

RESOLUTION NO. 2022-132

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MARINA APPROVING
A MITIGATION SERVICES AGREEMENT WITH THE BIG SUR LAND TRUST TO
SERVE AS THE CONSERVATION EASEMENT HOLDER FOR THE IMJIN PKWY
WIDENING PROJECT, AND AUTHORIZING THE CITY MANAGER TO EXECUTE
THE AGREEMENT ON BEHALF OF THE CITY COUNCIL SUBJECT TO FINAL
REVIEW AND APPROVAL BY THE CITY ATTORNEY

WHEREAS, at the regular meeting of February 5, 2019, the City Council adopted Resolution No. 2019-11, accepting the Initial Study/Mitigated Negative Declaration for the Imjin Parkway Widening Project completing the California Environmental Quality Act (CEQA) process; and

WHEREAS, on March 4, 2019, Caltrans determined that the project is a Categorical Exclusion under the National Environmental Protection Act (NEPA); and

WHEREAS, within the approximately 29.6 acres of soil disturbance due to the project are areas of potential sand gilia habitat. Sand gilia is a protected species under California law and is subject to permitting to ensure that any take of sand gilia is mitigated. The City applied for an Incidental Take Permit (ITP) from the California Department of Fish and Wildlife (CDFW) in February of 2019; and

WHEREAS, as part of the ITP to be issued by CDFW, the City will be required to identify the three entities to support Habitat Management Lands for the mitigation of the sand gilia take. CDFW will require, per Government Code §§ 65965-65968, a separate Land Manager, mitigation funding Endowment Holder, and conservation Easement Grantee; and

WHEREAS, Staff has submitted application to the BSLT to serve as the Easement Grantee. BSLT will consider serving as Easement Grantee at an upcoming board meeting.

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Marina does hereby:

1. Approving a mitigation services agreement (**Exhibit A**) with the Big Sur Land Trust (BSLT) in order for the BSLT to serve as the conservation easement holder for the Imjin Parkway Widening Project, and;
2. Authorize the City Manager to execute the agreement on behalf of the City Council subject to final review and approval by the City Attorney.

PASSED AND ADOPTED, at a regular meeting of the City Council of the City of Marina, duly held on the 1ST day of November 2022, by the following vote:

AYES: COUNCIL MEMBERS: Burnett, Biala, Delgado

NOES: COUNCIL MEMBERS: None

ABSENT: COUNCIL MEMBERS: Medina Dirksen, Berkley

ABSTAIN: COUNCIL MEMBERS: None

Bruce C. Delgado, Mayor

ATTEST:

Anita Sharp, Deputy City Clerk

**BIG SUR LAND TRUST
MITIGATION SERVICES AGREEMENT
IMJIN PARKWAY CONSERVATION SITE**

Preamble

This document is a template and contains draft language and an overview of processes for typical mitigation projects but will be edited and adjusted for each project, as needed.

Summary

The City of Marina (hereafter “Project Proponent”) is engaged in a transportation improvement project, including improvements to Imjin Parkway from Reservation Road west to Imjin Road. The establishment of the Imjin Parkway Conservation Site is intended to fulfill mitigation requirements of the California Department of Fish and Wildlife (hereafter “Regulatory Agency”) certification approval for the development of the Imjin Parkway Improvement Project. Terms of an Incidental Take Permit will require habitat mitigation in the form of a conservation easement and/or fee title land with specific management and monitoring requirements. This easement and/or fee title land will be known as the Imjin Parkway Conservation Site. The Project Proponent has asked Big Sur Land Trust (hereafter “BSLT”) to participate as a third-party easement and/or land holder and endowment holder, and in related capacities to assist the Project Proponent in fulfilling their habitat mitigation obligations for the Imjin Parkway Improvement Project. The parties desire to enter into this Agreement to set forth the parties respective duties and the financial arrangements.

