

City of Piedmont
COUNCIL AGENDA REPORT

DATE: February 16, 2016

TO: Mayor and Council

FROM: Michelle Marchetta Kenyon, City Attorney

SUBJECT: Authorize the City Administrator to Enter into Settlement Agreement and Release of All Claims Between Harris & Associates and the City of Piedmont

RECOMMENDATION

Authorize the City Administrator to execute Settlement Agreement and Release of All Claims between Harris & Associates and the City of Piedmont (“City”) which resolves all claims against Harris & Associates in the litigation of *City of Piedmont v. Robert Gray & Associates, et.al*

DISCUSSION

In 2011, the City filed a complaint against Robert Gray & Associates and Harris & Associates related to the creation and construction of the Piedmont Hills Underground Assessment District in the City of Piedmont (“Project”). In the complaint, City alleged causes of action for breach of contract and negligence against both defendants. In July of this year, following protracted litigation and several mediation sessions, the City and Robert Gray & Associates reached a full and final settlement of all claims and demands. Now, the City and Harris & Associates have also reached a full and final settlement of all claims and demands associated with the complaint and all claims asserted against Harris & Associates for actions it took pursuant to the Project. In exchange, Harris & Associates has agreed to pay the City the amount of \$417,000 for a full release of all claims.

Payment of the \$417,000 will be submitted by Harris & Associates to the City within 30 days of execution of the settlement agreement. Upon receipt of this payment, all claims associated with Piedmont Hills Underground Assessment District will be resolved.

ATTACHMENTS:

- A. Settlement Agreement and Release of All Claims between Harris & Associates and the City of Piedmont

**SETTLEMENT AGREEMENT AND
RELEASE OF ALL CLAIMS**

This Settlement Agreement and Mutual Release (the “Agreement”) is made and entered into between defendant HARRIS & ASSOCIATES, INC. (“Harris”) and plaintiff the CITY OF PIEDMONT (“Piedmont”). Harris and Piedmont may be referred to herein individually as “Party” or collectively as “Parties.” This Agreement is made with reference to the following facts:

RECITALS

A. The Parties have been involved in civil litigation entitled City of Piedmont v. Robert Gray & Associates; Harris & Associates, Inc., in the Superior Court of California, Contra Costa County, Case No. MSC11-00762 (the “Action”). Piedmont filed its complaint alleging certain acts or omissions by defendants relating to the creation and construction of the Piedmont Hills Underground Assessment District within the City of Piedmont (the “Project”). In the complaint, Piedmont asserted causes of action for breach of contract and negligence, alleging that, among other things, defendants negligently created plans, specifications and bid documents for the Project, causing Piedmont to experience and incur cost overruns.

B. Harris generally denied Piedmont’s allegations and asserted various affirmative defenses.

C. Without admitting any fault or liability, the Parties wish to resolve and settle finally, fully and completely all matters or disputes that now exist or may exist between them relating directly or indirectly to the Action.

D. Piedmont agrees this Agreement shall serve as a waiver of all claims against Harris related to the Action or the Project, including, but not limited to, any cause of action

against Harris included in the complaint and any cause of action or claim relating to the facts underlying the Action.

E. The “Effective Date” shall be the date upon which the Parties fully execute and deliver this Agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual promises and releases contained herein, the Parties agree as follows:

1. Payment. In full and complete satisfaction of all the claims and disputes in or related to this Action, the Parties agree that Harris, through its insurer CNA Insurance, shall pay to Piedmont the total sum of \$417,000.00 (“Settlement Sum”) within thirty (30) calendar days from the Effective Date. The Settlement Sum is to be paid by check, made payable to The City of Piedmont and sent to counsel for Plaintiff.

2. Dismissal. Within five (5) business days of receipt of the Settlement Sum, Piedmont shall file with the court a dismissal of the Action with prejudice.

