

**CITY OF COSTA MESA
PROFESSIONAL SERVICES AGREEMENT
WITH
FAIRBANK, MASLIN, MAULLIN, METZ & ASSOCIATES, INC. DBA FM3 RESEARCH**

THIS PROFESSIONAL SERVICES AGREEMENT ("Agreement") is made and entered into as of March 11, 2022 ("Effective Date"), by and between the CITY OF COSTA MESA, a municipal corporation ("City"), and FAIRBANK, MASLIN, MAULLIN, METZ & ASSOCIATES, INC., a California corporation DBA FM3 RESEARCH ("Consultant").

RECITALS

A. City proposes to utilize the services of Consultant as an independent contractor to provide voter opinion research services, as more fully described herein; and

B. Consultant represents that it has that degree of specialized expertise contemplated within California Government Code section 37103, and holds all necessary licenses to practice and perform the services herein contemplated; and

C. City and Consultant desire to contract for the specific services described in Exhibit "A" and desire to set forth their rights, duties and liabilities in connection with the services to be performed; and

D. No official or employee of City has a financial interest, within the provisions of sections 1090-1092 of the California Government Code, in the subject matter of this Agreement; and

E. City and Consultant intend and desire that this Agreement be effective retroactive to the Effective Date.

NOW, THEREFORE, for and in consideration of the mutual covenants and conditions contained herein, the parties hereby agree as follows:

1.0. SERVICES PROVIDED BY CONSULTANT

1.1. Scope of Services. Consultant shall provide the professional services described in Consultant's Proposal, attached hereto as Exhibit "A" and incorporated herein. Consultant shall perform 500, 20-minute surveys, in accordance with Exhibit A.

1.2. Professional Practices. All professional services to be provided by Consultant pursuant to this Agreement shall be provided by personnel experienced in their respective fields and in a manner consistent with the standards of care, diligence and skill ordinarily exercised by professional consultants in similar fields and circumstances in accordance with sound professional practices. Consultant also warrants that it is familiar with all laws that may affect its performance of this Agreement and shall advise City of any changes in any laws that may affect Consultant's performance of this Agreement.

1.3. Performance to Satisfaction of City. Consultant agrees to perform all the work to the complete satisfaction of the City. Evaluations of the work will be done by the City Manager or

his or her designee. If the quality of work is not satisfactory, City in its discretion has the right to:

- (a) Meet with Consultant to review the quality of the work and resolve the matters of concern;
- (b) Require Consultant to repeat the work at no additional fee until it is satisfactory; and/or
- (c) Terminate the Agreement as hereinafter set forth.

1.4. Warranty. Consultant warrants that it shall perform the services required by this Agreement in compliance with all applicable Federal and California employment laws, including, but not limited to, those laws related to minimum hours and wages; occupational health and safety; fair employment and employment practices; workers' compensation insurance and safety in employment; and all other Federal, State and local laws and ordinances applicable to the services required under this Agreement. Consultant shall indemnify and hold harmless City from and against all claims, demands, payments, suits, actions, proceedings, and judgments of every nature and description including attorneys' fees and costs, presented, brought, or recovered against City for, or on account of any liability under any of the above-mentioned laws, which may be incurred by reason of Consultant's performance under this Agreement.

1.5. Non-Discrimination. In performing this Agreement, Consultant shall not engage in, nor permit its agents to engage in, discrimination in employment of persons because of their race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military or veteran status, except as permitted pursuant to section 12940 of the Government Code.

1.6. Non-Exclusive Agreement. Consultant acknowledges that City may enter into agreements with other consultants for services similar to the services that are subject to this Agreement or may have its own employees perform services similar to those services contemplated by this Agreement.

1.7. Delegation and Assignment. This is a personal service contract, and the duties set forth herein shall not be delegated or assigned to any person or entity without the prior written consent of City. Consultant may engage a subcontractor(s) as permitted by law and may employ other personnel to perform services contemplated by this Agreement at Consultant's sole cost and expense.

1.8. Confidentiality. Employees of Consultant in the course of their duties may have access to financial, accounting, statistical, and personnel data of private individuals and employees of City. Consultant covenants that all data, documents, discussion, or other information developed or received by Consultant or provided for performance of this Agreement are deemed confidential and shall not be disclosed by Consultant without written authorization by City. City shall grant such authorization if disclosure is required by law. All City data shall be returned to City upon the termination of this Agreement. Consultant's covenant under this Section shall survive the termination of this Agreement.

2.0. COMPENSATION AND BILLING

2.1. Compensation. Consultant shall be paid in accordance with the fee schedule set forth in Exhibit A. Consultant's total compensation shall not exceed Thirty-Three Thousand Five Hundred Dollars (\$33,500.00).

2.2. Additional Services. Consultant shall not receive compensation for any services provided outside the scope of services specified in the Consultant's Proposal unless the City Manager or designee, prior to Consultant performing the additional services, approves such additional services in writing. It is specifically understood that oral requests and/or approvals of such additional services or additional compensation shall be barred and are unenforceable.

2.3. Method of Billing. Consultant may submit invoices to the City for approval on a progress basis, but no more often than two times a month. Said invoice shall be based on the total of all Consultant's services which have been completed to City's sole satisfaction. City shall pay Consultant's invoice within forty-five (45) days from the date City receives said invoice. Each invoice shall describe in detail, the services performed, the date of performance, and the associated time for completion. Any additional services approved and performed pursuant to this Agreement shall be designated as "Additional Services" and shall identify the number of the authorized change order, where applicable, on all invoices.

2.4. Records and Audits. Records of Consultant's services relating to this Agreement shall be maintained in accordance with generally recognized accounting principles and shall be made available to City or its Project Manager for inspection and/or audit at mutually convenient times from the Effective Date until three (3) years after termination of this Agreement.

