

**PROFESSIONAL SERVICES AGREEMENT  
WITH FREILICH AND POPOWITZ, LLP  
LEGAL SERVICES FOR SUSTAINABLE LAND DEVELOPMENT CODE**

This agreement is made and entered into on this 27<sup>th</sup> day of August, 2013, by and between Santa Fe County (hereinafter referred to as the "County"), a New Mexico political subdivision, and Freilich and Popowitz LLP, a California limited liability partnership providing legal services with a principal address located at 10580 Wilshire Blvd., Suite 56, Los Angeles California, 90024 (hereinafter referred to as the "Contractor").

**WHEREAS**, on March 20, 2008, the County and Miller Barondess, LLP, a California limited liability partnership entered into Agreement No. 28-0106-LG/RH for legal services;

**WHEREAS**, by Amendment No. 1 dated April 1, 2009 Agreement No. 28-0106-LG/RH was amended to change the Contractor name and information to allow for continued services under this Agreement by Robert H. Freilich, through the law firm of Freilich and Popowitz, LLP;

**WHEREAS**, by Amendment No. 2 dated June 16, 2011 Agreement No. 28-0106-LG/RH was amended to establish a fixed fee rather than an hourly rate for certain tasks related to the County's Sustainable Land Development Code (SLDC);

**WHEREAS**, on July 24, 2013, pursuant to NMSA 1978 13-1-126, Sole Source Procurement, the County's Purchasing Division Manager made a Sole Source Determination to allow the Contractor to provide additional services for legal completion of the SLDC prior to its implementation;

**WHEREAS**, on March 20, 2012 Agreement No. 28-0106-LG/RH terminated and the County and the Contractor desire to enter into a new Agreement (No. 2014-0081-GM/GG);

**WHEREAS**, the County requires the services of the Contractor, and the Contractor is willing to provide these services and both parties wish to enter into this Agreement.

**NOW THEREFORE**, in consideration of the premises and mutual obligations herein, the parties hereto do mutually agree as follows:

**1. SCOPE OF WORK**

The Contractor shall:

- A. Review and analyze the Santa Fe County adoption draft of the Sustainable Land Development Code (SLDC) to ensure legal compliance prior to release of this draft, and provide a summary report.
- B. Determine consistency between the SLDC and the Sustainable Growth Management Plan (SGMP).

- C. Ensure that Sustainable Development Areas (SDA) are identified in appropriate sections of the SLDC and are linked to applicable procedures in the Adequate Public Facilities Assessment.
- D. Ensure that the growth management principles set forth in the draft SLDC through the Capital Improvement Plan (CIP), Sustainable Development Areas (SDAs), development fees, Adequate Public Facilities Assessment (APFA) are enforceable.
- E. Attend and participate at any required meeting(s) upon request, SLDC discussions and Santa Fe Board of County Commission (BCC) hearings and workshops and respond to questions from the BCC, Santa Fe County staff and concerned citizens.

## **2. COMPENSATION, INVOICING, AND SET-OFF**

- A. In consideration of its obligations under this Agreement the Contractor shall be compensated as follows:
  - 1) The County shall pay to the Contractor at the following hourly rates for services performed: Tasks 1(A) through 1(D) shall not exceed the sum of \$38,500.00; task 1(E) shall be billed at the hourly rate of \$495.00, exclusive of gross receipts tax (GRT). Any New Mexico GRT levied on the amounts payable under this Agreement shall be paid by the County to the Contractor.
  - 2) Hourly rates shall be tracked and billed in one-tenth (0.1) hour increments.
  - 3) Travel expenses shall be billed at cost.
- B. The County shall pay to the Contractor for reimbursable expenses based on the following: photocopies: \$0.10 per page; color copies: \$0.50 per page; facsimile charge: \$0.10 per page for outgoing transmittals; and actual telephone charges for long distance calls.
- C. The Contractor shall submit a written request for payment to the County when payment is due under this Agreement. Upon the County's receipt of the written request, the County shall issue a written certification of complete or partial acceptance or rejection of the contractual items or services for which payment is sought. The Contractor acknowledges and agrees that the County shall not make any payment hereunder unless and until it has issued a written certification accepting the contractual items or services. Within thirty (30) days of the issuance of a written certification accepting the contractual items or services, the County shall tender payment for the accepted items or services. In the event the County fails to tender payment within thirty (30) days of the written certification

accepting the items or services, the County shall pay late payment charges of one and one-half percent (1.5%) per month, until the amount due is paid in full.

