

CITY OF VISALIA
PROPERTY AND BUSINESS IMPROVEMENT DISTRICT
MANAGEMENT AGREEMENT

THIS PROPERTY AND BUSINESS IMPROVEMENT DISTRICT MANAGEMENT AGREEMENT is made and entered into this January 1, 2020 by and between the City of Visalia, a Municipal corporation, whose address of record is 707 W Acequia, Visalia, California 93291, (hereinafter referred to as "City") and the Downtown Visalia Property Owner's Association, Inc., a California Nonprofit Mutual Benefit Corporation, whose address of record is 120 South Church Street, Visalia, California 93291, (hereinafter referred to as, "DVPOA").

WHEREAS, upon petition by property owners in the City's downtown business district, the Downtown Visalia Property and Business Improvement District ("District") was renewed by the City Council of the City of Visalia on July 7, 2019, pursuant to the Property and Business Improvement District Law of 1994 (the "PBID Statute")¹; and,

WHEREAS, District special assessments levied by the City shall solely be used to fund the activities and improvements described in the Management District Plan for the District ("Plan"), attached hereto as Exhibit "B" and incorporated herein by reference; and,

WHEREAS, DVPOA, as a private, nonprofit mutual benefit corporation, represents that it possesses the labor and professional skills and expertise to administer and implement the activities and improvements of the District described in the Plan; and,

WHEREAS, The DVPOA, a nonprofit 501(c)(6) organization which has been formed for the purpose of administering and implementing the activities and improvements described in the Plan and funded through District assessments, is designated to serve as the Owner's Association in the District Plan, and thus, pursuant to the PBID Statute², the City is required to contract with DVPOA to provide the aforementioned services.

NOW, THEREFORE, the parties hereto, in consideration of the mutual covenants, promises, and agreements herein contained, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged and agreed, the parties hereto do hereby agree as follows:

1. INCORPORATION OF RECITALS. The RECITALS above are true and correct and constitute an enforceable provision of this Agreement.
2. SCOPE OF SERVICE. DVPOA shall furnish the following services:
 - A. Administer and implement, either directly or through sub-contracts as specified hereafter, all of the activities and improvements of the District as stated, listed, or otherwise described in the Plan. It is anticipated that the DVPOA will sub-contract with other parties, persons or entities to provide some or all of the services and improvements as may be specified in the Plan or in the annual operation budget. Any such sub-contract shall be between DVPOA and such third parties, DVPOA shall solely be responsible for all obligations arising thereunder, and the City of Visalia shall not be deemed an agent, principal or

¹ Streets and Highways code §36600 *et seq.* All further statutory references are to the Streets and Highways Code unless otherwise indicated.

² §36651.

joint venturer of DVPOA for the purpose of such sub-contracts. ;

- B. Prepare and provide to the City, for review by the City Council, an annual operations report for all matters covered under this Agreement on or prior to May 31, 2020, and thereafter no later than May 31st of each year. Such annual report shall include financial summaries to be provided in the format set forth in Exhibit A, and account for:
- i. all actual revenue, activities and expenditures during the fiscal year of the District (January 1 through December 31) prior to the year of the report;
 - ii. all to-date and projected revenue, activities and expenditures during the then current fiscal year; and
 - iii. a specific management plan, including operating budget, for the fiscal year following the year of the report. The specific management plan and budget for the following fiscal year shall specify the actual maintenance, activities and improvements proposed to be provided for in that year along with their estimated cost; and
 - iv. shall be filed with the clerk and shall refer to the property and business improvement district by name, specify the fiscal year to which the report applies and also include any additional information required under §36650(b) of the PBID Statute, such as:
 1. Any proposed changes to the boundaries, benefit zones, or classification of property within the district.
 2. The method and basis of levying assessments, including any proposed increases, in sufficient detail to allow property owners to estimate the amount of their individual assessments.
 3. The estimated amount of any surplus or deficit revenues to be carried from previous fiscal years.
 4. The estimated amount of any contributions to be made from sources other than district assessments.

