

# *City of Brisbane*

## *Agenda Report*

**TO:** Honorable Mayor and City Council  
**FROM:** Hal Toppel, City Attorney  
**SUBJECT:** Fourth Addendum to UPC Agreement to Pay Processing Costs  
**DATE:** For Council Meeting on September 19, 2011

**RECOMMENDATION:**

Approve Fourth Addendum to Agreement to Pay Processing Costs and authorize the City Manager to execute the Addendum on behalf of the City.

**BACKGROUND AND DISCUSSION:**

In 2004, the City entered into an agreement with UPC providing for the on-going payment by UPC of processing costs related to the Baylands project. The agreement was later amended to require quarterly payments for a portion of the personnel costs of the City's "principal planner" working on the project – who at that time was John Swiecki. With the appointment of John to the position of Director of Community Development, this language became obsolete. Moreover, the requirement to send monthly bills to UPC for other staff time expenses was found to be time consuming and a burdensome.

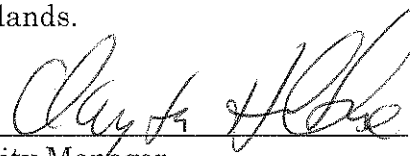
The proposed Addendum is intended to simplify the entire process of cost reimbursement by having UPC pay a fixed quarterly payment for all staff time devoted to the Baylands project. The Finance Department estimated the total personnel cost, which amounts to a quarterly payment of \$43,748. This amount will be subject to adjustment in the future, based upon any increase in the Consumer Price Index.

The agreement only applies to City staff time and UPC will continue to be responsible for payment of other processing costs, such as the cost of outside consultants retained by the City to perform professional services and investigations.

**FISCAL IMPACT/FINANCING ISSUES:**

The Addendum should enable better cost recovery for City staff time devoted toward processing UPC's applications for development of the Baylands.

  
City Attorney

  
City Manager

**FOURTH ADDENDUM  
TO  
AGREEMENT TO PAY  
PROCESSING COSTS**

**THIS FOURTH ADDENDUM**, effective as of August 1, 2011, between THE CITY OF BRISBANE, a municipal corporation ("City") and UNIVERSAL PARAGON CORPORATION, a California corporation ("UPC"), is made with reference to the following facts:

A. City and UPC are parties to a certain Agreement To Pay Processing Costs, dated October 20, 2004 ("the Processing Cost Agreement") in the form attached hereto as Exhibit 1, wherein UPC has agreed to advance funds for payment of various fees and costs related to the processing by City of UPC's applications for development of its property, commonly known as the Baylands. The Processing Cost Agreement was amended by a First Addendum thereto effective as of July 1, 2006, Second Addendum thereto dated February 4, 2006, and a Third Addendum thereto effective as of January 1, 2009.

B. City and UPC desire to modify the Processing Cost Agreement, as hereinafter set forth,

**NOW, THEREFORE, the parties agree as follows:**

1. This Addendum shall modify the Processing Cost Agreement, the terms and provisions of which, as previously modified by the First, Second and Third Addenda thereto, are incorporated herein by reference. Any capitalized terms used in this Addendum shall have the same meanings as defined in the Processing Cost Agreement.

2. Section 2 of the Processing Cost Agreement is modified to read as follows:

2. **Payment of Processing Fees and Costs.** At the time of filing each application for a Land Use Entitlement, UPC shall pay the initial application fee as may be specified in City's adopted fee schedule, together with any costs that are normally collected by the City at that time in connection with the application. In addition, UPC shall also pay: (i) the cost of all professional consultants reasonably retained by City to prepare the Environmental and Economic Reviews and assist in processing and evaluating the applications for Land Use Entitlements, including,

but not limited to, civil engineers, engineering geologists, planners, traffic engineers, environmental consultants, economic consultants, landscape and horticulture experts, and plan checkers, plus a ten percent (10%) contract administration charge payable to City, such contract administration charge not to exceed an aggregate total of Fifty Thousand Dollars (\$50,000) during any calendar year unless otherwise approved by UPC; (ii) the cost of all legal services reasonably rendered by the City Attorney pertaining to the Environmental Reviews and Land Use Entitlements, (iii) other out-of-pocket expenses reasonably and necessarily incurred by City in connection with the processing of the Environmental and Economic Reviews and Land Use Entitlements, including, but not limited to, the cost of publication and mailing of notices of public hearings and the cost of reproduction of surveys, plans, drawings and documents. All of the fees, costs, and expenses referred to in this Section shall be disbursed by City as needed from the Reserve Account. In addition to the foregoing, UPC shall also make quarterly payments for City staff time in accordance with the provisions of Section 4 of this Agreement.

