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Office of the City Attorney
John A. Russo

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June 1, 2004

HONORABLE CITY COUNCIL
Oakland, California

President De La Fuente and Members of the City Council:

**Subject: *Piedmont Avenue Neighborhood Improvement League, et al.*
 v. City of Oakland, et al.
 Alameda County Superior Court
 No. RG-03115264
 Our Matter No. X02029 (CEDA/Mountain View Cemetery)**

Pursuant to Section 401 of the Charter, the City Attorney recommends settlement of the above-entitled matter. This case involves a challenge to the City's approval of a 106-seat chapel, mausoleum and columbarium (totaling approximately 19,000 square feet) (the "Project") on the existing Mountain View Cemetery site, located at 5000 Piedmont Avenue. The Project applicant has proposed to settle the case by withdrawing the Project applications and asking the City to vacate the Project approvals, including the mitigated negative declaration prepared for the Project. The applicant would pay Petitioners' attorneys fees and would continue to be obligated to indemnify, defend and hold harmless the City. Petitioners have accepted the applicants' offer, subject to the City's approval of the settlement. The City Council authorized settlement of this matter in closed session on May 4, 2004.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'John A. Russo', written over a horizontal line.

JOHN A. RUSSO
City Attorney

Attorney Assigned:
Heather B. Lee

10.7CC

OAKLAND CITY COUNCIL

Hee

RESOLUTION NO. _____ C.M.S.



Resolution Authorizing and Directing the City Attorney to Compromise and Settle the Case of Piedmont Avenue Neighborhood Improvement League, et al. v. City of Oakland, et al. (Mountain View Cemetery) (Alameda County Superior Court Case No. RG-03115264)

WHEREAS, on or about August 6, 2003, the Oakland City Planning Commission denied the appeal of administrative, staff-level approvals of a 06-seat chapel, mausoleum and columbarium (totaling approximately 19,000 square feet) (the "Project") on the existing Mountain View Cemetery site, located at 5000 Piedmont Avenue; and

WHEREAS, on or about September 5, 2003, the Piedmont Avenue Neighborhood Improvement League ("PANIL") and other petitioners filed a petition for writ of mandate challenging the City's approval of the Project, asserting that the City violated the California Environmental Quality Act ("CEQA"); and

WHEREAS, the parties now wish to fully and completely resolve their disagreements relating to the Project; **Now, therefore, be it**

RESOLVED: that the City Council authorizes and directs the City Attorney to compromise and settle the case of Piedmont Avenue Neighborhood Improvement League, *t al.* v. City of Oakland, *et al.* (Mountain View Cemetery) (Alameda County Superior Court Case No. RG-03115264); and be it

FURTHER RESOLVED: that the City Attorney and staff are authorized to take whatever steps may be necessary to effect said settlement, including without limitation entering into a settlement agreement in substantial conformity with **Attachment A**; and be it

FURTHER RESOLVED: that the settlement agreement shall be approved as to form and legality by the City Attorney.

10.7CC

COUNCIL, OAKLAND, CALIFORNIA, _____, 2004

PASSED BY THE FOLLOWING VOTE:

AYES- BROOKS, BRUNNER, CHANG, NADEL, QUAN, REID, WAN AND PRESIDENT DE LA FUENTE

NOES-

ABSENT-

ABSTENTION-

ATTEST: _____
CEDA FLOYD
City Clerk and Clerk of the Council
of the City of Oakland, California

ATTACHMENT A

SETTLEMENT AGREEMENT AND MUTUAL RELEASE OF CLAIMS

SETTLEMENT AGREEMENT AND MUTUAL RELEASE OF CLAIMS

This Settlement Agreement and Mutual Release of Claims ("Agreement") is entered into by and between Petitioners PIEDMONT AVENUE NEIGHBORHOOD IMPROVEMENT LEAGUE, VALERIE WINEMILLER, AND CALIFORNIA PRESERVATION FOUNDATION (together referred to as "PANIL") and Respondents CITY OF OAKLAND, OAKLAND CITY COUNCIL, OAKLAND PLANNING COMMISSION (together referred to as "the City"), and Real Parties in Interest MOUNTAIN VIEW CEMETERY and MOUNTAIN VIEW CEMETERY BOARD OF DIRECTORS (together referred to as "Mountain View Cemetery"), collectively referred to as the "Parties".