The City Council shall review the report to ensure consistency with the Plan. In accordance with the provisions of PBID Statute, the City Council may approve the report as filed by the DVPOA or may modify any particular contained in the report and approve it as modified.

- C. Pursuant to Visalia City Council Resolution 2008-39 (approved July 14, 2008), the City of Visalia implemented a program providing for the waiver of certain parking in lieu fees for "change of use" projects within the boundaries of the District's predecessor district, in exchange for an initial annual payment from the predecessor district of \$25,000 (to be adjusted as provided for in said Resolution 2008-29). The DVPOA shall determine each year whether to maintain such program by including this annual payment in the budget submitted with the annual operations report. The annual parking in-lieu waiver payment for the 2019 PBID year was \$32,617, and this amount will continue to be adjusted annually per §17.30.035 B of the City Code, as provided for in Resolution 2008-39. The City retains the right to rescind Resolution 2008-29

at any time, but shall not do so except at the end of any year in which the annual payment has been made.

- D. DTVPOA expenditures on behalf of the DTVPBID shall comply with the assessment budget, as set forth in the Plan. The DTVPOA is authorized by the Plan, to approve re-allocation of up to 15% of the DTVPBID budget by line item within budget categories (Minor Amendments). Any such minor amendments will be submitted to Council for review, with the Annual Report. Budget re-allocations in excess of 15% by line item within categories, and any re-allocation between categories shall be approved in advance, in writing, by the City Manager.
3. TERM OF AGREEMENT. This Agreement shall be effective as of the date executed by all parties and approved as to form by the City Attorney and shall continue with all services provided for in this Agreement until December 31, 2029 (the termination of the PBID authorization), unless earlier or otherwise terminated as set forth in Section 14 of this Agreement.
 4. SCHEDULE FOR PERFORMANCE. DVPOA agrees that time is of the essence in the performance of all of the services under this Agreement and further agrees to produce all required reports and documents in the times stated in the PBID Statute and this Agreement. Deviations from time schedule may be made only with the prior written approval of the City Manager or his/her designee. In the event of any inconsistency between terms of this Agreement and any other document, including but not limited to the PBID Statute, the terms of this Agreement shall control.
 5. COLLECTION OF ASSESSMENT. City shall coordinate with Tulare County to arrange for the annual levy and collection of District assessments. City shall not collect, deduct or charge an administrative fee related to such collected assessments, other than as may be charged or deducted by the County of Tulare. Neither the City's general fund nor any other fund or monies of the City, other than the actual District assessment received by City, is liable for any payment under this Agreement. Obligations under this Agreement are not a debt of the City, nor are they a legal or equitable pledge, charge, lien, or encumbrance upon any of the City's property, income, receipts, or revenues.
 6. COMPENSATION. After deducting any amounts due City from DVPOA under separate agreements between the parties, and any fee collected or deducted by Tulare County, City shall forward DVPOA any remaining balance of the District assessment actually collected and received by Tulare County (less any fee charged or deducted by Tulare County). Because the District assessments are collected with the regular county property taxes, the parties anticipate that the assessments will be collected twice each year. Subject to the foregoing requirements, City shall make payment to DVPOA within 30 calendar days after receiving disbursement from the county (typically within 90 days after December 10 and April 10 of each year).
 7. BROWN ACT. DVPOA shall comply with the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Part I of Division 2 of Title 5 of the Government Code), at all times when matters within the subject matter of the District are heard, discussed, or deliberated, and with the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code), for all records relating to activities of the District.
 8. WORK PRODUCT. It is understood and agreed that all plans, studies, specifications, data magnetically or otherwise recorded on computer or computer diskettes, records,

files, reports, etc., in possession of DVPOA relating to the matters covered by this Agreement shall be the property of the City, and DVPOA hereby agrees to deliver the same to the City upon termination of the Agreement. It is understood and agreed that the documents and other materials including but not limited to those set forth hereinabove, prepared pursuant to this Agreement are prepared specifically for the City and are not necessarily suitable for any future or other use.