- D. The County will reimburse the Contractor reasonable travel expenses. Authorized travel shall be reimbursed at a rate set forth for hourly public officers and employees in the Travel and Per Diem Act, NMSA 1978, Sections 10-8-1 through 10-8-8 NMSA 1978.
- E. In the event the Contractor or the County breach this Agreement, as determined by a court of law, or by arbitration, the Arbitrator may determine the exact amount of damages, either party suffered as a result of the breach.
- F. Payment under this Agreement shall not foreclose the right of the County to recover excessive payment, or the Contractor to recover all fees and expenses, together with late payment charges due to the Contractor.
- G. Either party may request conclusive arbitration of any dispute between the parties. The arbitration shall be conducted by the American Arbitration Association office located in Albuquerque, New Mexico, pursuant to the AAA rules.

### **3. EFFECTIVE DATE AND TERM**

This Agreement shall, upon due execution by all parties, become effective as of the date first written above and shall terminate one (1) year later, unless earlier terminated pursuant to Section 5 (Termination) or Section 6 (Appropriations and Authorizations). The County has the option to extend this Agreement at the same price, terms and conditions for a period of one (1) additional year upon the approval of Santa Fe County. The County may exercise this option by submitting a written notice to Contractor that the Agreement will be extended an additional year. The notice must be submitted to Contractor at least sixty (60) days prior to expiration of the initial Agreement.

### **4. ADDITIONAL SERVICES**

- A. The parties agree that all tasks set forth in Paragraph 1, SCOPE OF WORK of this Agreement, shall be completed in full, to the satisfaction of the County, for the amount set forth in Section 2, COMPENSATION, INVOICING, AND SET-OFF, of this Agreement, and for no other cost, amount, fee, or expense.
- B. The County may from time-to-time request changes in the Scope of Work to be performed hereunder. Such changes, including any increase or decrease in the amount of the Contractor's compensation, which are mutually agreed upon by and between the County and the Contractor, shall be incorporated in written amendments to this Agreement.

**5. TERMINATION**

A. Termination of Agreement for Cause. Either party may terminate the Agreement based upon a material breach of this Agreement by the other party. The non-breaching party shall give the breaching party written notice of termination specifying the grounds for the termination. The termination shall be effective thirty (30) days from the breaching party's receipt of the notice of termination, during which time the breaching party shall have the right to cure the breach. If, however, the breach cannot with due diligence be cured within thirty (30) days, the breaching party shall have a reasonable time to cure the breach, provided that, within thirty (30) days of its receipt of the written notice of termination, the breaching party began to cure the breach and advised the non-breaching party in writing that it intended to cure.

B. Termination for Convenience of the County. The County may, in its discretion, terminate this Agreement at any time for any reason by giving the Contractor written notice of termination by certified mail return receipt requested. The notice shall specify the effective date of termination, which shall not be less than fifteen (15) days from the Contractor's receipt of the notice. The County shall pay the Contractor for all fees and expenses, together with all late payment charges incurred which are in accordance with the specifications and standards set forth in this Agreement, performed before the effective date of termination but shall not be liable for any work performed after the effective date of termination.

**6. INDEPENDENT CONTRACTOR**

The Contractor and its agents and employees are independent contractors and are not employees or agents of the County. Accordingly, the Contractor and its agents and employees shall not accrue leave, participate in retirement plans, insurance plans, or liability bonding, use County vehicles, or participate in any other benefits afforded to employees of the County. Except as may be expressly authorized elsewhere in this Agreement, the Contractor has no authority to bind, represent, or otherwise act on behalf of the County and agrees not to purport to do so.

**7. ASSIGNMENT**

The Contractor shall not assign or transfer any interest in this Agreement or assign any claims for money due or to become due under this Agreement without the advance written approval of the County. Any attempted assignment or transfer without the County's advance written approval shall be null and void and without any legal effect.

**8. SUBCONTRACTING**

The Contractor shall not subcontract or delegate any portion of the services to be performed under this Agreement without the advance written approval of the County. Any attempted subcontracting or delegating without the County's advance written approval shall be null and void and without any legal effect.

