



AGENDA REPORT

SAN CLEMENTE CITY COUNCIL MEETING
Meeting Date: August 2, 2016

Agenda Item 9A
Approvals:
City Manager [Signature]
Dept. Head [Signature]
Attorney SS
Finance [Signature]

Department: Public Works / Engineering
Prepared By: Tom Bonigut, Deputy Public Works Director TB

Subject: **APPROVE DESIGN PHASE AGREEMENT FOR U.S. ARMY CORPS OF ENGINEERS SAND REPLENISHMENT PROJECT.**

Fiscal Impact: Yes. The proposed agreement requires the City to provide 35% of the design phase cost which is estimated at \$397,250. The City has committed State grant funding and budgeted General Funds to provide the entire local cost sharing contribution. If the design phase cost budget increases in the future, the City would need to either provide additional funding for its share of costs or terminate the design phase.

Summary: Staff recommends City Council approval of an agreement to fund the design phase of the Corps sand replenishment project, as well as approval for the City Manager, City Treasurer and City Attorney to sign related certifications.

Discussion: The U.S. Army Corps of Engineers (Corps) completed a Feasibility Study which identified a sand replenishment project to mitigate beach erosion along the central portion of San Clemente's shoreline. The recommended project is to place 251,000 cubic yards of sand along the shoreline from Linda Lane to South T-Street beaches (a distance of about 3,400 feet), which would widen the beach by 50 feet. This section of beach would be periodically replenished with sand about every 6 years over the course of a 50-year project life.

The next step in the Federal process is the design phase, which will include two years of pre-construction monitoring as required by environmental approvals for the project. As with the Feasibility Phase of the project, the City will be required to provide funding to share in the cost of the design phase. The total design phase cost is estimated at \$1,135,000, with the Corps obligated to provide 65% or \$737,750, and the City to provide 35% or \$397,250. As noted above the City has funding in place for the required design phase cost sharing contribution. Similar to the Feasibility Study phase, the Corps has prepared a design phase cost sharing agreement for City approval. A draft proposed agreement is provided in Attachment 1. Although the agreement is still in final review by the Corps, staff recommends City Council approval of the agreement provided there are not significant changes from the attached draft final agreement. There are several related certifications that are required by the Corps (provided in Attachment 2), and this report requests City Council approval to authorize the City Manager, City Attorney and City Treasurer to sign those certifications.

Approval of the design phase agreement will allow the City to continue forward in the required process toward a sand replenishment project along the City's beach. The

Coastal Advisory Committee (CAC) considered this matter at its July 14, 2016 meeting. Since the City has in place funding required to proceed with the design, most of which will be provided by the State, the CAC recommends City Council approval of the design phase cost sharing agreement.

The construction phase of the project (i.e. actual sand replenishment phase) is estimated at \$11.3 million. Assuming project construction funding is approved in a future Federal budget, the City will need to set aside a local match contribution of 35% to construct the project, or about \$4 million. The City submitted two grant applications to the State Parks Department for the anticipated Corps of Engineers project which were successful. The recently-approved State Fiscal Year 2017 budget included \$3.4 million for the San Clemente-Corps of Engineers sand replenishment project. At the current project estimate, that would provide 85% of the City's required local match, which is the maximum allowed by State funding guidelines. That leaves about \$600,000 that the City would need to provide in local funds, which would be due before the project begins via a future construction phase cost sharing agreement. In the coming months staff will receive a State grant funding agreement for City Council approval, which will reserve the grant construction funds for three years (with potential to extend if needed).

Recommended**Action:**

STAFF RECOMMENDS THAT the City Council:

1. Approve and authorize the City Manager to sign an agreement with the U.S. Army Corps of Engineers for design of the San Clemente Shoreline Beach Sand Replenishment project;
2. Authorize the City Manager to sign related documents and certifications as may be needed during the design phase provided those do not involve increases to the approved design phase budget;
3. Authorize the City Treasurer to sign the design phase Financial Self-Certification form; and
4. Authorize the City Attorney to sign the Certificate of Authority form.