9. DVPOA'S BOOKS AND RECORDS. During the term of this Agreement, and for three years after the term expires or terminates or for any longer period required by law, DVPOA shall maintain detailed records pertaining to the District's administration, including but not limited to ledgers, books of account, invoices, vouchers, canceled checks, and other records or documents evidencing or concerning budgeting, charges, expenditures, subcontractors (e.g., bid records), insurance, permits, administrative expenses, and overhead. DVPOA shall make all such records available to City for inspection, audit, and/or copying at all reasonable times. If requested by City, DVPOA shall obtain and provide to the City, at DVPOA'S sole cost, an independent financial audit of DVPOAs' use of District funds for any or all years of the District's operation.
10. INDEPENDENT CONTRACTOR. It is expressly understood that DVPOA is an independent contractor and that its employees shall not be employees of or have any contractual relationship with the City. DVPOA shall be responsible for the payment of all taxes, workers' compensation insurance and unemployment insurance. Should DVPOA desire any insurance protection, DVPOA is to acquire same at its expense.

In the event DVPOA or any employee, agent, or subcontractor of DVPOA providing services under this Agreement is determined by a court of competent jurisdiction or the California Public Employees Retirement System (PERS) to be eligible for enrollment in PERS as an employee of the City, DVPOA shall indemnify, protect, defend, and hold harmless the City for the payment of any employee and/or employer contributions for PERS benefits on behalf of DVPOA or its employees, agents, or subcontractors, as well as for the payment of any penalties and interest on such contributions, which would otherwise be the responsibility of City.

11. INDEMNIFICATION AND INSURANCE. DVPOA shall indemnify, protect, defend, save and hold City, its officers, employees, agents, and volunteers harmless from any and all claims or causes of action for death or injury to persons, or damage to property resulting from intentional or negligent acts, errors, or omissions of DVPOA or its officers, employees, agents, volunteers, contractors, and subcontractors during performance of this Agreement, or from any violation of any federal, state, or municipal law or ordinance, to the extent caused, in whole or in part, by the willful misconduct, negligent acts, or omissions of DVPOA or its officers, employees, agents, volunteers, contractors, or subcontractors, or by the quality or character of DVPOA's work or activities, or resulting from the negligence of the City, its officers, employees, agents, and volunteers, except for loss caused solely by the gross negligence of the City. It is understood that the duty of DVPOA to indemnify and hold harmless includes the duty to defend as set forth in Section 2778 of the California Civil Code. Acceptance by City of insurance certificates and endorsements required under this Agreement does not relieve DVPOA from liability under this indemnification and hold harmless clause. This indemnification and hold harmless clause shall apply to any damages or claims for damages whether or not such insurance policies shall have been determined to apply and shall survive the termination of this Agreement. By execution of this Agreement, DVPOA acknowledges and agrees to the provisions of this Section and that it is a material element of consideration.

City shall indemnify, protect, defend, save and hold DVPOA, its officers, employees, agents, and volunteers harmless from any and all claims or causes of action for death or injury to persons, or damage to property resulting from intentional or negligent acts, errors, or omissions of City, or its officers, employees, agents, volunteers, contractors, and subcontractors, other than during performance of this Agreement. It is understood that the duty of City to indemnify and hold harmless includes the duty to defend as set forth in Section 2778 of the California Civil Code.