3.0. TIME OF PERFORMANCE

3.1. Commencement and Completion of Work. Unless otherwise agreed to in writing by the parties, the professional services to be performed pursuant to this Agreement shall commence within five (5) days from the Effective Date of this Agreement. Said services shall be performed in strict compliance with the project schedule agreed upon by City and Consultant. Failure to commence work in a timely manner and/or diligently pursue work to completion may be grounds for termination of this Agreement.

3.2. Excusable Delays. Neither party shall be responsible for delays or lack of performance resulting from acts beyond the reasonable control of the party or parties. Such acts shall include, but not be limited to, acts of God, fire, strikes, pandemics, material shortages, compliance with laws or regulations, riots, acts of war, or any other conditions beyond the reasonable control of a party (each, a "Force Majeure Event"). If a party experiences a Force Majeure Event, the party shall, within five (5) days of the occurrence of the Force Majeure Event, give written notice to the other party stating the nature of the Force Majeure Event, its anticipated duration and any action being taken to avoid or minimize its effect. Any suspension of performance shall be of no greater scope and of no longer duration than is reasonably required and the party experiencing the Force Majeure Event shall use best efforts without being obligated to incur any material expenditure to remedy its inability to perform; provided, however, if the suspension of performance continues for sixty (60) days after the date of the occurrence and such failure to perform would constitute a material breach of this Agreement in the absence of such Force Majeure Event, the parties shall meet and discuss in good faith any amendments to this Agreement to permit the other party to exercise its rights under this Agreement. If the parties are

not able to agree on such amendments within thirty (30) days and if suspension of performance continues, such other party may terminate this Agreement immediately by written notice to the party experiencing the Force Majeure Event, in which case neither party shall have any liability to the other except for those rights and liabilities that accrued prior to the date of termination.

4.0. TERM AND TERMINATION

4.1. Term. This Agreement shall be effective retroactive to the Effective Date and continue through December 31, 2022, unless previously terminated as provided herein or as otherwise agreed to in writing by the parties.

4.2. Notice of Termination. The City reserves and has the right and privilege of canceling, suspending or abandoning the execution of all or any part of the work contemplated by this Agreement, with or without cause, at any time, by providing written notice to Consultant. The termination of this Agreement shall be deemed effective upon receipt of the notice of termination. In the event of such termination, Consultant shall immediately stop rendering services under this Agreement unless directed otherwise by the City.

4.3. Compensation. In the event of termination, City shall pay Consultant for reasonable costs incurred and professional services satisfactorily performed up to and including the date of City's written notice of termination. Compensation for work in progress shall be prorated based on the percentage of work completed as of the effective date of termination in accordance with the fees set forth herein. In ascertaining the professional services actually rendered hereunder up to the effective date of termination of this Agreement, consideration shall be given to both completed work and work in progress, to complete and incomplete drawings, and to other documents pertaining to the services contemplated herein whether delivered to the City or in the possession of the Consultant.

4.4. Documents. In the event of termination of this Agreement, all documents prepared by Consultant in its performance of this Agreement including, but not limited to, finished or unfinished design, development and construction documents, data studies, drawings, maps and reports, shall be delivered to the City within ten (10) days of delivery of termination notice to Consultant, at no cost to City. Any use of uncompleted documents without specific written authorization from Consultant shall be at City's sole risk and without liability or legal expense to Consultant.

5.0. INSURANCE

5.1. Minimum Scope and Limits of Insurance. Consultant shall obtain, maintain, and keep in full force and effect during the life of this Agreement all of the following minimum scope of insurance coverages with an insurance company admitted to do business in California, rated "A," Class X, or better in the most recent Best's Key Insurance Rating Guide, and approved by City:

- (a) Commercial general liability, including premises-operations, products/completed operations, broad form property damage, blanket contractual liability, independent contractors, personal injury or bodily injury with a policy limit of not less than One Million Dollars (\$1,000,000.00), combined single limits, per occurrence. If such insurance contains a general aggregate limit, it shall apply separately to this Agreement or shall

be twice the required occurrence limit.

- (b) Business automobile liability for owned vehicles, hired, and non-owned vehicles, with a policy limit of not less than One Million Dollars (\$1,000,000.00), combined single limits, per occurrence for bodily injury and property damage.
- (c) Workers' compensation insurance as required by the State of California. Consultant agrees to waive, and to obtain endorsements from its workers' compensation insurer waiving subrogation rights under its workers' compensation insurance policy against the City, its officers, agents, employees, and volunteers arising from work performed by Consultant for the City and to require each of its subcontractors, if any, to do likewise under their workers' compensation insurance policies.
- (d) Professional errors and omissions ("E&O") liability insurance with policy limits of not less than One Million Dollars (\$1,000,000.00), combined single limits, per occurrence and aggregate. Architects' and engineers' coverage shall be endorsed to include contractual liability. If the policy is written as a "claims made" policy, the retro date shall be prior to the start of the contract work. Consultant shall obtain and maintain, said E&O liability insurance during the life of this Agreement and for three years after completion of the work hereunder.

