating to Consultant's employment practices, to the extent such records are not confidential or privileged under State or federal law.

### 29. Force Majeure

Consultant and Town agree that neither Town nor Consultant shall be responsible for delays or failures in performance resulting from acts beyond the control of either party. Such acts shall include, but not be limited to acts of God, strikes, lockouts, riots, acts of war, epidemics, governmental regulations imposed after this Agreement was executed, fire, communication line failures, earthquakes, or other disasters.

### 30. Time of Essence

Consultant and Town agree that time is of the essence in regard to performance of any of the terms and conditions of this Agreement.

### 31. Covenants and Conditions

Consultant and Town agree that each term and each provision of this Agreement to be performed by Consultant shall be construed to be both a covenant and a condition.

32. Governing Law

Town and Consultant agree that the construction and interpretation of this Agreement and the rights and duties of Town and Consultant hereunder shall be governed by the laws of the State of California.

33. Compliance with Laws

Consultant agrees to comply with all Town, State, and federal laws, rules, and regulations, now or hereafter in force, pertaining to the services performed by Consultant pursuant to this Agreement.

34. Severability

Town and Consultant agree that the invalidity in whole or in part of any provision of this Agreement shall not void or affect the validity of any other provision.

35. Waiver

Town and Consultant agree that no waiver of a breach of any provision of this Agreement by either Consultant or Town shall constitute a waiver of any other breach of the same provision or any other provision of this Agreement. Failure of either Town or Consultant to enforce at any time, or from time to time, any provision of this Agreement, shall not be construed as a waiver of such provision or breach.

36. Counterparts

Town and Consultant agree that this Agreement may be executed in two or more counterparts, each of which shall be deemed an original.

37. Arbitration

Consultant and Town agree that in the event of any dispute with regard to the provisions of this Agreement, the services rendered or the amount of Consultant's compensation, the dispute may be submitted to arbitration upon the mutual agreement of the parties, under such procedures as the parties may agree upon, or, if the parties cannot agree, then under the Rules of the American Arbitration Association.

38. Expenses of Enforcement

Consultant and Town agree that the prevailing party's reasonable costs, attorneys' fees (including the reasonable value of the services rendered by the Town Attorney Office) and expenses, including investigation fees and expert witness fees, shall be paid by the non-prevailing party in any dispute involving the terms and conditions of this Agreement.

39. Authority to Execute

- a. Town acknowledges that the person executing this Agreement has been duly authorized by the Town Council to do so on behalf of Town.
- b. Consultant acknowledges that the person executing this Agreement has been duly authorized by Consultant to do so on behalf of Consultant.

#### 40. Notices

Any notice, request, demand, or other communication required or permitted hereunder shall be deemed to be served when delivered by one of the following courier companies: FedEx, Airborne, UPS, or DSL (overnight, next day delivery) and addressed to:

- a. The Consultant, Mr. David L. Hayward, Principal, Hayward Consulting Group, 837 Muirfield Drive, Oceanside, CA 92058; and
- b. Town of Apple Valley, 14955 Dale Evans Parkway, Apple Valley, California 92307, Attention: Marc Puckett, Assistant Town Manager.

#### 41. Amendment

Town and Consultant agree that the terms and conditions of the Agreement may be reviewed or modified at any time. Any modifications to this Agreement, however, shall be effective only when agreed upon to in writing by both the Town representative authorized to do so under the Town's purchasing policies and Consultant.

#### 42. Disclaimer

Consultant makes no warranties, guarantees, or representations concerning the outcome or final result of the valuation or the end result of its consulting services because the field of valuation is not as certain as any of us would prefer, and also because the valuation process involves many intangibles, judgment calls, and frequently the resolution of conflicting viewpoints. All statements made by Consultant concerning the valuation are statements of educated opinion only. Consultant can and will advise the Town to help the Town understand financial benefits and risks; however, the Town must decide what benefits it wishes to pursue as well as what risks it is willing to take. Moreover, it has been explained to the Town that it is difficult to predict with any reasonable degree of accuracy the nature, duration, or extent of consulting services which will be required. Consultant therefore has made no prediction or commitment as to any maximum fee that may be charged for Town's project, nor to the ultimate outcome of any of Consultant's services. Moreover, because of the uncertainty and fact-specific interpretations by courts of law and other adjudicatory bodies, Consultant has not and cannot guarantee that its analysis and/or conclusion(s) would be accepted by any court or adjudicatory body. Any rejection of Consultant's work product by any adjudicatory or regulatory body shall not constitute a breach of this Agreement nor otherwise create an excuse to full performance by the Town of all the terms and duties in this Agreement.