Without limiting City's right to indemnification, it is agreed that DVPOA shall secure prior to commencing any activities under this Agreement, and maintain during the term of this Agreement, insurance coverage as follows:

- A. Workers' compensation insurance as required by California statutes.
- B. Commercial general liability insurance with a combined single limit of not less than One Million Dollars (\$1,000,000) per occurrence. Such insurance shall include coverage for Premises and Operations, Contractual Liability, Personal Injury Liability, Products and Completed Operations Liability, Broad Form Property Damage (if applicable), Independent Contractor's Liability (if applicable).
- C. Professional liability insurance coverage, in an amount not less than One Million Dollars (\$1,000,000).
- D. Comprehensive Automobile Liability coverage with a combined single limit of not less than One Million Dollars (\$1,000,000) per occurrence. Such insurance shall include coverage for owned, hired, and non-owned automobiles and shall be provided by a business automobile policy.

City's Risk Manager is hereby authorized to reduce the requirements set forth above in the event he/she determines that such reduction is in the City's best interest.

DVPOA agrees to provide thirty (30) days written notice of any policy cancellation, limitation in scope or coverage, or non-renewal. Such notice shall be provided to the City of Visalia Finance department located at 707 W Acequia, California 93291.

- 12. ASSIGNABILITY OF AGREEMENT. It is understood and agreed that this Agreement contemplates personal performance by DVPOA and is based upon a determination of its unique personal competence and experience and upon its specialized personal knowledge. Assignments of any or all rights, duties or obligations of DVPOA under this Agreement will be permitted only with the express written consent of the City, which may be withheld at the City's sole and complete discretion.
- 13. CONFLICT OF INTEREST. DVPOA certifies that it has disclosed to City any actual, apparent, or potential conflicts of interest that may exist relative to the services to be provided pursuant to this Agreement. DVPOA agrees to advise City of any actual, apparent or potential conflicts of interest that may develop subsequent to the date of execution of this Agreement. DVPOA further agrees to complete any statements of economic interest required by either City ordinance or State law.

14. INTEREST OF OFFICIALS AND THE DVPOA. No officer, member, or employee of the City who exercises any functions or responsibilities in the review or approval of this Agreement shall:

- A. Participate in any decision relating to this Agreement which effects his personal interest or the interest of any corporation, partnership, or association in which he has, directly or indirectly, any interest; or
- B. Have any interest, direct or indirect, in this Agreement or the proceeds thereof during his tenure or for one year thereafter.

DVPOA hereby covenants that it has, at the time of the execution of this Agreement, no interest, and that he shall not acquire any interest in the future, direct or indirect, which would conflict in any manner or degree with the performance of services required to be performed pursuant to this Agreement. DVPOA further covenants that no person having any such interest shall be employed in the performance of this work.

15. TERMINATION. City has and reserves the right to suspend, terminate or abandon the execution of any work by DVPOA upon adoption of a resolution disestablishing the District pursuant to the PBID Statute. Per the PBID Statute, such a resolution may only be adopted if (1) the City Council finds there has been misappropriation of funds, malfeasance, or a violation of law in connection with the management of the District and a noticed hearing on disestablishment is held, or (2) in the thirty (30) days period following the anniversary of the PBID's renewal, property owners paying fifty percent (50%) or more of the assessment file a written protest with the City and a hearing on disestablishment is held. In the event of such termination, City shall pay DVPOA for all services actually rendered up to and including the date of termination, and DVPOA shall promptly remit, refund, or otherwise transfer all remaining District assessment held by DVPOA to City within seven (7) calendars of the date of termination. DVPOA shall further deliver to City copies of all reports, analyses, and other work product, whether completed or not, that were prepared or were being prepared under the provisions of this Agreement within fourteen (14) calendar days of termination.

16. CONFORMANCE TO APPLICABLE LAWS. DVPOA shall comply with all applicable Federal, State, and municipal laws, rules and ordinances. No discrimination shall be made by DVPOA in the employment of persons to work under this contract because of race, color, national origin, ancestry, disability, sex or religion of such person.

17. WAIVER. In the event that either City or DVPOA shall at any time or times waive any breach of this Agreement by the other, such waiver shall not constitute a waiver of any other or succeeding breach of this Agreement, whether of the same or any other covenant, condition or obligation. Waiver shall not be deemed effective until and unless signed by the waiving party.