- Attachments:**
1. Draft Final design phase agreement.
 2. Certification forms.

Notification: None.

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DESIGN AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
THE CITY OF SAN CLEMENTE
FOR
DESIGN
FOR THE
SAN CLEMENTE SHORELINE, ORANGE COUNTY, CALIFORNIA

THIS AGREEMENT is entered into this _____ day of _____, ____ by and between the Department of the Army (hereinafter the “Government”), represented by the U.S. Army Engineer, Los Angeles District (hereinafter the “District Engineer”) and the City of San Clemente (hereinafter the “Non-Federal Sponsor”), represented by the City Manager.

WITNESSETH, THAT:

WHEREAS, Federal funds were provided in Public Law 113–235—Dec. 16, 2014 Consolidated and Further Continuing Appropriations Act, 2015 to initiate design of the San Clemente Shoreline, Orange County, California Project (hereinafter the “Project” as defined in Article I.A. of this Agreement);

WHEREAS, construction of the Project is authorized by Section 7002 of the Water Resources Reform and Development Act of 2014, Public Law 113–121;

WHEREAS, Section 103 of the Water Resources Development Act of 1986, as amended (33 U.S.C. 2213), specifies the cost-sharing requirements applicable to construction of the Project, and Section 105(c) of the Water Resources Development Act of 1986 (33 U.S.C. 2215), provides that the costs of design shall be shared in the same percentages as construction of the Project;

WHEREAS, based on the Project’s primary project purpose of coastal storm damage reduction, the parties agree that the Non-Federal Sponsor shall contribute **35** percent of the total design costs under this Agreement;

WHEREAS, pursuant to Section 221(a)(4) of the Flood Control Act of 1970, as amended (42 U.S.C. 1962d-5b(a)), the Non-Federal Sponsor may perform or provide in-kind contributions for credit towards the non-Federal share of the total design costs;

WHEREAS, the Government and Non-Federal Sponsor have the full authority and capability to perform in accordance with the terms of this Agreement.

NOW, THEREFORE, the parties agree as follows:

ARTICLE I - DEFINITIONS

A. The term "Project" means construction of a fifty-foot-wide protective beach berm extending along about 3,400 feet of shoreline with a crest elevation of +17 feet above Mean Lower Low Water and renourishment to maintain the protection on the average of every six years over a 50-year period of Federal participation, as generally described in the Final Feasibility Report and Final Environmental Impact Statement, dated February 2012, and approved by the Assistant Secretary of the Army (Civil Works) on September 6, 2012.

B. The term "Design" means performance of detailed pre-construction engineering and design, including: a) preparation of plans and specifications for the initial construction contract for the Project; b) biological and physical monitoring required to be conducted before initial construction of the Project; and c) other related activities and analyses to prepare for initial construction of the Project.

C. The term "total design costs" means the sum of all costs that are directly related to the Design and cost shared in accordance with the terms of this Agreement. Subject to the provisions of this Agreement, the term shall include, but is not necessarily limited to: the Government's costs for engineering and design, economic and environmental analyses, and evaluation; for contract dispute settlements or awards; for supervision and administration; for Agency Technical Review and other review processes required by the Government; for response to any required Independent External Peer Review; and the Non-Federal Sponsor's creditable costs for in-kind contributions, if any. The term does not include any costs for dispute resolution; for participation in the Design Coordination Team; for audits; for an Independent External Peer Review panel, if required; for betterments; or for negotiating this Agreement or a subsequent Project Partnership Agreement.

D. The term "in-kind contributions" means those Design activities to be performed or provided by the Non-Federal Sponsor that otherwise would have been undertaken by the Government and that have previously been identified as being integral to the Design in an integral determination report approved by the Division Engineer for the South Pacific Division subsequent to the execution of this Agreement, or in any amendments thereto approved by the Division Engineer.

E. The term "fiscal year" means one year beginning on October 1st and ending on September 30th of the following year.

F. The term "betterment" means a difference in the design of a portion of the Project that results from the application of standards that the Government determines exceed those that the Government would otherwise apply to the design of that portion.