RECITALS

A. A civil lawsuit (the "Action") entitled *PANIL v. City of Oakland, et al.* Case No. RG03115264, is now pending in the Alameda County Superior Court. The Petition for Writ of Mandamus in the Action, a copy of which is attached hereto as Exhibit A, filed September 5, 2003 under the California Environmental Quality Act ("CEQA") and Code of Civil Procedure § 1094.5, named City of Oakland, Oakland City Council and Oakland Planning Commission as Respondents and Mountain View Cemetery, and Mountain View Cemetery Board of Directors as Real Parties in Interest. The Petition for Writ of Mandamus alleges violations of CEQA in that Defendants allegedly abused their discretion in approving a use permit and a Mitigated Negative Declaration for construction of a new chapel and mausoleum. Further, the Petition for Writ of Mandamus seeks a temporary restraining order, preliminary injunction, and/or administrative stay order as well as costs and attorneys' fees pursuant to Code of Civil Procedure section 1021.5.

B. The City and Mountain View Cemetery dispute the claims in the Action. No responsive pleadings have been filed in this matter by either the City or Mountain View Cemetery.

C. The claims and allegations of PANIL's Petition for Writ of Mandamus are

incorporated by reference into this Agreement solely for the purpose of identifying the various allegations set forth by PANIL.

D. The parties met to discuss a potential settlement on October 14, 2003.

E. As is set forth in this Agreement, the Parties mutually desire to avoid further litigation and to remove from litigation all claims, counterclaims, and disputes among them of any kind or nature relating to PANIL's Petition for Writ of Mandamus and the Action. As a result, the Parties have agreed to settle such claims, counterclaims and disputes on the terms and conditions set forth below.

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

TERMS AND CONDITIONS

1. Vacation of Approval of CUP and MND and Withdrawal of Application for Development. The Planning Commission shall vacate it's approval of Conditional Use Permit (CUP)02-468/ER/03-0015 and the Mitigated Negative Declaration adopted therewith, and Mountain View Cemetery will withdraw its application for a building permit.

2. Dismissal. Within five business days of the City's vacation of the CUP and the Mitigated Negative Declaration, PANIL shall dismiss the Action and each and every cause of action therein with prejudice by filing a Request for Dismissal with the Alameda County Superior Court.

3. Costs and Attorneys' fees. Within five business days of receipt of a copy of Petitioners' file-stamped Request for Dismissal, Mountain View Cemetery will pay a total of \$27,038.45 to Veneruso & Moncharsh for Leila Moncharsh's representation of PANIL in this lawsuit. Each party hereby waives any and all other contractual, statutory or other right to recover costs or attorneys' fees from the other relating to the Action, except that nothing in this Agreement abrogates or limits Mountain View Cemetery's on-going obligations to indemnify, defend and hold harmless the City, which obligations include, without limitation, expenses related to this Agreement.

4. Jurisdiction of the Court to Enforce Settlement Agreement. The court will retain jurisdiction over the case solely for purposes of enforcing the terms of this Settlement Agreement. The court's jurisdiction shall terminate upon the completion of the tasks set forth in Paragraphs 1, 2 and 3.