5.2. Endorsements. The commercial general liability insurance policy and business automobile liability policy shall contain or be endorsed to contain the following provisions:

- (a) Additional insureds: "The City of Costa Mesa and its elected and appointed boards, officers, officials, agents, employees, and volunteers are additional insureds with respect to: liability arising out of activities performed by or on behalf of the Consultant pursuant to its contract with the City; products and completed operations of the Consultant; premises owned, occupied or used by the Consultant; automobiles owned, leased, hired, or borrowed by the Consultant."
- (b) Notice: "Said policy shall not terminate, be suspended, or voided, nor shall it be cancelled, nor the coverage or limits reduced, until thirty (30) days after written notice is given to City."
- (c) Other insurance: "The Consultant's insurance coverage shall be primary insurance as respects the City of Costa Mesa, its officers, officials, agents, employees, and volunteers. Any other insurance maintained by the City of Costa Mesa shall be excess and not contributing with the insurance provided by this policy."
- (d) Any failure to comply with the reporting provisions of the policies shall not affect coverage provided to the City of Costa Mesa, its officers, officials, agents, employees, and volunteers.
- (e) The Consultant's insurance shall apply separately to each insured against

whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

5.3. Deductible or Self Insured Retention. If any of such policies provide for a deductible or self-insured retention to provide such coverage, the amount of such deductible or self-insured retention shall be approved in advance by City. No policy of insurance issued as to which the City is an additional insured shall contain a provision which requires that no insured except the named insured can satisfy any such deductible or self-insured retention.

5.4. Certificates of Insurance. Consultant shall provide to City certificates of insurance showing the insurance coverages and required endorsements described above, in a form and content approved by City, prior to performing any services under this Agreement.

5.5. Non-Limiting. Nothing in this Section shall be construed as limiting in any way, the indemnification provision contained in this Agreement, or the extent to which Consultant may be held responsible for payments of damages to persons or property.

6.0. GENERAL PROVISIONS

6.1. Entire Agreement. This Agreement constitutes the entire agreement between the parties with respect to any matter referenced herein and supersedes any and all other prior writings and oral negotiations. This Agreement may be modified only in writing, and signed by the parties in interest at the time of such modification. The terms of this Agreement shall prevail over any inconsistent provision in any other contract document appurtenant hereto, including exhibits to this Agreement.

6.2. Representatives. The City Manager or his or her designee shall be the representative of City for purposes of this Agreement and may issue all consents, approvals, directives and agreements on behalf of the City, called for by this Agreement, except as otherwise expressly provided in this Agreement.

Consultant shall designate a representative for purposes of this Agreement who shall be authorized to issue all consents, approvals, directives and agreements on behalf of Consultant called for by this Agreement, except as otherwise expressly provided in this Agreement.

6.3. Project Managers. City shall designate a Project Manager to work directly with Consultant in the performance of this Agreement.

Consultant shall designate a Project Manager who shall represent it and be its agent in all consultations with City during the term of this Agreement. Consultant or its Project Manager shall attend and assist in all coordination meetings called by City.

6.4. Notices. Any notices, documents, correspondence or other communications concerning this Agreement or the work hereunder may be provided by personal delivery or mail and shall be addressed as set forth below. Such communication shall be deemed served or delivered: (a) at the time of delivery if such communication is sent by personal delivery, and (b) 48 hours after deposit in the U.S. Mail as reflected by the official U.S. postmark if such communication is sent through regular United States mail.

IF TO CONSULTANT:

FM3 Research
12100 Wilshire Blvd., Suite 350
Los Angeles, CA 90025
Tel: (310) 828-1183
Attn: Richard Bernard

IF TO CITY:

City of Costa Mesa
77 Fair Drive
Costa Mesa, CA 92626
Tel: (714) 754-5617
Attn: Jennifer Le

Courtesy copy to:

City of Costa Mesa
77 Fair Drive
Costa Mesa, CA 92626
Attn: Finance Dept. | Purchasing

6.5. Drug-Free Workplace Policy. Consultant shall provide a drug-free workplace by complying with all provisions set forth in City's Council Policy 100-5, attached hereto as Exhibit "B" and incorporated herein. Consultant's failure to conform to the requirements set forth in Council Policy 100-5 shall constitute a material breach of this Agreement and shall be cause for immediate termination of this Agreement by City.

6.6. Attorneys' Fees. In the event that litigation is brought by any party in connection with this Agreement, the prevailing party shall be entitled to recover from the opposing party all costs and expenses, including reasonable attorneys' fees, incurred by the prevailing party in the exercise of any of its rights or remedies hereunder or the enforcement of any of the terms, conditions, or provisions hereof.

6.7. Governing Law. This Agreement shall be governed by and construed under the laws of the State of California without giving effect to that body of laws pertaining to conflict of laws. In the event of any legal action to enforce or interpret this Agreement, the parties hereto agree that the sole and exclusive venue shall be a court of competent jurisdiction located in Orange County, California.

6.8. Assignment. Consultant shall not voluntarily or by operation of law assign, transfer, sublet or encumber all or any part of Consultant's interest in this Agreement without City's prior written consent. Any attempted assignment, transfer, subletting or encumbrance shall be void and shall constitute a breach of this Agreement and cause for termination of this Agreement. Regardless of City's consent, no subletting or assignment shall release Consultant of Consultant's obligation to perform all other obligations to be performed by Consultant hereunder for the term of this Agreement.

6.9. Indemnification and Hold Harmless. Consultant agrees to defend, indemnify, hold free and harmless the City, its elected officials, officers, agents and employees, at Consultant's sole expense, from and against any and all claims, actions, suits or other legal proceedings brought against the City, its elected officials, officers, agents and employees arising out of the performance of the Consultant, its employees, and/or authorized subcontractors, of the work undertaken pursuant to this Agreement. The defense obligation provided for hereunder shall apply without any advance showing of negligence or wrongdoing by the Consultant, its employees, and/or authorized subcontractors, but shall be required whenever any claim, action,

complaint, or suit asserts as its basis the negligence, errors, omissions or misconduct of the Consultant, its employees, and/or authorized subcontractors, and/or whenever any claim, action, complaint or suit asserts liability against the City, its elected officials, officers, agents and employees based upon the work performed by the Consultant, its employees, and/or authorized subcontractors under this Agreement, whether or not the Consultant, its employees, and/or authorized subcontractors are specifically named or otherwise asserted to be liable. Notwithstanding the foregoing, the Consultant shall not be liable for the defense or indemnification of the City for claims, actions, complaints or suits arising out of the sole active negligence or willful misconduct of the City. This provision shall supersede and replace all other indemnity provisions contained either in the City's specifications or Consultant's Proposal, which shall be of no force and effect.