**9. PERSONNEL**

- A. All work performed under this Agreement shall be performed by the Contractor or under its supervision.
- B. The Contractor represents that it has, or will secure at its own expense, all personnel required to discharge its obligations under this Agreement. Such personnel (i) shall not be employees of or have any contractual relationships with the County and (ii) shall be fully qualified and licensed or otherwise authorized or permitted under federal, state, and local law to perform such work.

**10. RELEASE**

Upon its receipt of all payments due under this Agreement, the Contractor releases the County, its elected officials, officers, agents and employees from all liabilities, claims, and obligations whatsoever arising from or under or relating to this Agreement.

**11. CONFIDENTIALITY**

Any confidential information provided to or developed by the Contractor in the performance of this Agreement shall be kept confidential and shall not be made available to any individual or organization by the Contractor without the prior written approval of the County.

**12. PUBLICATION, REPRODUCTION, AND USE OF MATERIAL; COPYRIGHT**

- A. The County has the unrestricted right to publish, disclose, distribute and otherwise use, in whole or in part, any reports, data, or other material prepared under or pursuant to this Agreement.
- B. The Contractor acknowledges and agrees that any material produced in whole or in part under or pursuant to this Agreement is a product owned by the County. Accordingly, to the extent that any such material is copyrightable in the United States or in any other country, the County shall own any such copyright.

**13. CONFLICT OF INTEREST**

The Contractor represents that it has no and shall not acquire any interest, direct or indirect, that would conflict in any manner or degree with the performance of its obligations under this Agreement.

**14. NO ORAL MODIFICATIONS; WRITTEN AMENDMENTS REQUIRED**

This Agreement may not be modified, altered, changed, or amended orally but, rather, only by an instrument in writing executed by the parties hereto. The Contractor specifically acknowledges and agrees that the County shall not be responsible for any changes to Section 1, "SCOPE OF

WORK”, of this Agreement unless such changes are set forth in a duly executed written amendment to this Agreement.

**15. ENTIRE AGREEMENT; INTEGRATION**

This Agreement incorporates all the agreements, covenants, and understandings between the parties hereto concerning the subject matter hereof, and all such agreements, covenants and understandings have been merged into this written Agreement. No prior or contemporaneous agreement, covenant or understandings, verbal or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this Agreement.

**16. COMPLIANCE WITH APPLICABLE LAW; CHOICE OF LAW**

A. In performing its obligations hereunder, the Contractor shall comply with all applicable laws, ordinances, and regulations.

B. The Agreement shall be construed in accordance with the substantive laws of the State of New Mexico, without regard to its choice of law rules. Contractor and the County agree that the forum for any dispute resolution between them arising out of or related to this Agreement shall be arbitration as provided for in paragraph 2G.

**17. RECORDS AND INSPECTIONS**

A. To the extent its books and records relate to (i) its performance of this Agreement or any subcontract entered into pursuant to it or (ii) cost or pricing data (if any) set forth in this Agreement or that was required to be submitted to the County as part of the procurement process, the Contractor agrees to (i) maintain such books and records during the term of this Agreement and for a period of six (6) years from the date of final payment under this Agreement; (ii) allow the County or its designee to audit such books and records at reasonable times and upon reasonable notice; and (iii) to keep such books and records in accordance with generally accepted accounting principles (GAAP).

B. To the extent its books and records relate to (i) its performance of this Agreement or any subcontract entered into pursuant to it or (ii) cost or pricing data (if any) set forth in this Agreement or that was required to be submitted to County as part of the procurement process, the Contractor also agrees to require any subcontractor it may hire to perform its obligations under this Agreement to (i) maintain such books and records during the term of this Agreement and for a period of six (6) years from the date of final payment under the subcontract; (ii) to allow the County or its designee to audit such books and records at reasonable times and upon reasonable notice; and (iii) to keep such books and records in accordance with GAAP.

**18. SEVERABILITY**

If any term or condition of this Agreement shall be held invalid or non-enforceable by any court of competent jurisdiction, the remainder of this Agreement shall not be affected and shall be valid and enforceable to the fullest extent of the law.