ARTICLE II - OBLIGATIONS OF THE GOVERNMENT AND
THE NON-FEDERAL SPONSOR

A. In accordance with Federal laws, regulations, and policies, the Government shall conduct the Design using funds appropriated by the Congress and funds provided by the Non-Federal Sponsor. The Non-Federal Sponsor shall perform or provide any in-kind contributions in accordance with applicable Federal laws, regulations, and policies. If the Government and non-Federal interest enter into a Project Partnership Agreement for construction of the Project, the Government shall include the total design costs in the calculation of construction costs for the Project in accordance with the terms and conditions of the Project Partnership Agreement.

B. The Non-Federal Sponsor shall contribute 35 percent of total design costs in accordance with the provisions of this paragraph and provide required funds in accordance with Article III.

1. After considering the estimated amount of credit for in-kind contributions, if any, that will be afforded in accordance with paragraph C. of this Article, the Government shall provide the Non-Federal Sponsor with a written estimate of the amount of funds required from the Non-Federal Sponsor for the initial fiscal year of the Design. No later than thirty (30) calendar days after such notification, the Non-Federal Sponsor shall provide the full amount of such funds to the Government.

2. No later than August 1st prior to each subsequent fiscal year of the Design, the Government shall provide the Non-Federal Sponsor with a written estimate of the amount of funds required from the Non-Federal Sponsor during that fiscal year. No later than September 1st prior to that fiscal year, the Non-Federal Sponsor shall provide the full amount of such required funds to the Government.

C. The Government shall credit towards the Non-Federal Sponsor's share of total design costs, the costs, documented to the satisfaction of the Government, that the Non-Federal Sponsor incurs in providing or performing in-kind contributions integral to the Design, including associated supervision and administration. Such costs shall be subject to audit in accordance with Article VII to determine reasonableness, allocability, and allowability, and crediting shall be in accordance with the following procedures, requirements, and limitations:

1. As in-kind contributions are completed and no later than 60 calendar day after such completion, the Non-Federal Sponsor shall provide the Government appropriate documentation, including invoices and certification of specific payments to contractors, suppliers, and the Non-Federal Sponsor's employees. Failure to provide such documentation in a timely manner may result in denial of credit.

2. No credit shall be afforded for interest charges, or any adjustment to reflect changes in price levels between the time the in-kind contributions are completed and credit is afforded; for the value of in-kind contributions obtained at no cost to the

Non-Federal Sponsor; for any items provided or performed prior to the effective date of this Agreement unless covered by an In-Kind Memorandum of Understanding; for any items not identified as integral in the integral determination report; or for costs that exceed the Government's estimate of the cost for such item if it had been performed by the Government.

3. No reimbursement will be provided for any in-kind contributions that exceed the Non-Federal Sponsor's share of the total design costs under this Agreement. As provided in Article II.A., total design costs, including credit for in-kind contributions, shall be included in the calculation of construction costs for the Project in accordance with the terms and conditions of the Project Partnership Agreement.

D. To the extent practicable and in accordance with Federal laws, regulations, and policies, the Government shall afford the Non-Federal Sponsor the opportunity to review and comment on solicitations for contracts prior to the Government's issuance of such solicitations; proposed contract modifications, including change orders; and contract claims prior to resolution thereof. Ultimately, the contents of solicitations, award of contracts, execution of contract modifications, and resolution of contract claims shall be exclusively within the control of the Government.

E. The Non-Federal Sponsor shall not use Federal Program funds to meet any of its obligations under this Agreement unless the Federal agency providing the funds verifies in writing that the funds are authorized to be used for the Project. Federal program funds are those funds provided by a Federal agency, plus any non-Federal contribution required as a matching share therefor.

F. Except as provided in paragraph C. of this Article, the Non-Federal Sponsor shall not be entitled to any credit or reimbursement for costs it incurs in performing its responsibilities under this Agreement.