6.10. Independent Contractor. Consultant is and shall be acting at all times as an independent contractor and not as an employee of City. Consultant shall have no power to incur any debt, obligation, or liability on behalf of City or otherwise act on behalf of City as an agent. Neither City nor any of its agents shall have control over the conduct of Consultant or any of Consultant's employees, except as set forth in this Agreement. Consultant shall not, at any time, or in any manner, represent that it or any of its agents or employees are in any manner agents or employees of City. Consultant shall secure, at its sole expense, and be responsible for any and all payment of Income Tax, Social Security, State Disability Insurance Compensation, Unemployment Compensation, and other payroll deductions for Consultant and its officers, agents, and employees, and all business licenses, if any are required, in connection with the services to be performed hereunder. Consultant shall indemnify and hold City harmless from any and all taxes, assessments, penalties, and interest asserted against City by reason of the independent contractor relationship created by this Agreement. Consultant further agrees to indemnify and hold City harmless from any failure of Consultant to comply with the applicable worker's compensation laws. City shall have the right to offset against the amount of any fees due to Consultant under this Agreement any amount due to City from Consultant as a result of Consultant's failure to promptly pay to City any reimbursement or indemnification arising under this paragraph.

6.11. PERS Eligibility Indemnification. In the event that Consultant or any employee, agent, or subcontractor of Consultant providing services under this Agreement claims or 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, Consultant shall indemnify, defend, and hold harmless City for the payment of any employee and/or employer contributions for PERS benefits on behalf of Consultant 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.

Notwithstanding any other agency, state or federal policy, rule, regulation, law or ordinance to the contrary, Consultant and any of its employees, agents, and subcontractors providing service under this Agreement shall not qualify for or become entitled to, and hereby agree to waive any claims to, any compensation, benefit, or any incident of employment by City, including but not limited to eligibility to enroll in PERS as an employee of City and entitlement to any contribution to be paid by City for employer contribution and/or employee contributions for PERS benefits.

6.12. Cooperation. In the event any claim or action is brought against City relating to Consultant's performance or services rendered under this Agreement, Consultant shall render

any reasonable assistance and cooperation which City might require.

6.13. Ownership of Documents. All findings, reports, documents, information and data including, but not limited to, computer tapes or discs, files and tapes furnished or prepared by Consultant or any of its subcontractors in the course of performance of this Agreement, shall be and remain the sole property of City. Consultant agrees that any such documents or information shall not be made available to any individual or organization without the prior consent of City. Any use of such documents for other projects not contemplated by this Agreement, and any use of incomplete documents, shall be at the sole risk of City and without liability or legal exposure to Consultant. City shall indemnify and hold harmless Consultant from all claims, damages, losses, and expenses, including attorneys' fees, arising out of or resulting from City's use of such documents for other projects not contemplated by this Agreement or use of incomplete documents furnished by Consultant. Consultant shall deliver to City any findings, reports, documents, information, data, in any form, including but not limited to, computer tapes, discs, files audio tapes or any other Project related items as requested by City or its authorized representative, at no additional cost to the City.

6.14. Public Records Act Disclosure. Consultant has been advised and is aware that this Agreement and all reports, documents, information and data, including, but not limited to, computer tapes, discs or files furnished or prepared by Consultant, or any of its subcontractors, pursuant to this Agreement and provided to City may be subject to public disclosure as required by the California Public Records Act (California Government Code section 6250 *et seq.*). Exceptions to public disclosure may be those documents or information that qualify as trade secrets, as that term is defined in the California Government Code section 6254.7, and of which Consultant informs City of such trade secret. The City will endeavor to maintain as confidential all information obtained by it that is designated as a trade secret. The City shall not, in any way, be liable or responsible for the disclosure of any trade secret including, without limitation, those records so marked if disclosure is deemed to be required by law or by order of the Court.

6.15. Conflict of Interest. Consultant and its officers, employees, associates and subconsultants, if any, will comply with all conflict of interest statutes of the State of California applicable to Consultant's services under this agreement, including, but not limited to, the Political Reform Act (Government Code sections 81000, *et seq.*) and Government Code section 1090. During the term of this Agreement, Consultant and its officers, employees, associates and subconsultants shall not, without the prior written approval of the City Representative, perform work for another person or entity for whom Consultant is not currently performing work that would require Consultant or one of its officers, employees, associates or subconsultants to abstain from a decision under this Agreement pursuant to a conflict of interest statute.

6.16. Responsibility for Errors. Consultant shall be responsible for its work and results under this Agreement. Consultant, when requested, shall furnish clarification and/or explanation as may be required by the City's representative, regarding any services rendered under this Agreement at no additional cost to City. In the event that an error or omission attributable to Consultant occurs, then Consultant shall, at no cost to City, provide all necessary design drawings, estimates and other Consultant professional services necessary to rectify and correct the matter to the sole satisfaction of City and to participate in any meeting required with regard to the correction.

6.17. Prohibited Employment. Consultant will not employ any regular employee of City while this Agreement is in effect.

6.18. Order of Precedence. In the event of an inconsistency in this Agreement and any of the attached exhibits, the terms set forth in this Agreement shall prevail. If, and to the extent this Agreement incorporates by reference any provision of any document, such provision shall be deemed a part of this Agreement. Nevertheless, if there is any conflict among the terms and conditions of this Agreement and those of any such provision or provisions so incorporated by reference, this Agreement shall govern over the document referenced.