Nature of Relationship

The Project Proponent is requesting that BSLT implement certain mitigation obligations required for the Imjin Parkway Improvement Project as required by the Regulatory Agency. The Project Proponent will provide a retainer fee from which BSLT will reimburse itself for all of BSLT’s fees, costs and expenses; however, some key differences exist between a client/consultant relationship than exists when the Project Proponent hires a private consultant and the relationship with BSLT for mitigation services created by this Agreement. BSLT will ultimately hold the conservation easement and/or fee title land and endowment and be responsible to the Regulatory Agency for the management and enforcement of the easement and/or fee title land requirements and the associated endowment. BSLT will remain an independent third party with specific obligations and subject to on-going requirements that may, at times, be in conflict with the Project Proponent’s interests and/or preferences. Entities that act as an easement holder and land manager have the legal obligation to monitor and, if necessary, enforce the easement terms against the landowner. Therefore, BSLT will be responsible for ensuring that the Project Proponent is complying with the terms of any easement agreement with the Regulatory Agency and, in the unlikely event that an easement violation occurs and is not remedied, BSLT will be required to bring suit against the Project Proponent to resolve the violation, recoup any funds expended by BSLT in mitigation, restoration or litigation activities and, potentially, seek damages as a result of the violation. At the outset of the relationship it is essential to establish and agree that BSLT is not acting as a consultant to the Project Proponent and is not subject to the Project Proponent’s direction or control.

Scope of Work

BSLT will analyze the applicable mitigation requirements, permits and biological opinion and assess the proposed mitigation site; complete due diligence on the site, including site visits, evaluating conditions of title & insurance, mineral report and hazardous waste assessment; develop and/or analyze management plans and endowment calculations; develop language for the conservation easement, mitigation agreement, escrow instructions, and other necessary agreements between the parties; and create the baseline documentation report for the mitigation site. Nothing herein shall give BSLT the right to request additional mitigation not required by the Regulatory Agency. In addition, all conservation easement and/or deed language shall be created and/or revised in conjunction with the Project Proponent and the Regulatory Agency.

There are essentially four phases to a mitigation project which include:

1. Initial Project Evaluation:

- a. Initial Inquiry: The Project Proponent will present the potential project to BSLT including the general project parameters. BSLT staff will determine if BSLT has interest in the project. BSLT staff will send the Mitigation Policy, Mitigation Services Agreement template and current mitigation rates to the Project Proponent, along with a Project Application and request for the required non-refundable application fee of \$1,000.
- b. Application Review and Screening Decision: Once the application and initial fee are received, BSLT staff will review the application and seek additional information as needed from the Project Proponent, permitting agency and make mapping inquiries. BSLT staff will evaluate capacity and alignment with conservation priorities as well as the project timeline and other current project timelines. If BSLT staff determines that the project fits within our capacity and interests, it will be presented to the Internal Operations Committee (IOC) of BSLT's Board of Trustees. BSLT's IOC will evaluate the project and determine whether or not to proceed with developing a Mitigation Services Agreement.

BSLT's Board of Trustees will consider the project at the next Board of Trustees meeting and will advise BSLT staff if a project is approved to move forward.

A letter will be sent to the Project Proponent informing them of BSLT's decision. If the project is accepted, then the letter will outline the next steps required to move the project forward into the Project Evaluation and Project Portfolio Development Phase.

2. Mitigation Services Agreement and Retainer Fee:

BSLT will work with the Project Proponent to develop a Mitigation Services Agreement. A retainer fee in an amount appropriate to the terms of the project, usually approximately \$10,000-\$30,000, is required at the time that the document is executed.

Note: The Agreement will require that the Project Proponent pay for all of BSLT's staff time and expenses, including the legal and staff expenses to draft the Mitigation Services Agreement. The Agreement does not commit either BSLT or the Project Proponent to accept the final mitigation project, but rather defines the terms of the relationship for project development. Occasionally

Mitigation Services Agreements will be developed prior to IOC review depending upon project timing and scope.