5. Mutual Release.

a. PANIL, on its own behalf and on behalf of its predecessors, successors, assigns, subsidiaries, affiliates, officers, directors, employees, shareholders and attorneys, hereby acknowledges full and complete satisfaction of, covenants not to sue with respect to, and releases and discharges the City and/or Mountain View Cemetery and their predecessors, successors, assigns, subsidiaries, affiliates, officers, directors, employees, shareholders, members, managers and attorneys from any and all claims, demands, actions, causes of action, suits, liabilities, losses, agreements, contracts, covenants, wages, debts, costs, attorneys' fees or expenses, known or unknown, suspected or unsuspected, that PANIL now has or may ever have had against any of the released persons and entities, arising out of or related to any and all claims described in, or that could have been described in, or arising out of or in any way related to, the Action. PANIL does not waive any right to object to any subsequent projects that may be proposed by Mountain View Cemetery, including reapplication for the project that is the subject of this Action.

b. The City and Mountain View Cemetery, on their own behalf and on behalf of their predecessors, successors, assigns, subsidiaries, affiliates, officers, directors, employees, shareholders, members, managers and attorneys, hereby acknowledges full and complete satisfaction of, covenants not to sue with respect to, and releases and discharges PANIL and its predecessors, successors, assigns, subsidiaries, affiliates, officers, directors, employees, shareholders and attorneys, from any and all claims, demands, actions, causes of action, suits, liabilities, losses, agreements, contracts, covenants, wages, debts, costs, attorneys' fees or expenses, known or unknown, suspected or unsuspected, that the City and/or Mountain View Cemetery now have or may ever have had against any of the released persons and entities, including without limitation any and all claims arising out of or in any way related to the Action.

City and Mountain View Cemetery do not waive any right to pursue reapproval of the project that is the subject of this Action or approval of any other project.

6. No Assignment. The Parties represent and warrant that they have not sold, assigned, transferred, conveyed or otherwise disposed of any claim, demand, cause of action, obligation, damage or liability released in paragraph 8 above, and each further agrees to indemnify and hold the other harmless from any liability, claims, demands, damages, costs, expenses, and attorneys' fees incurred by any such assignment or transfer.

7. General Release and Waiver of Civil Code Section 1542. With respect to claims within the foregoing releases, the Parties specifically and expressly waive any right and benefit available to them under the provisions of Section 1542 of the Civil Code of the State of California which provides:

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

It is understood and agreed by the parties that this Agreement is a full and final general release and shall extinguish all of the Parties past and present claims, demands and causes of action against each other, whether known or unknown, foreseen or unforeseen, anticipated or unanticipated, that arise out of or in any way relate to the Action, which claims, demands and causes of action are remised and forever discharged.

8. Notices. All notices and other communications required to be provided pursuant to this Agreement shall be by facsimile, followed by first class mail to the following persons at the following addresses, phone and facsimile numbers:

TO PANIL:

Leila H. Moncharsh
VENERUSO & MONCHARSH
440 Grand Avenue, Suite 360
Oakland, California 94610-5012
Telephone: (510) 433-0390
Facsimile: (510) 433-0389

TO THE CITY and MOUNTAIN VIEW CEMETERY:

Arne E. Mudge
Stoel Rives LLP
111 Sutter Street, Suite 700
San Francisco, CA 94104
Telephone: (415) 617-8900
Facsimile: (415) 676-3000

Jeff Lindeman
Mountain View Cemetery
5000 Piedmont Avenue
Oakland, CA 94961
Telephone: (510) 658-2588
Facsimile: (510) 652-2726

John Russo
Oakland City Attorney
1 Frank H. Ogawa Plaza, 6th Floor
Oakland, CA 94612
Telephone: (510) 238-3814
Facsimile: (510) 238-6500

9. Advice of Counsel. In executing this Agreement, the Parties acknowledge that they have consulted with and been advised by their respective attorneys, and that they have executed this Agreement after independent investigation, and without fraud, duress or undue influence. The Parties further acknowledge and agree that they have had a reasonable period of time for deliberation before executing this Agreement.

10. Future Waivers. No waiver by the Parties or by their respective attorneys of any condition or term of this Agreement shall be deemed a waiver of any other condition or provision at the same or any other time.

11. Modification. This Agreement may be modified only in a writing signed by the Parties.

12. No Admission of Liability. This Agreement is the result of a compromise and shall never at any time for any purpose be considered as an admission of liability or responsibility on the part of any party hereto, and each party continues to deny any liability to the other, and further agrees not to represent to any other person or entity that this Agreement, or any

of the provisions hereof, represents a confession or admission of liability on the part of any other party.