6.19. Costs. Each party shall bear its own costs and fees incurred in the preparation and negotiation of this Agreement and in the performance of its obligations hereunder except as expressly provided herein.

6.20. Binding Effect. This Agreement binds and benefits the parties and their respective permitted successors and assigns.

6.21. No Third Party Beneficiary Rights. This Agreement is entered into for the sole benefit of City and Consultant and no other parties are intended to be direct or incidental beneficiaries of this Agreement and no third party shall have any right in, under or to this Agreement.

6.22. Headings. Paragraphs and subparagraph headings contained in this Agreement are included solely for convenience and are not intended to modify, explain or to be a full or accurate description of the content thereof and shall not in any way affect the meaning or interpretation of this Agreement.

6.23. Construction. The parties have participated jointly in the negotiation and drafting of this Agreement and have had an adequate opportunity to review each and every provision of the Agreement and submit the same to counsel or other consultants for review and comment. In the event an ambiguity or question of intent or interpretation arises with respect to this Agreement, this Agreement shall be construed as if drafted jointly by the parties and in accordance with its fair meaning. There shall be no presumption or burden of proof favoring or disfavoring any party by virtue of the authorship of any of the provisions of this Agreement.

6.24. Amendments. Only a writing executed by the parties hereto or their respective successors and assigns may amend this Agreement.

6.25. Waiver. The delay or failure of either party at any time to require performance or compliance by the other of any of its obligations or agreements shall in no way be deemed a waiver of those rights to require such performance or compliance. No waiver of any provision of this Agreement shall be effective unless in writing and signed by a duly authorized representative of the party against whom enforcement of a waiver is sought. The waiver of any right or remedy in respect to any occurrence or event shall not be deemed a waiver of any right or remedy in respect to any other occurrence or event, nor shall any waiver constitute a continuing waiver.

6.26. Severability. If any provision of this Agreement is determined by a court of competent jurisdiction to be unenforceable in any circumstance, such determination shall not affect the validity or enforceability of the remaining terms and provisions hereof or of the offending provision in any other circumstance. Notwithstanding the foregoing, if the value of this Agreement, based upon the substantial benefit of the bargain for any party, is materially impaired, which determination made by the presiding court or arbitrator of competent jurisdiction shall be binding,

then both parties agree to substitute such provision(s) through good faith negotiations.

6.27. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original. All counterparts shall be construed together and shall constitute one agreement.

6.28. Corporate Authority. The persons executing this Agreement on behalf of the parties hereto warrant that they are duly authorized to execute this Agreement on behalf of said parties and that by doing so the parties hereto are formally bound to the provisions of this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by and through their respective authorized officers, as of the date first above written.

CONSULTANT

Richard Bernard
Signature

Date: 6/13/2022

RICHARD BERNARD, PARTNER
[Name and Title]

CITY OF COSTA MESA

Carol Molina
Carol Molina
Purchasing Officer

Date: 6/22/22

ATTEST:

Brenda Green 6/22/22
Brenda Green
City Clerk




APPROVED AS TO FORM:

Kimberly Hall Barlow
Kimberly Hall Barlow
City Attorney

Date: 6/16/2022

APPROVED AS TO INSURANCE:



Ruth Wang
Risk Management

Date: 6/15/22

DEPARTMENTAL APPROVAL:



Jennifer Le
Economic and Development Services
Director

Date: 6/15/22

EXHIBIT A
CONSULTANT'S PROPOSAL



OPINION
RESEARCH
& STRATEGY

TO Lori Ann Farrell Harrison, City Manager
City of Costa Mesa

FROM Richard Bernard, Ph.D., John Fairbank & Adam Sonenshein
FM3 Research

RE: Proposal to Provide Opinion Research for the City of Costa Mesa

DATE February 2, 2022

Fairbank, Maslin, Maullin, Metz & Associates (FM3) is pleased to submit this proposal to conduct voter opinion research for the City of Costa Mesa evaluating the viability of a potential 2022 municipal ballot measure that would clarify, amend, modify or otherwise address the challenges and impacts posed by the City's existing land-use initiative, Measure Y. We understand that the California Department of Housing and Community Development notified the City in December 2021 that Measure Y "is clearly a constraint on development and conflicts with meeting state requirements," and is requiring that the City's 2021-2029 housing element "address this constraint."

As you know, FM3 provided extremely accurate research for the City of Costa Mesa two years ago during the development of your 2020 cannabis tax, Measure Q (for which FM3's survey research indicated 63% support - two percentage points from Measure Q's ultimate election result of 65% and well within the survey's margin of sampling error). We would be very pleased to work with the City once again on this project.

To maximize your opportunity for success, and in recognition of the considerable limitations placed on agency-funded ballot measure public engagement and education efforts by California law once a measure has been formally placed on the ballot, FM3 offers the City a customized research program consisting of a baseline survey (to be conducted ASAP) and a shorter, more economical, optional tracking survey (to be conducted shortly before the Costa Mesa City Council intends to vote on whether to place the measure on the November 2022 ballot). During the interim period between the two surveys, the City will be able to leverage the findings provided by the baseline survey to cost-effectively educate the Costa Mesa community about the challenges the measure is designed to address, using themes and communications strategies that resonate with your constituents. The tracking survey will provide updated data on the measure's viability, accounting for the impact of the City's public engagement and education efforts, the effects of significant current events, and refinements to the measure's 75-word ballot label language informed by the baseline survey. The Mayor and City Council members will then be able to utilize the current data provided by the tracking survey to inform their ultimate decision regarding whether to proceed with placing the measure on the November ballot.