3. Attorney Fees. Except as otherwise provided herein, each Party shall bear its own attorney fees and costs.

4. General Release.

(a) Except for the obligations and any reservation of rights created by, acknowledged by, or arising out of this Agreement, Piedmont and its employees, agents, members, predecessors, executors, administrators, heirs, successors, assigns, agents, attorneys, representatives, beneficiaries, and all persons acting by, through, under or in concert with Piedmont, or any of them, hereby fully releases and absolutely and forever discharges Harris and its respective predecessors, executors, administrators, heirs, successors, assigns, agents,

attorneys, insurance providers, representatives, and all parent, subsidiary, predecessor, successor, and related corporations, and all officers, directors, shareholders, members, partners, agents and employees and all persons acting by, through, under or in concert with Harris of and from any and all claims, demands, damages, debts, liabilities, accounts, reckoning, obligations, costs, expenses, liens, actions and causes of action of every kind and nature whatsoever, whether now known or unknown, suspected or unsuspected, which Piedmont now has, owns or holds or at any time ever had, owned or held or could, shall, or may hereafter have, own or hold based upon or arising out of any matter, cause, fact, act, or omission whatsoever accruing or existing at any time between the Parties arising from, relating or pertaining to the Project or the Action, or which might have been put at issue in the Action, or any possible amendments to the Complaint filed in the Action.

(b) In furtherance of the intentions set forth herein, Piedmont acknowledges that it is familiar with Section 1542 of the Civil Code of the State of California which provides as follows:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

(c) Except as otherwise provided in this Agreement, Piedmont waives and relinquishes any right or benefit which it has or may have under Section 1542 of the California Civil Code or any similar provision of statutory or non-statutory law of any other jurisdiction, to the full extent that it may lawfully waive all such rights and benefits pertaining to the subject matter of this Agreement. In connection with such waiver and relinquishment, Piedmont acknowledges that it is aware that it or its attorneys or accountants may hereafter discover claims or facts in addition to or different from those which it now knows or believes to exist with

respect to the subject matter of this Agreement. Except as otherwise stated, it is the intention to hereby fully, finally and forever settle and release all claims, disputes and differences known or unknown, suspected or unsuspected, which now exist, may exist or heretofore existed against Harris.

5. Covenant Not To Sue. Except for the obligations and any reservation of rights created by or contemplated in this Agreement, Piedmont covenants and agrees that at no time subsequent to the Effective Date will it file or maintain or cause or knowingly permit the filing or maintenance of, in any state, federal or foreign court, or before any local, state, federal or foreign administrative agency, or any other tribunal, any charge, claim, or action of any kind, nature or character whatsoever, known or unknown, which it may now have, or have ever had, or which they may later discover, against Harris, which is based in whole or in part on the matters released pursuant to this Agreement. The Parties agree that this Agreement shall constitute a full and complete defense to, and may be used as a basis for a permanent injunction against, any action, suit, or other proceeding, which may be instituted, prosecuted, maintained or attempted by Piedmont in breach of this Agreement.

6. Warranty of Authority. Each of the Parties hereto represents and warrants that:

- (a) It has the right and authority to execute this Agreement; and
- (b) It has not sold, assigned, transferred, conveyed, hypothecated, encumbered or otherwise disposed of any of the claims or demands relating to any subject matter covered by this Agreement.

7. No Admission of Liability. This Agreement and the releases contained herein, and the performance of the obligations hereunder effect a settlement of claims which are denied and contested and neither anything contained herein, nor the performance of any of the obligations hereunder shall be construed as an admission by any Party hereto of any liability of

any kind to any other Party. Each Party expressly denies that it is in any way liable or indebted to the other Parties except as set forth herein.

8. Successors and Assigns. All covenants and agreements herein shall bind and inure to the benefit of the respective heirs, beneficiaries, executors, administrators, successors and assigns of the Parties hereto.

9. Additional Documents. Each of the Parties agree that they will execute and provide, at the reasonable request of any other Party, any and all such other documents or written instruments as may be reasonably necessary to effectuate the purpose of this Agreement.

10. Further Assurances. In performing the obligations set forth in this Agreement, each of the Parties agree act in good faith and to take any and all further actions as reasonably necessary to complete performance of this Agreement and effectuate the purpose of this Agreement.

11. Gender and Number. The neuter and masculine gender and singular number shall include the feminine, masculine, neuter and plural, as the context may demand.

12. Choice of Law. This Agreement is entered into and shall be enforceable under and pursuant to the laws of the State of California. California law requires the following language to appear in this form:

ANY PERSON WHO KNOWINGLY PRESENTS A FALSE OR FRAUDULENT CLAIM FOR THE PAYMENT OF A LOSS IS GUILTY OF A CRIME AND MAY BE SUBJECT TO FINES AND CONFINEMENT IN STATE PRISON. (Insurance Code § 1871.2.)