G. In carrying out its obligations under this Agreement, the Non-Federal Sponsor shall comply with all the requirements of applicable Federal laws and implementing regulations, including, but not limited to: Title VI of the Civil Rights Act of 1964 (P.L. 88-352), as amended (42 U.S.C. 2000d), and Department of Defense Directive 5500.11 issued pursuant thereto; the Age Discrimination Act of 1975 (42 U.S.C. 6102); and the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), and Army Regulation 600-7 issued pursuant thereto.

H. If Independent External Peer Review (IEPR) is required for the Design, the Government shall conduct such review in accordance with Federal laws, regulations, and policies. The Government's costs for an IEPR panel shall not be included in the total design costs.

I. In addition to the ongoing, regular discussions of the parties in the delivery of the Design, the Government and the Non-Federal Sponsor may establish a Design Coordination Team consisting of Government's Project Manager and the Non-Federal

Sponsor's counterpart and one senior representative each from the Government and Non-Federal Sponsor to discuss significant issues or actions. Neither the Government's nor the Non-Federal Sponsor's costs for participation on the Design Coordination Team shall be included in the total design costs. The Non-Federal Sponsor's costs for participation on the Design Coordination Team shall be paid solely by the Non-Federal Sponsor without reimbursement or credit.

J. The Non-Federal Sponsor may request in writing that the Government perform betterments on behalf of the Non-Federal Sponsor. Each request shall be subject to review and approval by the Division Engineer for the South Pacific Division. If the Government agrees to such request, the Non-Federal Sponsor, in accordance with Article III.F., must provide funds sufficient to cover the costs of such work in advance of the Government performing the work.

ARTICLE III - METHOD OF PAYMENT

A. As of the effective date of this Agreement, total design costs are projected to be \$1,135,000, with the Government's share of such costs projected to be \$737,750, the Non-Federal Sponsor's share of such costs projected to be \$397,250; and the costs for betterments are projected to be \$0. These amounts are estimates subject to adjustment by the Government, after consultation with the Non-Federal Sponsor, and are not to be construed as the total financial responsibilities of the Government and the Non-Federal Sponsor.

B. The Government shall provide the Non-Federal Sponsor with quarterly reports setting forth the estimated total design costs and the Government's and Non-Federal Sponsor's estimated shares of such costs; costs incurred by the Government, using both Federal and Non-Federal Sponsor funds, to date; the amount of funds provided by the Non-Federal Sponsor to date; the estimated amount of any creditable in-kind contributions; and the estimated remaining cost of the Design.

C. The Non-Federal Sponsor shall provide to the Government required funds by delivering a check payable to "FAO, USAED, Los Angeles L1)" to the District Engineer, or verifying to the satisfaction of the Government that the Non-Federal Sponsor has deposited such required funds in an escrow or other account acceptable to the Government, with interest accruing to the Non-Federal Sponsor, or by providing an Electronic Funds Transfer of such required funds in accordance with procedures established by the Government.

D. The Government shall draw from the funds provided by the Non-Federal Sponsor to cover the non-Federal share of the total design costs as those costs are incurred. If the Government determines at any time that additional funds are needed from the Non-Federal Sponsor to cover the Non-Federal Sponsor's required share of the total design costs, the Government shall provide the Non-Federal Sponsor with written notice of the amount of additional funds required. Within 60 calendar days of such

notice, the Non-Federal Sponsor shall provide the Government with the full amount of such additional funds.

E. Upon conclusion of the Design and resolution of all relevant claims and appeals, the Government shall conduct a final accounting and furnish the Non-Federal Sponsor with the written results of such final accounting. Should the final accounting determine that additional funds are required from the Non-Federal Sponsor, the Non-Federal Sponsor, within 60 calendar days of written notice from the Government, shall provide the Government with the full amount of such additional funds. Should the final accounting determine that the Non-Federal Sponsor has provided funds in excess of its required amount, the Government shall refund the excess amount, subject to the availability of funds or if requested by the Non-Federal Sponsor, apply the excess amount towards the non-Federal share of the cost of construction of the Project in the event a Project Partnership Agreement is executed for the Project. Such final accounting does not limit the Non-Federal Sponsor's responsibility to pay its share of total design costs, including contract claims or any other liability that may become known after the final accounting.