This proposal is organized in three sections: **Section 1** outlines our current understanding of this project, its objectives, and our preliminary thoughts on how best to achieve them; **Section 2** summarizes our relevant experience; and **Section 3** provides specifications and costs for the research we propose for this project.

1 PROJECT UNDERSTANDING

FM3 understands that the voter approval requirement for certain land use changes (including those allowing for 40 or more additional dwelling units) established by Measure Y present an obstacle to the City of Costa Mesa's efforts to update and implement your housing element to accommodate the 11,734 new residential units the City's land use policies must allow for due to the State of California's most recent Regional Housing Needs Assessment (RHNA). As a result, the City is interested in assessing the viability of securing voter approval for a ballot measure which would address the challenges Measure Y poses to meeting the City's housing goals as well as other economic development goals along key commercial corridors.

While such a measure will no doubt generate opposition, a number of significant events have transpired over the six years since its passage that may have shifted Costa Mesa voters' thinking regarding land use matters, and that we believe are worthy of exploration in the City's research. These include not only the urgent need for new housing to help address the ongoing homelessness crisis, but also the most recent utilization plans for the 100+ acre, state-owned Fairview Developmental Center property on Harbor Boulevard (the closure of which, when announced in early 2016, helped to precipitate a heated public debate on land use in Costa Mesa which ultimately resulted in the passage of Measure Y), including as a temporary shelter for mentally-ill homeless individuals in 2019 and as a temporary emergency hospital for COVID-19 patients in 2020.

FM3's experience conducting research on land use issues in communities throughout California during the Great Recession and its immediate aftermath suggests that economic rationales for making land use changes have greater resonance among many voters during times of heightened economic concern. In many communities, during the Great Recession and the early stages of the subsequent recovery, voters who just a few years earlier had strenuously opposed local re-zonings and development began to (temporarily) embrace them, often for reasons not entirely different from those that undergirded their original opposition: they viewed these changes as a proxy for job creation and as a direct and indirect economic investment in local business. For many voters, during good economic times, the economic benefits for residents, local businesses, and the City itself (via additional developer fees, property taxes, and in some cases sales taxes and transient occupancy taxes) provided by making land use changes (particularly those implemented to accommodate higher intensity development) aren't worth the associated quality of life concerns, such as additional traffic congestion. But during times of economic worry, this calculation can – and often does – change rapidly. For this reason, we envision that comprehensively exploring the impact of the current economic climate (which is viewed negatively by a substantial majority of residents in Orange and San Diego Counties¹) on Costa Mesa voters' views and priorities regarding land use changes will be an important focus for this aspect of the research we conduct for the City.

¹ <https://www.ppic.org/publication/ppic-statewide-survey-californians-and-their-economic-well-being-november-2021/>

2 RELEVANT EXPERIENCE

FM3’s research has been at the forefront of providing actionable, reliable information that enables key stakeholders – including public agencies, developers, and property owners – to communicate effectively with the public and build consensus around proposed land use changes throughout Southern California.

An example of our work on land use issues which features clear parallels with the effort to modify Costa Mesa’s Measure Y was our work as pollster for **The Coalition to Protect L.A. Neighborhoods and Jobs**, the committee that opposed Measure S, the so-called “Neighborhood Integrity Initiative” on the City of Los Angeles March 2017 municipal election ballot. While this research was conducted on behalf of a political committee rather than a public agency, Los Angeles’s 2017 Measure S and Costa Mesa’s 2016 Measure Y shared both common objectives (to reduce the amount and intensity of real estate development) and similar means for achieving them (significantly reducing the authority of elected and appointed City officials to implement land use changes). In the case of Measure S, a broad coalition formed in response to the serious threat the measure posed to renters, low-income residents, affordable housing developers, the construction trades, and the local real estate industry. Measure S was decisively defeated by a margin of 29.6 to 70.4 percent.



Another example of a similar local ballot measure which was defeated by a coalition of opponents using FM3’s research was the City of Santa Monica’s Measure LV in November 2016. Like the contemporaneous Measure Y in Costa Mesa and Measure S in Los Angeles, Measure LV in Santa Monica would have significantly reduced the authority of municipal officials to enact zoning changes without voter approval, requiring citywide referenda to authorize construction of any new structures in the City taller than 32-36 feet or to make changes to any of the City’s various land use regulations, including its general plan. Measure LV was ultimately defeated by a margin of 44.7 to 55.3 percent after a campaign in which measure opponents, informed by FM3’s research, succeeded in centering the public conversation about the measure on the negative impacts its adoption would create for lower- and fixed-income renters (many of whom were long-time community members), rather than the more amorphous concern for “neighborhood character” emphasized by the Measure’s proponents.



Other major land use projects and clients that FM3 has provided research for have included recent work on behalf of the cities of **Los Angeles** and **Lemon Grove** assessing community support for various approaches being considered to address their respective cities’ regional housing needs allocation. FM3 has also worked on behalf of commercial clients such as **The Beverly Hilton** revitalization, the **Playa Vista** development, **NBC Universal’s** Evolution and CityWalk projects, **AEG’s** Staples Center and Farmer’s Field proposal, the redevelopment of the **Miramar Hotel** in Santa Monica, **Caruso Affiliated** for the Americana at Brand project in the City of Glendale, **St. John’s Health Center** in Santa Monica regarding the hospital’s campus expansion, **Walmart** for proposed retail locations in the Los Angeles harbor area and in Inglewood, **Westfield Group** for various shopping center expansion projects, and supporters of the NFL’s **SoFi Stadium** in the City of Inglewood, among many others. In Orange

County specifically, we have previously provided research in support of development projects by **Lennar Homes** in Irvine and the **Bixby Land Company** in Seal Beach, as well as other projects throughout the County by **Bisno Development** and others. FM3 also regularly works on both the local and statewide levels with the **California Association of Realtors** and the **California Building Industry Association** on projects of public policy significance to the development and real estate industries.