13. Entire Agreement. This Agreement constitutes the entire agreement and understanding between the Parties with respect to the subject matter herein, and supersedes and replaces any prior agreements and understandings, whether oral or written, between and among them with respect to such matters. Any amendment to this Agreement, including an oral

modification supported by new consideration, must be reduced to writing and signed by all Parties before it will be effective.

14. Warranties. Piedmont warrants that it has full ownership of the claims released hereby, and that it has read and understands this Agreement. Each Party acknowledges to the other that it has been represented by legal counsel of its own choice throughout all of the negotiations which preceded the execution of this Agreement and it has executed the Agreement with the consent and on the advice of such counsel. Each Party further acknowledges that it and its counsel have had adequate opportunity to make whatever investigation or inquiry they may have deemed necessary or desirable in connection with the subject matter of this Agreement prior to the execution hereof. In addition, each Party and counsel for such Party has reviewed this Agreement and, accordingly, the normal rule or construction to the effect that any ambiguities are to be resolved against the drafting Party shall not be employed in the interpretation of this Agreement.

15. Counterparts. This Agreement may be executed in counterparts, and a signature transmitted by facsimile or electronic delivery shall be deemed the equivalent of an original signature, which taken together, shall constitute one and the same agreement and shall be effective as of the date of the last signature appearing thereon.

16. Enforcement. The Parties specifically intend for this Agreement to be final, binding and enforceable under California Code of Civil Procedure § 664.6, and that the Superior Court for the State of California, County of Contra Costa, shall have exclusive jurisdiction for purposes of such enforcement. If any Party hereto shall bring any action or proceeding against any other Party hereto by reason of the breach of any covenant, warranty, representation or condition hereof, or otherwise arising out of this Agreement, the prevailing Party in such action or proceeding shall be entitled to its costs of suit and attorney fees, as ordered by any court of

competent jurisdiction, which shall be payable whether or not such action or proceeding is prosecuted to judgment or order.

17. Severability. In the event that one or more of the provisions, or portions thereof, of this Agreement is determined to be void or unenforceable by a court of competent jurisdiction, such portion shall be stricken and the agreement reformed to approximate as closely as the law permits, the intent of the stricken portion or portions. The remainder of this Agreement shall not be affected thereby and each remaining provision or portion thereof shall continue to be valid and effective and shall be enforceable to the fullest extent permitted by law.

18. No Reliance. The Parties understand, agree, and represent that this Agreement is not made in reliance upon any statement, promise, or representation other than those contained herein.

19. No Waiver of Provisions. No waiver of any of the provisions of this Agreement shall be deemed to constitute a waiver of any other provisions, whether or not similar. No waiver of any of the provisions of this Agreement shall constitute a continuing waiver. No waiver shall be binding unless executed in writing by the Party making the waiver.

20. Amendments and Modifications. This Agreement can be amended, modified, or changed only by an instrument in writing and signed by all the Parties hereto.

21. Headings. The captions used in this Agreement are inserted for convenience and shall not be deemed a part of this Agreement for construction or interpretation.

22. Non-disparagement. The Parties hereto agree that they will not, under any circumstances, disparage any of the other Parties hereto. Specifically, the Parties agree that they will not make any derogatory or adverse comments about the other Party. It is hereby understood and agreed that damages would be an inadequate remedy at law in the event of a breach by a Party of any of the covenants in this paragraph and that any breach by a Party will

cause the non-breaching Party great and irreparable injury and damage. Accordingly, the Parties agree that, if any Party hereto shall bring any action or proceeding against any other Party hereto by reason of an alleged breach of the covenants contained in this paragraph, the prevailing non-breaching Party in such action or proceeding shall be, without waiving any additional rights or remedies otherwise available to the non-breaching Party at law or in equity or by statute, entitled to injunctive and other equitable relief, as well as attorney's fees and costs.

HARRIS & ASSOCIATES, INC.

Dated: February ____, 2016

Gary S. Wohl, President

CITY OF PIEDMONT

Dated: February ____, 2016

Paul Benoit, City Manager

Approved as to form:

HOPKINS & CARLEY, APC

Dated: February ____, 2016

David W. Lively, Attorneys for
HARRIS & ASSOCIATES, INC.