18. SEVERABILITY. If any portion of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the provisions of this Agreement shall remain in full force and effect and shall in no way be affected, impaired, or invalidated.

19. VENUE. This Agreement and all matters relating to it shall be governed by the laws of the State of California and any action brought relating to this Agreement shall be held exclusively in a state court in the County of Tulare.

20. ATTORNEY'S FEES. In any litigation, arbitration or any other proceeding where the City seeks to enforce any provision of this Agreement, or seeks a declaration of the rights and obligations of the parties, the prevailing party shall be awarded reasonable attorneys' fees, together with any costs and expenses incurred to resolve the dispute and to enforce any provision of this Agreement.
21. AMENDMENT. This Agreement shall not be amended, modified, or otherwise changed unless in writing and signed by both parties hereto.
22. SUCCESSORS AND ASSIGNS. This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the respective parties hereto.
23. INTEGRATION. This Agreement constitutes the entire understanding and agreement of the parties and supersedes all previous and/or contemporaneous understanding or agreement between the parties with respect to all or any part of the subject matter hereof.
24. AUTHORITY TO EXECUTE. The person or persons executing this Agreement on behalf of the parties hereto warrants and represents that he/she/they has/have the authority to execute this Agreement on behalf of their entity and has/have the authority to bind their party to the performance of its obligations hereunder.
25. COUNTERPARTS. This Agreement may be executed in one or more counterparts with each counterpart being deemed an original. No counterpart shall be deemed to be an original or presumed delivered unless and until the counterparts executed by the other parties hereto are in the physical possession of the party or parties seeking enforcement thereof.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed on the date first above written.

Downtown Visalia Property Owner's
Association, Inc.,
A California Nonprofit Mutual
Benefit Corporation

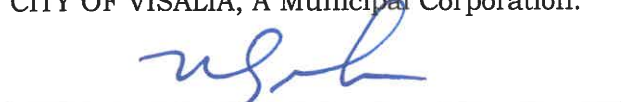
12/10/2019
Date


Mike Fistolera, President

27-3687294
Tax I.D. Number


Clare Whitlatch, Secretary

CITY OF VISALIA, A Municipal Corporation:



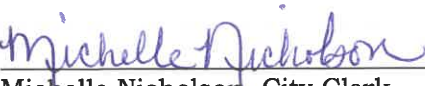
12-17-2019

Date

Randy Groom, City Manager

ATTEST:

ORIGINAL APPROVED AS TO FORM:



Michelle Nicholson, City Clerk
Chief Deputy



City Attorney

EXHIBIT A
Financial Report Template

**Downtown Visalia Property Owner's Association, Inc
Annual Operations Report and Proposed 2020 Budget**

	Prior Year Actual - 2018	Current Year Budget 2019	Current Year Projection 2019	Current Year Variance 2019	Next Year Proposed 2020
Resources:					
Beginning Cash Balances:					
POA Cash in Bank				-	
Due from City of Visalia				-	
Less Balance of Contingency/Reserve					
Sub Total Beginning Cash	-	-	-	-	-
Receipts:					
POA Assessments				-	
Contracts for Services				-	
Interest Earnings				-	
Sub Total Receipts	-	-	-	-	-
Total Resources Available	-	-	-	-	-
Disbursements:					
Environmental Enhancements					
Landscaping, Streetscape, Graffiti Removal & Maintenance				-	
Street Light Maintenance				-	
Public Safety				-	
Sub Total Environmental Enhancements	-	-	-	-	-
Economic Enhancements					
Infra Structure Improvements				-	
In-Lieu Parking				-	
Subtotal Economic Enhancements	-	-	-	-	-
Administration					
Administration				-	
Insurance				-	
Miscellaneous				-	
POA Renewal				-	
Subtotal Administration	-	-	-	-	-
Total Disbursements	-	-	-	-	-
Ending Resources Available	-	-	-	-	-

EXHIBIT B
MANAGEMENT DISTRICT PLAN