Specifically, the Town and the Consultant agree that:

- a. The professional literature identifies the process of valuation (as defined below) as part "art and science."
- b. The data used in the analysis of the services identified in Exhibit A and supplied by the Town to



the Consultant is accurate and that the Consultant is under no obligation to independently determine the accuracy or use of the information supplied by the Town.

- c. Valuation, in the context of this Agreement, is based, in part, on state and federal laws and regulations (e.g., from the state public utility commission or state utility commission, EPA, etc.) that potentially continuously change. The services identified in Exhibit A reasonably capture those laws and regulations as of the date of the valuation.
- d. Any computer program, software, and/or financial model is a quantitative representation of a company's or organization's past, present, and future business operations, or value of its assets. As such, any model or computer program is inherently impossible to predict the future. Users of business valuations should be aware that business valuations may be based on certain hypothetical values of assets and/or future economic benefits potential that may or may not materialize. Therefore, the actual asset values (or value of the business) and future period economic benefits may vary from the projections and amounts used in this valuation, and the variations may be material.
- e. The results of the services identified in Exhibit A are provided without warranty, of any kind, expressed or implied, including but not limited to the implied warranty of merchantability and fitness for a particular purpose. The Consultant does not assume any liability for any alleged or actual damages arising from the use of or the inability to use the services listed in Exhibit A.
- f. The Town is responsible for Town's own due diligence (e.g., environmental, financial, technical/operational, or other issues) regarding the information supplied to the Consultant in the context of the valuation.
- g. The Consultant is providing a valuation and not an appraisal of the physical condition of any assets.
- h. The Town is only interested in the results of the services listed in Exhibit A and is not interested in any quantitative and/or qualitative calculations included in the results of any model or analysis used by Consultant.
- i. The Town shall communicate, in writing, to the Consultant the primary purpose for the valuation. The purpose of the valuation may impact the valuation method(s) use by the Consultant. The report is intended for this specific purpose and is not to be used for any other purpose.

#### 43 Definitions

The Consultant and the Town agree to the following definitions:

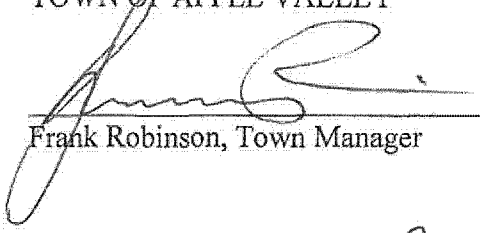
- a. "Disclose" shall mean that neither CONSULTANT nor CLIENT will transmit confidential property nor information to any third persons, entities, corporations, companies, or associations of any type whatsoever without the express written permission of CLIENT or CONSULTANT.
- b. "Valuation" is the act or process of determining the value of a business (or organization, or entity such as a utility owned or operated by a government), business ownership interest, security, tangible asset(s), or intangible asset(s). The terms "business valuation" and "valuation" are often used interchangeably.
- c. "Appraisal" is the act of examining the physical and/or economic condition of an asset or assets.

#### 44. Entire Agreement

Town and Consultant agree that this Agreement constitutes the entire agreement of the parties regarding the subject matter described herein and supersedes all prior communications, agreements, and promises, either oral or written.

TOWN OF APPLE VALLEY

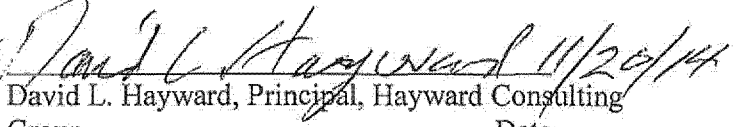
CONSULTANT



Frank Robinson, Town Manager

11/20/14

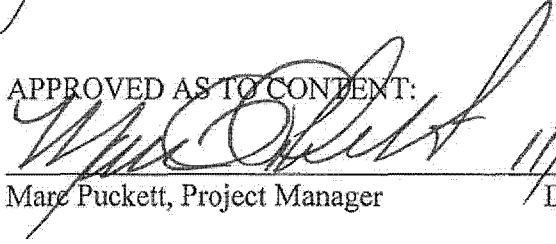
Date



David L. Hayward, Principal, Hayward Consulting Group

Date

APPROVED AS TO CONTENT:



Marc Puckett, Project Manager

11/20/14

Date

## **Exhibit A**

### Consulting Services (Scope of Work)

The purpose of this Agreement is to advise the Town's Project Manager on issues related to the business valuation of Apple Valley Ranchos Water Company (Company), and if requested, in writing, by the Project Manager, prepare a written valuation report of the Company with December 31, 2013 as the valuation date. The report is intended to assist the Town in the valuation of the Company's operating assets. The written valuation report, with the exceptions, general contingent and limiting conditions noted below, will meet the valuation report requirements of the National Association of Certified Valuation Analysts (NACVA) and specified in Business Valuation Body of Knowledge, Shannon P. Pratt, Hoboken, New Jersey, John Wiley & Sons, Inc., 2003.

The scope of work does not include Consultant providing testimony in any court proceedings.

### Deliverables

At the conclusion of this project, we will provide the following deliverables:

1. Twelve (12) hard-bound copies of the valuation report (if requested); and
2. One copy of the electronic work papers used in our analysis. We will not provide a copy of our proprietary software "FinMod" © Copyright David L. Hayward, All rights reserved; and
3. If requested by the Town's representatives, we will provide a briefing and/or PowerPoint presentation regarding our valuation approaches, methods, assumptions, limiting conditions, and conclusions.

### General Contingent and Limiting Conditions

The written valuation report, if requested, is made subject to the following general contingent and limiting conditions:

1. The Consultant assumes no responsibility for the legal description or matters including legal or title considerations. Title to the subject assets, properties, or business interests is assumed to be good and marketable unless otherwise stated.
2. The subject assets, properties, or business interests are valued free and clear of any or all liens or encumbrances unless otherwise stated.
3. The Consultant assumes responsible ownership and competent management with respect to the subject assets, properties, or business interests.
4. The information furnished by others (e.g., data related to comparable transactions) is believed to be reliable. However, the Consultant issues no warranty or other form of assurance regarding its accuracy.

5. The Consultant assumes no hidden or unapparent conditions regarding the subject assets, properties, or business interests.
6. The Consultant assumes that the Company is in full compliance with all applicable federal, state, and local regulations and laws unless lack of compliance is stated, defined, and considered in the valuation report.
7. The Consultant assumes all required licenses, certificates of occupancy, consents, or legislative or administrative authority from any local, state, or national government, or private entity or organization have been or can be obtained or reviewed for any use on which the opinion contained in the report is based.
8. Unless otherwise stated in the report, the Consultant did not observe, and has no knowledge of, the existence of hazardous materials with regard to the subject assets, properties, or business interests. However, the Consultant is not qualified to detect such substances. The Consultant assumes no responsibility for such conditions or for any expertise required to discover them.
9. Possession of the report does not carry with it the right of publication. It may not be used for any purpose by any person other than the Town to whom it is addressed without consultant's written permission, and, in any event, only with proper written qualifications and only in its entirety.
10. The Consultant is not required to give depositions, testimony, or be in attendance in court with reference to the assets, properties, or business interests in question unless arrangements have been previously made.
11. Neither all nor any part of the contents of this report shall be disseminated to the public through advertising, public relations, news, sales, or other media without Consultant's prior written consent and approval.
12. The analysis, opinions, and conclusions presented in this report apply to this engagement only and may not be used out of the context presented herein. This report is valid only for the effective date(s) specified herein and only for the purpose(s) specified herein.

**Exhibit B**

Schedule

## **Exhibit C**

### Fees and Expenses

The Town agrees to pay Consultant two hundred-fifty dollars (US\$250) per hour in fees for the scope of work identified in Exhibit A. In addition, the Town agrees to pay the subcontractor, Dr. Michael R. Schmidt one hundred seventy-five dollars (US\$175) per hour. Mr. Hayward's travel time related to the scope of work will be billed at one hundred twenty-five dollars (US\$125) per hour. (Travel is defined as the time consultant leaves his place of business and arrives at the intended destination.) Consulting time, including travel time, shall be calculated in ten (10) minute increments.

In addition to the above fees, the Town shall pay all reasonable expenses associated with the scope of work identified in Exhibit A. Reasonable expenses include, but not limited to, photocopying, postage and shipping, rental car, airport shuttle, meals, lodging, parking, airfare (coach class if possible), publications, word processing, computer programming services, telephone calls including faxes, legal research, and subscription to databases or research services.