**19. NOTICES**

Any notice required to be given to either party by this Agreement shall be in writing and shall be delivered in person, by courier service or by U.S. mail, either first class or certified, return receipt requested, postage prepaid, as follows:

- To the County: Santa Fe County Attorney  
102 Grant Avenue  
Santa Fe, New Mexico 87501  
  
and  
  
Santa Fe County  
Growth Management Department  
Planning Division  
102 Grant Avenue  
Santa Fe, New Mexico 87501
- To the Contractor: Freilich and Popowitz LLP  
10580 Wilshire Blvd., Suite 56  
Los Angeles California, 90024

**20. CONTRACTOR'S REPRESENTATIONS AND WARRANTIES**

The Contractor hereby represents and warrants that: This Agreement has been duly authorized by the County and the Contractor, the persons executing this Agreement have authority to do so, and, once executed by the Parties, this Agreement shall constitute a binding obligation.

**21. FACSIMILE SIGNATURES**

The parties hereto agree that a facsimile signature has the same force and effect as an original for all purposes.

**22. NO THIRD-PARTY BENEFICIARIES**

This Agreement was not intended to and does not create any rights in any persons not a party hereto.

**23. INSURANCE**

- A. General Conditions. The Contractor shall submit evidence of insurance as is required herein. Policies of insurance shall be written by companies authorized to write such insurance in New Mexico.

B. Malpractice/Errors and Omissions Insurance. The Contractor shall procure and maintain during the life of this Agreement professional liability or errors and omissions insurance in amounts not less than \$2,000,000.00 per occurrence, \$2,000,000.00 per aggregate.

**25. CAMPAIGN CONTRIBUTION DISCLOSURE FORM**

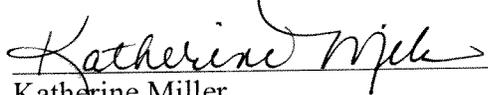
The Contractor agrees to compute and submit simultaneous with execution of this Agreement a Campaign Contribution Disclosure Form approved by the County.

**26. SURVIVAL**

The provisions of following paragraphs shall survive termination of this Contract; INDEMNIFICATION; RECORDS AND INSPECTION; RELEASE, CONFIDENTIALITY, PUBLICATION, REPRODUCTION, AND USE OF MATERIAL; COPYRIGHT; COMPLIANCE WITH APPLICABLE LAW; CHOICE OF LAW; NO THIRD-PARTY BENEFICIARIES; SURVIVAL.

**IN WITNESS WHEREOF**, the parties have duly executed this Amendment to the Agreement as of the date first written above.

**SANTA FE COUNTY:**

  
\_\_\_\_\_  
Katherine Miller  
Santa Fe County Manager

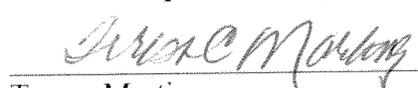
9.3.13  
Date

**Approved as to Form:**

  
\_\_\_\_\_  
Stephen C. Ross  
Santa Fe County Attorney

9-3-13  
Date

**Finance Department Approval:**

  
\_\_\_\_\_  
Teresa Martinez  
Santa Fe County Finance Director

9/3/13  
Date

**CONTRACTOR: FREILICH AND POPOWITZ, LLP**

\_\_\_\_\_  
Robert H. Freilich

August 27, 2013  
Date

**FEDERAL TAX I.D. NUMBER: 26-4768467**

(Print Name and Print Title)

**25. CAMPAIGN CONTRIBUTION DISCLOSURE FORM**

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**SANTA FE COUNTY:**

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Katherine Miller  
Santa Fe County Manager

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Date

**Approved as to Form:**

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Santa Fe County Attorney

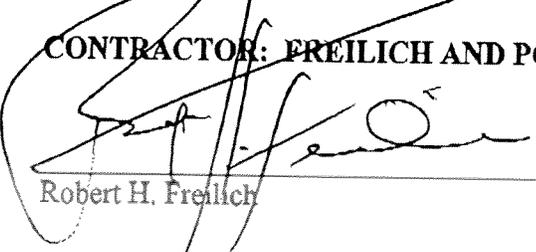
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Date

**Finance Department Approval:**

\_\_\_\_\_  
Teresa Martinez  
Santa Fe County Finance Director

\_\_\_\_\_  
Date

**CONTRACTOR: FREILICH AND POPOWITZ, LLP**

  
\_\_\_\_\_  
Robert H. Freilich

August 27, 2013  
Date

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