If there are funds remaining in the retainer fee account after a project and the scope have been defined and finalized, BSLT will return the balance within 30 days.

3. Project Evaluation and Project Portfolio Development:

Upon receipt of the signed Mitigation Services Agreement and the determined retainer fee, BSLT will begin working more closely with the Project Proponent and the agency to develop the project portfolio. During this phase BSLT will conduct site visits and will develop and/or review management and legal documents, including but not limited to a conservation easement, management plan and associated endowment, grazing plan, biological reports, biological opinion of the permitting agency and permits, and a final mitigation agreement document detailing roles and responsibilities of agency, the Project Proponent and BSLT. An escrow account will be opened to facilitate the final transaction.

This period requires significant due diligence as BSLT staff will be reviewing, developing and commenting on project documents and terms.

4. Project Acceptance and Closing:

- a. Final Decision by BSLT's Board of Trustees: Upon completion of the project development phase, the project will be presented to the Board of Trustees by the IOC for final approval including final project details and funding information. The Board may accept or reject the recommendation made by the IOC. The Project Proponent will be advised of the Board's decision.
- b. Mitigation Project Execution: Once the project has received final approval, BSLT staff will move forward with executing the mitigation requirements. This may or may not include the acceptance of a fee title property or conservation easement, or acceptance of land management responsibilities, or acceptance of in-lieu mitigation funds and/or acceptance of restoration or enhancement projects. The transaction will be completed through the escrow account and the conservation easement or fee title deed will be recorded in the county where the project is located.

It is understood that these phases and tasks can require considerable time and expense depending on the complexity of the project.

BSLT, and its legal counsel, will negotiate legal agreements and land management responsibilities that will be assumed by BSLT. The Project Proponent shall be involved in those negotiations to the extent that they involve the Project Proponent or require funding from the Project Proponent. If requested, BSLT and its legal counsel will participate with the Project Proponent in relevant discussions with the Regulatory Agency. During any such discussions, its legal counsel will be acting exclusively as BSLT's counsel. Please be advised that any attorney-client relationship is solely between BSLT's legal counsel and BSLT.

The acceptance of reimbursement for BSLT's expenses in connection with the Imjin Parkway Improvement Project does not establish an agency relationship between the Project Proponent and

BSLT. BSLT makes no representation as to the acceptance of the final mitigation project by other entities or government agencies, including, but not limited to, the Regulatory Agency.

While BSLT agrees to review the Imjin Parkway Improvement Project and all documents related to the required mitigation in good faith, BSLT reserves the right to choose, in its sole and absolute discretion, to accept or reject title to the conservation easement and/or fee title land as a result of its due diligence review, the terms of the negotiated documents, or otherwise. In addition, BSLT's participation in the Imjin Parkway Improvement Project does not obligate BSLT to accept or otherwise agree to any particular mitigation project task or outcome.

Either BSLT or the Project Proponent may terminate its working relationship with the other party at any time. However, if the working relationship is terminated, BSLT is entitled to receive reimbursement for all work done prior to the termination.

Reimbursement Schedule

The Project Proponent agrees to reimburse BSLT, under the retainer fee terms, for all reasonable fees and costs incurred in connection with the Imjin Parkway Improvement Project required to mitigate the Imjin Parkway Improvement Project including, but not limited to, staff time, legal fees and costs, outside consulting fees and materials. The Project Proponent acknowledges that since (insert date) BSLT has incurred fees and costs in the amount of \$X, plus legal fees in connection with the project and agrees to BSLT's reimbursement from the retainer fee for those fees and costs.