F. Payment of Costs for Betterments Provided on Behalf of the Non-Federal Sponsor. No later than 30 calendar days after receiving written notice from the Government of the amount of funds required to cover any such costs, as applicable, the Non-Federal Sponsor shall make the full amount of such required funds available to the Government by delivering a check payable to "FAO, USAED, Los Angeles (L1)" to the District Engineer, or by providing an Electronic Funds Transfer of such funds in accordance with procedures established by the Government. If at any time the Government determines that additional funds are required to cover any such costs, as applicable, the Non-Federal Sponsor shall provide those funds within 30 calendar days from receipt of written notice from the Government.

ARTICLE IV - TERMINATION OR SUSPENSION

A. If at any time the Non-Federal Sponsor fails to fulfill its obligations under this Agreement, the Government may suspend or terminate Design unless the Assistant Secretary of the Army (Civil Works) determines that continuation of the Design is in the interest of the United States or is necessary in order to satisfy agreements with any other non-Federal interests in connection with the Project.

B. If the Government determines at any time that the Federal funds made available for the Design are not sufficient to complete such work, the Government shall so notify the Non-Federal Sponsor in writing, and upon exhaustion of such funds, the Government shall suspend Design until there are sufficient Federal funds appropriated by the Congress and funds provided by the Non-Federal Sponsor to allow Design to resume.

C. In the event of termination, the parties shall conclude their activities relating to the Design and conduct an accounting in accordance with Article III.E. To provide for

this eventuality, the Government may reserve a percentage of available funds as a contingency to pay costs of termination, including any costs of resolution of contract claims and contract modifications.

D. Any suspension or termination shall not relieve the parties of liability for any obligation previously incurred. Any delinquent payment owed by the Non-Federal Sponsor pursuant to this Agreement shall be charged interest at a rate, to be determined by the Secretary of the Treasury, equal to 150 per centum of the average bond equivalent rate of the 13 week Treasury bills auctioned immediately prior to the date on which such payment became delinquent, or auctioned immediately prior to the beginning of each additional 3 month period if the period of delinquency exceeds 3 months.

ARTICLE V – HOLD AND SAVE

The Non-Federal Sponsor shall hold and save the Government free from all damages arising from the Design, except for damages due to the fault or negligence of the Government or its contractors.

ARTICLE VI - DISPUTE RESOLUTION

As a condition precedent to a party bringing any suit for breach of this Agreement, that party must first notify the other party in writing of the nature of the purported breach and seek in good faith to resolve the dispute through negotiation. If the parties cannot resolve the dispute through negotiation, they may agree to a mutually acceptable method of non-binding alternative dispute resolution with a qualified third party acceptable to the parties. Each party shall pay an equal share of any costs for the services provided by such a third party as such costs are incurred. The existence of a dispute shall not excuse the parties from performance pursuant to this Agreement.

ARTICLE VII - MAINTENANCE OF RECORDS AND AUDIT

A. The parties shall develop procedures for the maintenance by the Non-Federal Sponsor of books, records, documents, or other evidence pertaining to costs and expenses for a minimum of three years after the final accounting. The Non-Federal Sponsor shall assure that such materials are reasonably available for examination, audit, or reproduction by the Government.

B. The Government may conduct, or arrange for the conduct of, audits of the Design. Government audits shall be conducted in accordance with applicable Government cost principles and regulations. The Government's costs of audits for the Design shall not be included in total design costs.

C. To the extent permitted under applicable Federal laws and regulations, the Government shall allow the Non-Federal Sponsor to inspect books, records, documents,

or other evidence pertaining to costs and expenses maintained by the Government, or at the request of the Non-Federal Sponsor, provide to the Non-Federal Sponsor or independent auditors any such information necessary to enable an audit of the Non-Federal Sponsor's activities under this Agreement. The costs of non-Federal audits shall be paid solely by the Non-Federal Sponsor without reimbursement or credit by the Government.