13. No Representations. Each party to this Agreement acknowledges that it is fully aware of the significance and legal effect of this Agreement, including its release provisions, and is not entering into this Agreement in reliance on any representation, promise, or statement made by any party, except those explicitly contained in this Agreement.

14. Mistake. Each of the Parties to this Agreement has investigated the facts pertaining to the Action and to this Agreement to the extent each party deems necessary. In entering into this Agreement, each party assumes the risk of mistake with respect to such facts. This Agreement is intended to be final and binding upon the Parties regardless of any claim of mistake.

15. Severability. The provisions of this Agreement are contractual, and not mere recitals, and shall be considered severable, so that if any provision or part of this Agreement shall at any time be held invalid, that provision or part thereof shall remain in force and effect to the extent allowed by law, and all other provisions of this Agreement shall remain in full force and effect, and be enforceable.

16. Applicable Law. This Agreement shall be governed by and interpreted under the laws of the State of California.

17. Construction. This Agreement has been reviewed by the Parties, and by their respective attorneys, and the Parties have had a full opportunity to negotiate the contents of this Agreement. The Parties expressly waive any common law or statutory rule of construction that ambiguity should be construed against the drafter of this Agreement, and agree that the language in all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning.

18. Survival of Provisions. All promises, covenants, releases, representations and warranties contained in this Agreement shall survive the execution and delivery of this Agreement and the consummation of the transactions contemplated herein.

19. Attorneys' Fees Arising Out of The Agreement. In the event of litigation arising out of any alleged breach of this Agreement, the prevailing party shall be entitled to recover its costs, expenses and reasonable attorneys' fees in addition to any other relief to which it may be entitled.

20. Binding Effect. This Agreement shall bind and inure to the benefit of each party and each party's successors and assigns.

21. Execution in Counterpart. This Agreement may be executed in counterpart, and all executed copies are duplicate originals, equally admissible in evidence.

22. Entire Agreement. This Agreement contains the entire agreement among the Parties hereto with respect to the matters covered hereby, and supersedes all prior agreements, written or oral, among the Parties. No other agreement, statement or promise made by any party not contained herein shall be binding or valid.

23. Further Documents. Each party will execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, such further instruments and documents as may be necessary in order to consummate this Agreement.

24. Time Of the Essence. Time is of the essence of this Agreement and the performance by each party hereto of the obligations on that party's part to be performed.

25. Recitals in Caption. The recitals in the captions of the paragraphs and subparagraphs of this Agreement are for convenience and reference only; the words contained therein shall in no way be held to explain, modify, amplify or aid in the interpretation, construction or meaning of the provisions of this Agreement.

Approved as to Form:

STOEL RIVES, LLP

Dated: April 7, 2004

By: Anna E. Mudge
Anna E. Mudge
Attorneys for Mountain View Cemetery

MOUNTAIN VIEW CEMETERY

Dated: April 7, 2004

By: Jeff Lindeman
Jeff Lindeman

CITY OF OAKLAND

Dated: _____

By: _____
John Russo
Oakland City Attorney

Approved as to Form:

VENERUSO & MONCHARSH

Dated: _____

By: _____
Leila H. Moncharsh
Attorneys for PANIL

PANIL

Dated: _____

By: _____
Valerie Winemiller

Approved as to Form:

STOEL RIVES, LLP

Dated: _____

By: _____

Anne E. Mudge
Attorneys for Mountain View Cemetery

MOUNTAIN VIEW CEMETERY

Dated: _____

By: _____

Jeff Lindeman

CITY OF OAKLAND

Dated: _____

By: _____

John Russo
Oakland City Attorney

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Dated: _____

By: 

Leila H. Moncharsh
Attorneys for PANIL

PANIL

Dated: _____

By: _____

Valerie Wineciller