All work will be completed on a time and materials basis and all work done by BSLT in connection with development of the project is reimbursable. BSLT charges for staff time per the fee schedule attached hereto as **Attachment "1"**. BSLT's staff time is calculated by the quarter-hour. Incidental communication expenses, copying and postage, and certain other similar incidental expenses are incorporated into the labor rates on the fee schedule. Direct expense such as outside printing, special purchases, sub-consultant services, travel, air and hotel charges, conference calls, delivery fees, filing fees, extra insurance requirements, custom accounting or detailing of special business licenses or other permits to operate that are determined to be required, or any other extraneous costs for the purposes of this mitigation project are calculated as an "Expense" on the fee schedule. Travel time is calculated at 50% of the regular hourly rate. Preparation time and/or "wait" time is calculated at the full labor rate. These rates are subject to change with advance notice.

Legal services from BSLT's legal counsel will be charged at their normal hourly rates including, for example, time spent preparing documents, legal research, negotiations, conferences, telephone calls, travel time and any appearances before any government agency. Current hourly rates are \$X per hour. Legal counsel is assisted by (insert assistants name), whose rate is currently \$X per hour. These rates are subject to an increase effective January 1, 2020.

Additionally, any costs necessary for representation of BSLT in these matters advanced by BSLT's legal counsel will be additional charges to BSLT that will be passed on to the Project Proponent. Neither BSLT's legal counsel nor BSLT marks up the costs incurred by BSLT's legal counsel. Such costs include, but are not limited to, transportation costs, photocopying, faxing of documents, telephone calls and similar costs. BSLT's legal counsel telephone and postage costs are computed on a formula basis.

Any discussion or cursory estimate given by BSLT regarding fees and costs are only an estimate and the fees and costs may be greater than any certain amount mentioned. The number of hours expended, and

resulting fees and costs, varies greatly depending on how events unfold. This makes it impossible to estimate an ultimate fee and cost amount with any reasonable accuracy.

Retainer Fee

In order to proceed with work on this mitigation project, BSLT requires a **\$XX retainer fee**. The retainer fee will not earn interest. The retainer fee does not represent the total cost of fees that will be incurred by BSLT in connection with this project. The total cost which the Project Proponent may incur could be more or less than the amount deposited with BSLT. BSLT will deduct expenses incurred in association with the project from the retainer fee. When and if the account is drawn down to \$1,000, BSLT will review project status and discuss any requirement for additional funds with the Project Proponent. All amounts remaining in the retainer fee will be refunded when the Imjin Parkway Improvement Project is complete.

Billing

BSLT will send the Project Proponent copies of its billings, including a summary of billings from and any other outside consultant, usually on a monthly basis, indicating the current status of your account balance. Unless requested, account statements will not be itemized.

When BSLT's total billings, including billings from BSLT's legal counsel and any outside consultants, have drawn the account down to approximately \$1,000, BSLT shall contact the Project Proponent and coordinate a time to meet and discuss the status of the Imjin Parkway Improvement Project and the the Imjin Parkway Conservation Site easement and/or fee title land. BSLT shall not incur costs beyond the retainer fee until such meeting has been held, BSLT has permission to continue and an addition to the retainer fee is made by the Project Proponent.

Account statements will be sent to:

Layne Long
City Manager
211 Hillcrest Avenue
Marina, CA 93933
(831) 884-1278
llong@cityofmarina.org

No Warranty or Prediction of Results

Neither BSLT, nor BSLT's legal counsel, can warrant or predict results in these matters. Any expressions regarding such results are understood to be only opinion, intention or hope. BSLT will, however, attempt at all times to be diligent and provide accurate information to the best of its abilities.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the dates set forth next to their signatures below.