2.1 Experience & Familiarity with Issues Facing California Municipalities

FM3 stays well informed on the latest issues facing local governments through our work as the public opinion research firm for the League of California Cities. FM3 has served as the League's primary pollster for many years, and our research has contributed to numerous victories for the League and its member agencies, both in the legislature and on the statewide ballot. In this capacity, we regularly conduct research at the statewide level as well as in dozens of local communities throughout California. Most recently, FM3 worked closely with the League to help protect local authority over land-use and housing issues from encroachment by Sacramento and to shore up support for former Governor Brown's transportation funding package, Senate Bill 1. Our team also regularly conducts seminars and forums with the League to advise city leaders about how public opinion research can be used to address the concerns, needs and priorities of their residents, and to provide additional funds for city services.

2.2 Experience in Orange County

FM3 has more than three decades of experience conducting opinion research among Orange County voters and residents, and our firm is one of the leading providers of research for Orange County's municipalities. In recent years, our work has helped secure voter approval for local finance measures in the cities of **Costa Mesa** (2020 – Measure Q), **La Habra** (2020), **Los Alamitos** (2020), **Garden Grove** (2018), **Santa Ana** (2018 & 2010), **Laguna Beach** (2016), **Westminster** (2016), **Fountain Valley** (2016), **Seal Beach** (2014), **Stanton** (2014), **Huntington Beach** (2010), **La Habra** (2008 & 2002), and **San Juan Capistrano** (2008).

In 2017 and 2018, FM3 conducted Resident Satisfaction Research for the **City of Dana Point**, as well as (more recently) research on other topics including City policy regarding short-term rentals (Airbnb, etc.), district-based City Council elections, and cannabis business legalization. FM3 also conducted the **City of Rancho Santa Margarita's** Resident Satisfaction Survey in 2012 and again in 2014, with the later study focusing on general plan issues. Other Orange County municipalities for whom FM3 has conducted research include the cities of **Anaheim**, **Buena Park**, **Irvine**, **San Clemente** and **Yorba Linda**. We have also conducted extensive research on a variety of topics for the City of **San Juan Capistrano**, ranging from helping guide the City's successful efforts to secure passage of a \$30 million open space acquisition bond measure in 2008 to assessing residents' attitudes and behavior regarding recycling, and evaluating public perceptions of City services.

In addition to our work for Orange County municipalities, FM3 has provided research for **11 successful local education facilities bond measures for 10 Orange County school districts and community college districts** (including two - \$698 million Measure M in 2012 and \$370 million Measure C in 2002 - for the **Coast County Community College District** serving Costa Mesa). These local education bond measures have **raised a combined total of over \$3.1 billion** to improve the quality of public education in Orange County's K-12 schools and

community colleges. FM3 also regularly conducts research for countywide and regional agencies on a variety of topics, including water conservation and supply, transportation, environmental protection, and land-use planning. Our regional and countywide public agency clients include the **Transportation Corridor Agencies** (the Toll Roads), the **Orange County Transportation Authority (OCTA)**, the **Irvine Ranch Water District (IRWD)**, the **South Coast Air Quality Management District (SCAQMD)**, the **South Coast Water District (SCWD)**, and the **Southern California Association of Governments (SCAG)**, among others.

Our past and present private sector clients include industry leaders in the fields of real estate (**Irvine Company, Lennar Corporation, Bixby Land Company and Bisno Development**), entertainment (**The Walt Disney Company**), health care (**Mission Hospital Laguna Beach, Fountain Valley Regional Hospital & Medical Center**), utilities (**Southern California Edison, Southern California Gas Company, San Diego Gas & Electric**), transportation (**BNSF Railway, Auto Club of Southern California**), philanthropy (**The California Endowment, American Heart Association**), and media (**The Los Angeles Times**).

All told, FM3 has conducted more than 200 unique research projects in Orange County and its constituent communities, documenting the opinions of more than 85,000 County residents and voters. This broad portfolio of work throughout Orange County affords FM3 a current perspective on local public opinion in these dynamic and rapidly-evolving times—an advantage we will leverage to maximize the quality of research we design and conduct for the City of Costa Mesa.

3 PROPOSED RESEARCH SPECIFICATIONS & COSTS

3.1 Baseline Survey

Research Methodology	Dual-mode voter survey
Data Collection Mode	Telephone and online interviews
Respondent Contact Method	Telephone calls, Email invitations and Text message ² invitations
Sample	400-500 City of Costa Mesa registered voters likely to participate in the November 2022 General Election based upon past voting history
Margin of Sampling Error	±4.9 percent in 95 out of 100 cases for a sample of 400 interviews ±4.4 percent in 95 out of 100 cases for a sample of 500 interviews
Questionnaire	20-minute survey, featuring between 45 and 70 unique questions (including battery question items and demographic questions)
Language	Telephone interviews will be conducted in English and Spanish. Online interviews in English only.
Cost	Figure 1 below contains the total costs for the survey research described in this proposal. The prices shown by the figure are comprehensive, and include all costs for questionnaire design, sample acquisition and preparation, professional Spanish translation, programming, email and text message invitations, survey hosting, bilingual telephone interviewing, data entry and analysis.