3. Section 3 of the Processing Cost Agreement is modified to read as follows:

3. **Reports to UPC and Reinstatement of Reserve Account.** For purposes of agreement, the following definitions shall apply:

**“Regular Processing Costs”** means the cost of services provided by the City staff directly related to the processing of UPC’s application, including, but not limited to, administrative management, planning, public works, and building, for which UPC is making quarterly payments pursuant to Section 4 of this Agreement;

**“Extraordinary Processing Costs”** means all expenses over and above Regular Processing Costs, including but not limited to, professional consultants, surveys, and investigations.

City shall provide a monthly report to UPC showing the amount and purpose of each expenditure from the Reserve Account for Extraordinary Processing Costs. Such report shall include a description of the services rendered and the amount charged for such services. If, at any time, a disbursement from the Reserve Account will result in the balance in such account being reduced below the sum of Ten Thousand Dollars (\$10,000.00), City shall give written notice of such fact to UPC and UPC shall, within fifteen (15) days after receipt of such notice, deposit with City such additional amount as may be necessary to restore the balance of the Reserve Account to Fifty Thousand Dollars (\$50,000.00). In the event of any failure or refusal by UPC to deposit such additional amounts, the City Director of Community Development shall first pursue the “meet and confer” procedures set forth in paragraph 5 below. Only upon the failure of City and UPC to amicably resolve such payment dispute pursuant to a meet and confer session, shall City be entitled to suspend processing of UPC’s application.

City shall not incur any Extraordinary Processing Costs without the prior written consent of UPC, which shall not be unreasonably withheld or delayed. UPC's approval of a consulting contract or contract for professional service having a

"not to exceed" limit on compensation payable to the consultant or contractor shall constitute an approval of all payments made to that consultant or contractor up to the maximum amount. In the event UPC fails or refuses to approve any Extraordinary Processing Cost and City takes the stance that unless such expenditure is approved and paid by UPC further processing of the application will be suspended, then City and UPC shall meet and confer pursuant to paragraph 5 below prior to any such suspension.

4. Section 4 of the Processing Cost Agreement is modified to read as follows:

4. **Quarterly Payment for City Staff Time.** The parties acknowledge that City staff time is continuously being devoted toward processing UPC's applications for development entitlements and it would be exceedingly difficult, cumbersome, and time-consuming for City to furnish monthly billings to UPC for actual time spent by the numerous members of the City staff who are working on the Project. Consequently, it is agreed that UPC shall make a quarterly payment to City, due on January 10<sup>th</sup>, April 10<sup>th</sup>, July 10<sup>th</sup> and October 10<sup>th</sup> of each year, in the initial amount of Forty-Three Thousand Seven Hundred Forty-Eight Dollars \$43,748.00, to cover City's personnel costs. The parties agree that such amount represents a reasonable estimate of the actual costs incurred by City for staff time related to processing UPC's applications for development approvals.

The quarterly payment hereunder shall be subject to annual adjustment, to be made as of July 1<sup>st</sup> of each year (the "Adjustment Date"), in an amount equal to the percentage increase, if any, in the Consumer Price Index published by the United States Department of Labor, Bureau of Labor Statistics, for Urban Wage Earners and Clerical Workers, All Items, for the San Francisco-Oakland Statistical Area ("CPI"), published for the month nearest the Adjustment Date, when compared with the CPI published for the month nearest the Adjustment Date for the immediately preceding year.

If any quarterly payment is not made within sixty (60) days after the date on which it becomes due, such payment shall bear interest at an annual rate equal to the greater of either: (a) the rate of interest paid on funds invested in the Local Agency Investment Fund for the calendar quarter ending nearest to the calendar quarter in which the payment became due; or (b) three percent (3%) per annum.

5. Except as modified by the First, Second and Third Addenda and as further modified by this Fourth Addendum, the Processing Cost Agreement is declared to remain in full force and effect.

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IN WITNESS WHEREOF, the parties have executed this Fourth Addendum on the day and year first above written.

**CITY OF BRISBANE,**  
a municipal corporation

By: \_\_\_\_\_  
City Manager

APPROVED AS TO FORM

  
\_\_\_\_\_  
City Attorney

**UNIVERSAL PARAGON CORPORATION**  
a California corporation

By: \_\_\_\_\_