Big Sur Land Trust

Date: _____

By _____
Name/Title

Project Proponent

Date: _____

By _____
Name/Title

Date: _____

By _____
Name/Title

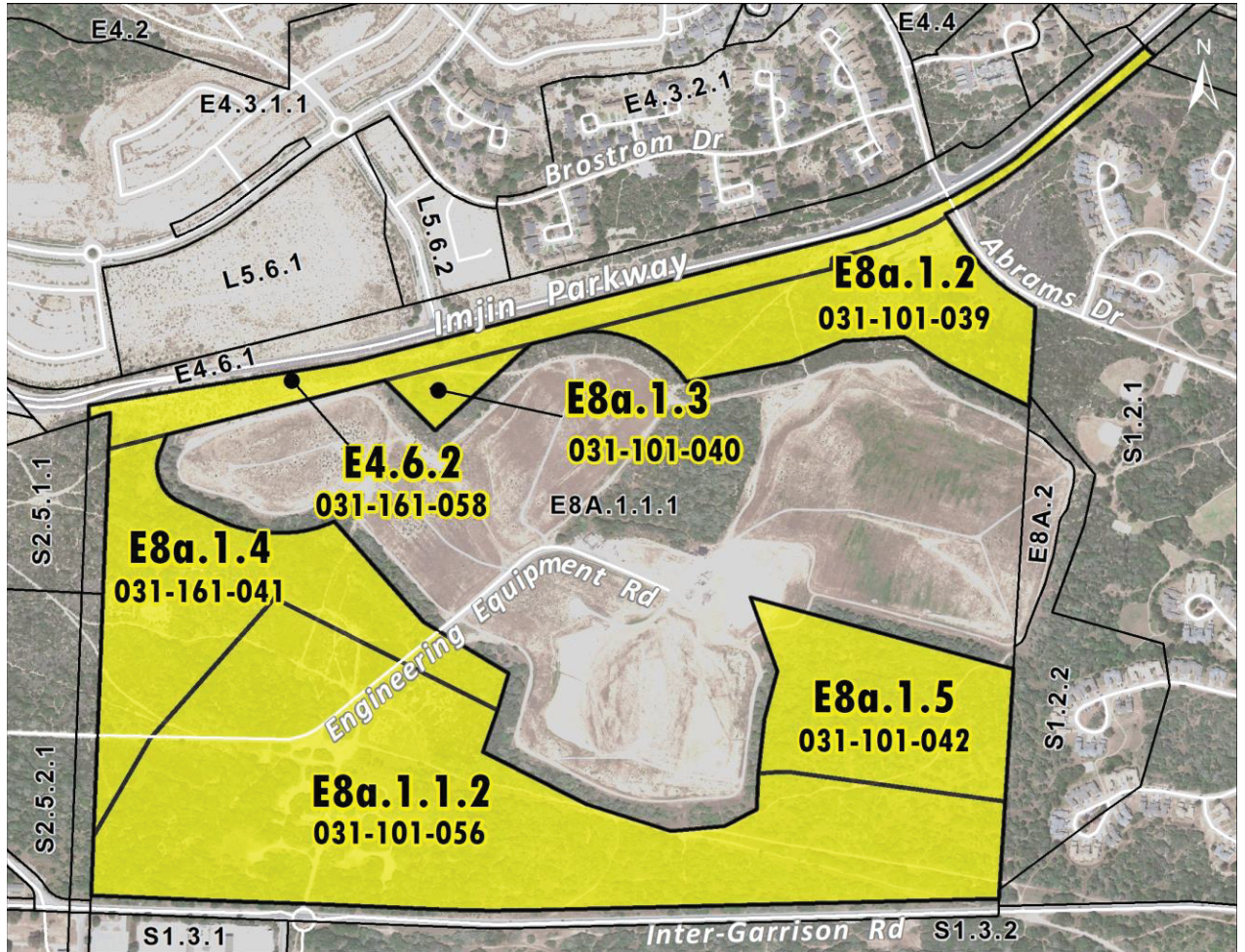
SAMPLE

ATTACHMENT 1

BIG SUR LAND TRUST
MITIGATION SERVICES FEE SCHEDULE
2019-2020

President/CEO	\$200
COO	\$150
Senior Staff	\$120
Field Staff	\$90
Accounting Staff	\$80
Support Services	\$60
Legal Counsel	min. \$300
Mileage	IRS rate + 15%
Expenses	Cost + 10%
Per Diem	\$55/day