LOMBARDI, LOPER & CONANT, LLP

Dated: February ____, 2016

Matthew S. Conant, Attorneys for the CITY
OF PIEDMONT

**Item #4 – Settlement Agreement with Harris & Associates
Correspondence Received Monday, February 16th at 4:15 p.m.**

Dear Mayor Fujioka and Council,

What are the final City legal costs for the litigations related to the Piedmont Hills Undergrounding Utility District (PHUUD)? Kindly state this figure Monday evening so we know the full extent of the loss of taxpayer money.

Upon giving away the second Million dollars of taxpayer money for the Piedmont Hills Undergrounding Utility District (PHUUD) I recall a resolution that once the litigation was settled that PHUDD would be asked to reimburse the City and taxpayers. I suggest seeking funds from PHUUD before reaching out to taxpayers this June.

City Manager Benoit and all current Department Heads are doing a fine job; I speculate the Underground over runs would not have occurred on Mr. Benoit's watch. A critical question remains and was entirely ignored by the "investigation" sub-committee: when cost overruns had exhausted all financial contingencies by the end of August 2009, and even after the Crest Road collapse in October, why did staff not inform anyone and keep digging?

The two separate million dollar bailouts are essentially a result of (1) accepting an unbalanced contractors bid that included a bedrock clause that was over five times the second highest bidder (2) the common knowledge and extensive City history of widespread bedrock being ignored, and disturbingly (3) a staff that apparently operated in a manner skewed toward private interest.

The bailouts seem to be a result of an out of control situation and gross mismanagement. What occurred with the Crest Road bailout is more a calculated orchestration by staff as the required work stated by staff to repair the collapse was never done. Contractor Valley Utility was required to protect all work and was liable for collapse; the work was not protected adequately and Valley was still paid for repairs. The repairs were not done according to an Engineering Report that Staff stated required trench dams, yet Staff allow repair by simply dumping slurry over corrected conduit. While I firmly believe our current City Staff would not operate in that previous manner, the way in which public funds were used for private benefit on Crest Road remains a disturbing and open question beyond the two million dollars given away.

Before the PHUUD "Investigation" Sub-committee I asked about former City Attorney George Peyton's liability and about seeking recourse from his Errors and Omissions Insurance. I received no response from the sub-committee. I wrote the following to Council on 2/6/2010 upon the second Million Dollar Gift and my position on this matter remains: "George Peyton in his capacity as City Attorney reviewed and signed the contracts and it is his fiduciary responsibility to assure the city these contracts would follow city policy that private undergrounding districts pay 100% of their cost. These contracts are grossly defective as beyond the \$1,000,400 gifted on Dec. 12, 2009 HUUD has also received \$296,000 for repair work on Crest Road, countless hours of City Staff in managing the project and taxpayer funded engineering scrutiny of Valley Utility billings. The Sea View Underground District Steering Committee and the City are defendants in a lawsuit yet 100% of the litigation defense, \$262,000 and counting, has been paid by Piedmont Taxpayers. I request that action be commenced to obtain recourse from City Attorney Peyton's insurance carrier for these defective contracts." I note the

Sea View Undergrounding District litigation cost taxpayers approximately \$600,000 when concluded. I suggest seeking recourse through Mr. Peyton's Insurance rather than seeking more taxpayer money in June.

Subject to the Public Record Act I request that all depositions taken related to the PHUUD litigation be put on the City website.

Respectfully,
Rick Schiller

City Council:

Included below is the text from Resolution 11-10 passed February 6, 2010 by City Council authorizing the expenditure of an additional \$1.06M of General Funds on the cost overrun incurred by the Piedmont Hills Undergrounding Utility District project. Note the section in bold in which Council requests that any of these funds not recovered from the legal actions be contributed by the residents of the District. Assuming you approve the settlement, I recommend you direct the City Administrator to initiate communications with the residents of the District to solicit these contributions and report back to Council on the results of that effort. In the event you proceed with this recommendation, I suggest you seek contributions only from those District residents who voted in favor of the undergrounding district.