ARTICLE VIII - RELATIONSHIP OF PARTIES

In the exercise of their respective rights and obligations under this Agreement, the Government and the Non-Federal Sponsor each act in an independent capacity, and neither is to be considered the officer, agent, or employee of the other. Neither party shall provide, without the consent of the other party, any contractor with a release that waives or purports to waive any rights a party may have to seek relief or redress against that contractor.

ARTICLE IX - NOTICES

A. Any notice, request, demand, or other communication required or permitted to be given under this Agreement shall be deemed to have been duly given if in writing and delivered personally or mailed by certified mail, with return receipt, as follows:

If to the Non-Federal Sponsor:

City of San Clemente (attn.: Deputy Public Works Director)
910 Calle Negocio, Suite 100
San Clemente, CA 92673

If to the Government:

USACE Los Angeles District
District Engineer
915 Wilshire Blvd.
Los Angeles, CA 90017

B. A party may change the recipient or address for such communications by giving written notice to the other party in the manner provided in this Article.

ARTICLE X - CONFIDENTIALITY

To the extent permitted by the laws governing each party, the parties agree to maintain the confidentiality of exchanged information when requested to do so by the providing party.

ARTICLE XI - THIRD PARTY RIGHTS, BENEFITS, OR LIABILITIES

Nothing in this Agreement is intended, nor may be construed, to create any rights, confer any benefits, or relieve any liability, of any kind whatsoever in any third person not party to this Agreement.

ARTICLE XII - OBLIGATIONS OF FUTURE APPROPRIATIONS

The Non-Federal Sponsor intends to fulfill fully its obligations under this Agreement. Nothing herein shall constitute, nor be deemed to constitute, an obligation of future appropriations by the City Council of the City of San Clemente, where creating such an obligation would be inconsistent with Article XVI, Section 18 of the Constitution of the State of California. If the Non-Federal Sponsor is unable to, or does not, fulfill its obligations under this Agreement, the Government may exercise any legal rights it has to protect the Government's interests.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, which shall become effective upon the date it is signed by the District Engineer.

DEPARTMENT OF THE ARMY

CITY OF SAN CLEMENTE

BY: _____
Kirk E. Gibbs
Colonel, U.S. Army
District Engineer

BY: _____
James Makshanoff
City Manager

CERTIFICATION REGARDING LOBBYING

The undersigned certifies, to the best of his or her knowledge and belief that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. 1352. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

James Makshanoff
City Manager
City of San Clemente

DATE: _____

**NON-FEDERAL SPONSOR'S
SELF-CERTIFICATION OF FINANCIAL CAPABILITY
FOR AGREEMENTS**

I, Mark Taylor, do hereby certify that I am the City Treasurer of the City of San Clemente (the "Non-Federal Sponsor"); that I am aware of the financial obligations of the Non-Federal Sponsor for the San Clemente Shoreline Nourishment Project; and that the Non-Federal Sponsor has the financial capability to satisfy the Non-Federal Sponsor's obligations under the San Clemente Shoreline design agreement for the San Clemente Shoreline Nourishment Project.

IN WITNESS WHEREOF, I have made and executed this certification this _____ day of _____, 2016.

Mark Taylor
City Treasurer
City of San Clemente

DATE: _____

CERTIFICATE OF AUTHORITY

I, Scott Smith, do hereby certify that I am the principal legal officer of the City of San Clemente, that the City of San Clemente is a legally constituted public body with full authority and legal capability to perform the terms of the Agreement between the Department of the Army and the City of San Clemente in connection with the San Clemente Shoreline Nourishment Project, Orange County, California, and to pay damages, if necessary, in the event of the failure to perform in accordance with the terms of this Agreement, as required by Section 221 of Public Law 91-611, as amended (42 U.S.C. Section 1962d-5b), and that the persons who have executed this Agreement on behalf of the City of San Clemente have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this
_____ day of _____ 2016.

Scott Smith
City Attorney
City of San Clemente