Exhibit “B”
Map of Landfill Border Parcels Site



Honorable Mayor and Members
of the Marina City Council

City Council Meeting of
November 1, 2022

**RECOMMENDATION TO CONSIDER ADOPTING RESOLUTION NO. 2022-,
APPROVING A MITIGATION SERVICES AGREEMENT WITH THE BIG
SUR LAND TRUST TO SERVE AS THE CONSERVATION EASEMENT
HOLDER FOR THE IMJIN PKWY WIDENING PROJECT, AND
AUTHORIZING THE CITY MANAGER TO EXECUTE THE AGREEMENT
ON BEHALF OF THE CITY COUNCIL SUBJECT TO FINAL REVIEW AND
APPROVAL BY THE CITY ATTORNEY**

RECOMMENDATION:

It is requested that the City Council consider

1. Adopting Resolution No. 2022-, approving a mitigation services agreement (**Exhibit A**) with the Big Sur Land Trust (BSLT) in order for the BSLT to serve as the conservation easement holder for the Imjin Parkway Widening Project, and;
2. Authorize the City Manager to execute the agreement on behalf of the City Council subject to final review and approval by the City Attorney.

BACKGROUND:

At the regular meeting of February 5, 2019, the City Council adopted Resolution No. 2019-11, accepting the Initial Study/Mitigated Negative Declaration for the Imjin Parkway Widening Project completing the California Environmental Quality Act (CEQA) process.

On March 4, 2019, Caltrans determined that the project is a Categorical Exclusion under the National Environmental Protection Act (NEPA).

Within the approximately 29.6 acres of soil disturbance due to the project are areas of potential sand gilia habitat. Sand gilia is a protected species under California law and is subject to permitting to ensure that any take of sand gilia is mitigated. Project biologists surveyed the project area for the presence of sand gilia June 1-2 and August 29, 2017, April 19-20 and May 17-19, 2018, and April 26 through April 28 and on May 5, 2021. Any sand gilia observed during the gilia flowering seasons was documented and the information was included in permit applications. The City applied for an Incidental Take Permit (ITP) from the California Department of Fish and Wildlife (CDFW) in February of 2019.

CDFW determined that the ITP application was complete on January 14, 2022. Staff and consultants for the project have been coordinating with CDFW for the issuance of the ITP which is expected within the next two weeks.

ANALYSIS:

The City has proposed that the area of mitigation for the taking of sand gilia on the project be within parcel E8a.1.2 near the intersection of Imjin Parkway and Abrams Drive as shown on **Exhibit B**. The ITP once issued will identify the full extent of mitigation area that the state will require. As part of the ITP to be issued by CDFW, the City will be required to identify the three entities to support Habitat Management Lands for the mitigation of the sand gilia take. CDFW will require, per Government Code §§ 65965-65968, a separate *Land Manager*, mitigation funding *Endowment Holder*, and *conservation Easement Grantee*. No take of sand gilia can occur on the project before the three roles are established.

Staff has proposed that the BSLT become the Easement Grantee. CDFW has previously vetted the BSLT on another permit application which will help streamline and expedite the start of construction of the Imjin Parkway Project. The City as landowner can serve as the Land Manager with a certified biologist to oversee management under contract. The National Fish and Wildlife Foundation serves as the Endowment Holder on many projects which will also help expedite the process.

Staff has submitted application to the BSLT to serve as the Easement Grantee. BSLT will consider serving as Easement Grantee at an upcoming board meeting.

FISCAL IMPACT:

The fiscal impact of applying for BSLT to be the Easement Holder is \$1,000 permit filling fee and a retainer in the range of \$10,000 to \$30,000 to cover BSLT costs associated with establishing the easement. All fees and the retainer associated with this action are available within the already approved budget for the Imjin Parkway Widening Project.

CONCLUSION:

This request is submitted for City Council consideration and possible action.

Respectfully submitted,

Brian McMinn, P.E., P.L.S.
Public Works Director/City Engineer
City of Marina

REVIEWED/CONCUR:

Layne P. Long
City Manager
City of Marina