Garrett Keating
148 Ricardo Ave

Resolution 11-10

WHEREAS, the City has entered into a Contract with Valley Utility for construction work relating to the Piedmont Hills Underground Utility District ("District"); and
WHEREAS, unanticipated additional costs relating to such construction work have arisen, including costs relating to excavation of rock; and
WHEREAS, City has used all of the monies raised through the issuance of bonds for such construction work; and
WHEREAS, City has attempted to locate additional sources of funds to cover such additional construction costs, including donations from homeowners within the District; and
WHEREAS, it has become clear that in order to complete the construction work so that the overhead utility lines can be finally removed and transferred underground and the supporting poles removed, it will be necessary for the City Council to appropriate City funds to pay for the construction work pursuant to its Contract with Valley Utility; and
WHEREAS, the City Council recognizes that there is a clear and important public purpose in completing the construction work in the District; and
WHEREAS, there is a specific and important public purpose in providing additional safety to the residents of Piedmont by removing the danger of having overhead live utility lines and poles falling across and blocking the public streets and sidewalks during a major earthquake, firestorm, major rainstorms and flooding or other calamitous events, which blockage of public streets and sidewalks can endanger human lives by preventing

or impeding the ability of people to escape those dangerous circumstances; and WHEREAS, there is an important public purpose in improving the beauty and appearance of the City by removal of unsightly utility poles and lines; and WHEREAS, the City Council also realizes that there is an important public purpose served in appropriating the necessary funds to complete the construction work for the District in order to avoid exposing the City and its taxpayers to potentially valid legal claims from homeowners and/or bondholders in the District, as well as potentially valid legal claims by Valley Utility, which could between them well exceed \$5,000,000, far in excess of the appropriation needed to complete such construction work; and WHEREAS, the City Council also recognizes that appropriating the necessary funds now to complete the construction will serve an important public purpose of saving the taxpayers substantial additional expenses which would probably occur if Valley Utility were to permanently cease work on the project due to lack of funding and the City were required to find a new contractor at a future date, probably at a cost far in excess of the amounts which are proposed for Valley Utility to complete the work now; and WHEREAS, the City Council also acknowledges that such an appropriation by the City is contrary to the adopted policy of the City regarding undergrounding utilities, specifically that *“No General Fund monies shall be used to assist in the formation of a private undergrounding district except direct costs associated with the assessment of city owned property located within a private undergrounding district and indirect costs for staff time required to process undergrounding applications”* but still believes that the specific and important public purpose of completing a partially constructed project in the public streets requires a deviation from the existing policy; and WHEREAS, the City Council is committed to a full public review of the existing underground utility policy, the process for development of plans and bid specifications for further undergrounding projects, and the process for estimating costs related to such projects is committed to avoiding the risk of any such appropriations in the future; and WHEREAS, while it is recognized that the completion of such construction work will benefit the individual homeowners in the District, this in no way diminishes the public purpose of the benefits that completion of such construction work will provide to all residents of Piedmont, most particularly the public safety benefits and substantial savings in expenditure of taxpayer’s funds that will be provided; and WHEREAS, additional costs have now been determined and agreed by Valley Utility and the City of Piedmont and the City Council appreciates the agreement by Valley Utility to not exceed the \$1,127,013 cost guarantee for the completion of all remaining work on the District; and WHEREAS, to mitigate the costs necessary to complete the District construction project, it is appropriate to complete this District construction project as soon as reasonably possible; and

WHEREAS, while the City Council requests that any funds expended by the City for completion of the construction project that are not recovered from legal actions against responsible parties be contributed by residents of the District.

RESOLVED: the Piedmont City Council has previously directed that its Audit Committee work with City staff and outside advisors to investigate and prepare a report on the City process in relation to the contracts executed regarding the Piedmont Hills Underground Utility District by no later than April 30, 2010, so that the City Council and

the public can engage in appropriate measures to avoid risk to the City in the future; and
RESOLVED FURTHER: the City Council has retained outside legal counsel to pursue
any and all legal actions and causes of action against any person, party or entity
responsible in any manner for the cost overruns the District has encountered; and
RESOLVED FURTHER: That the City Council finds that for the reasons set forth
heretofore that appropriation and expenditure of City funds for completion of the
construction work on the Piedmont Hills Underground Utility District serves an
important public purpose; and

RESOLVED FURTHER: That the City Council hereby appropriates and authorizes the
expenditure of up to \$1,060,000 to be paid for the completion of all construction work for
the Piedmont Hills Underground Utility District.

Moved by Barbieri, Seconded by Chiang. Ayes: Barbieri, Chiang, Friedman **Noes:**

Fujioka, Keating

Absent: None