Figure 1: 20-Minute Dual-Mode Bilingual Likely Voter Survey Costs

Sample Size	400 Interviews	500 Interviews
Cost	\$29,850	\$33,500

² Please note that FM3’s use of text messages to distribute survey invitations has been vetted by independent legal counsel and determined to be in compliance with all applicable state and federal laws and regulations, including the U.S. Telephone Consumer Protection Act (known as the TCPA).

3.2 Tracking Survey (OPTIONAL)

Research Methodology	Dual-mode voter survey
Data Collection Mode	Telephone and online interviews
Respondent Contact Method	Telephone calls, Email invitations and Text message invitations
Sample	400 City of Costa Mesa registered voters likely to participate in the November 2022 General Election based upon past voting history
Margin of Sampling Error	±4.9 percent in 95 out of 100 cases for a sample of 400 interviews
Questionnaire	12-minute survey, featuring between 25 and 35 unique questions (including battery question items and demographic questions)
Language	Telephone interviews will be conducted in English and Spanish. Online interviews in English only.
Cost	FM3 will be happy to provide the survey research described in this proposal for a total cost of \$25,500 . This price is comprehensive, and includes all costs for questionnaire design, sample acquisition and preparation, professional Spanish translation, programming, email and text message invitations, survey hosting, bilingual telephone interviewing, data entry and analysis.



We would welcome the opportunity to work with you on this research. If you have any questions or if there is any further information we can provide, please do not hesitate to contact us. Thank you for your consideration, and you may reach us as follows:

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EXHIBIT B

CITY COUNCIL POLICY 100-5

CITY OF COSTA MESA, CALIFORNIA

COUNCIL POLICY

SUBJECT	POLICY NUMBER	EFFECTIVE DATE	PAGE
DRUG-FREE WORKPLACE	100-5	8-8-89	1 of 3

BACKGROUND

Under the Federal Drug-Free Workplace Act of 1988, passed as part of omnibus drug legislation enacted November 18, 1988, contractors and grantees of Federal funds must certify that they will provide drug-free workplaces. At the present time, the City of Costa Mesa, as a sub-grantee of Federal funds under a variety of programs, is required to abide by this Act. The City Council has expressed its support of the national effort to eradicate drug abuse through the creation of a Substance Abuse Committee, institution of a City-wide D.A.R.E. program in all local schools and other activities in support of a drug-free community. This policy is intended to extend that effort to contractors and grantees of the City of Costa Mesa in the elimination of dangerous drugs in the workplace.

PURPOSE

It is the purpose of this Policy to:

1. Clearly state the City of Costa Mesa's commitment to a drug-free society.
2. Set forth guidelines to ensure that public, private, and nonprofit organizations receiving funds from the City of Costa Mesa share the commitment to a drug-free workplace.

POLICY

The City Manager, under direction by the City Council, shall take the necessary steps to see that the following provisions are included in all contracts and agreements entered into by the City of Costa Mesa involving the disbursement of funds.

1. Contractor or Sub-grantee hereby certifies that it will provide a drug-free workplace by:
 - A. Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in Contractor's and/or sub-grantee's workplace, specifically the job site or location included in this contract, and specifying the actions that will be taken against the employees for violation of such prohibition;
 - B. Establishing a Drug-Free Awareness Program to inform employees about:

SUBJECT	POLICY NUMBER	EFFECTIVE DATE	PAGE
DRUG-FREE WORKPLACE	100-5	8-8-89	2 of 3

1. The dangers of drug abuse in the workplace;
 2. Contractor's and/or sub-grantee's policy of maintaining a drug-free workplace;
 3. Any available drug counseling, rehabilitation and employee assistance programs; and
 4. The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;
- C. Making it a requirement that each employee to be engaged in the performance of the contract be given a copy of the statement required by subparagraph A;
- D. Notifying the employee in the statement required by subparagraph 1 A that, as a condition of employment under the contract, the employee will:
1. Abide by the terms of the statement; and
 2. Notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than five (5) days after such conviction;
- E. Notifying the City of Costa Mesa within ten (10) days after receiving notice under subparagraph 1 D 2 from an employee or otherwise receiving the actual notice of such conviction;
- F. Taking one of the following actions within thirty (30) days of receiving notice under subparagraph 1 D 2 with respect to an employee who is so convicted:
1. Taking appropriate personnel action against such an employee, up to and including termination; or
 2. Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health agency, law enforcement, or other appropriate agency;

SUBJECT	POLICY NUMBER	EFFECTIVE DATE	PAGE
DRUG-FREE WORKPLACE	100-5	8-8-89	3 of 3

- G. Making a good faith effort to maintain a drug-free workplace through implementation of subparagraphs 1 A through 1 F, inclusive.
2. Contractor and/or sub-grantee shall be deemed to be in violation of this Policy if the City of Costa Mesa determines that:
 - a. Contractor and/or sub-grantee has made a false certification under paragraph 1 above;
 - b. Contractor and/or sub-grantee has violated the certification by failing to carry out the requirements of subparagraphs 1 A through 1 G above;
 - c. Such number of employees of Contractor and/or sub-grantee have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the contractor and/or sub-grantee has failed to make a good faith effort to provide a drug-free workplace.
 3. Should any contractor and/or sub-grantee be deemed to be in violation of this Policy pursuant to the provisions of 2 A, B, and C, a suspension, termination or debarment proceeding subject to applicable Federal, State, and local laws shall be conducted. Upon issuance of any final decision under this section requiring debarment of a contractor and/or sub-grantee, the contractor and/or sub-grantee shall be ineligible for award of any contract, agreement or grant from the City of Costa Mesa for a period specified in the decision, not to exceed five (5) years. Upon issuance of any final decision recommending against debarment of the contractor and/or sub-grantee, the contractor and/or sub-grantee shall be eligible for compensation as provided by law.