

0-5207 (A)

DEPOSIT AGREEMENT BETWEEN THE  
CITY OF NEWPORT BEACH AND NEWPORT BANNING RANCH LLC, AERA ENERGY  
LLC, AND CHEROKEE NEWPORT BEACH, LLC FOR COSTS INCURRED

THIS AGREEMENT ("AGREEMENT") is made and entered into by and between the City of Newport Beach, a municipal corporation of the State of California, hereinafter referred to as "CITY," and Newport Banning Ranch LLC, Aera Energy LLC, and Cherokee Newport Beach, LLC, hereinafter referred to as "APPLICANT."

WHEREAS, APPLICANT submitted an application to CITY for approval of various discretionary matters and environmental assessments, hereinafter referred to as the "ENTITLEMENTS;"

WHEREAS, on August 14, 2012, the City Council approved the ENTITLEMENTS. Pursuant to that approval, the APPLICANT is required to indemnify, defend and hold harmless CITY, its City Council and others as a result of this approval;

WHEREAS, on August 24, 2012, a Petition for Writ of Mandate challenging this decision was filed in the Orange County Superior Court as Case No. 30-2012-00593557-CU-WM-CXC ("LAWSUIT");

WHEREAS, CITY has elected to retain Whitman F. Manley and Jennifer Holman of Remy, Moose & Manley, LLP to serve as legal counsel to the CITY on the LAWSUIT, and APPLICANT has retained Susan Hori of Manatt Phelps & Phillips, LLP as its counsel on the LAWSUIT; and,

WHEREAS, APPLICANT has previously deposited \$12,734.94 with the CITY to reimburse the CITY for the professional legal services incurred as a result of the LAWSUIT.

NOW, THEREFORE, in consideration of the promises and agreements hereinafter made and exchanged, the parties agree as follows:

1. PAYMENT

APPLICANT agrees to reimburse CITY for its reasonable expenses and costs defending itself against the LAWSUIT as follows:

A. Within ten (10) days following execution of this AGREEMENT by CITY, APPLICANT will make an additional payment to CITY in the amount of Thirty Thousand (\$30,000.00) Dollars (hereinafter the "AMOUNT OF DEPOSIT"). The parties acknowledge that the AMOUNT OF DEPOSIT will be used to reimburse the CITY for the professional legal services incurred as a result of the LAWSUIT. If, at any time the AMOUNT OF DEPOSIT is less than Fifteen Thousand (\$15,000.00) Dollars, APPLICANT shall replenish the AMOUNT OF DEPOSIT with Fifteen Thousand (\$15,000.00) Dollars to fund professional services within ten (10) days' notice from CITY. APPLICANT acknowledges that the amount referenced in this AGREEMENT is the CITY's best estimate of the costs for the services described herein, and that the actual cost of said services may be higher. In the event that the actual cost of said services exceeds the estimated costs, APPLICANT agrees to pay the actual cost within ten (10) days after receiving CITY's invoice for same. In the event the actual costs are less than the estimated costs, CITY will refund the difference between the actual and estimated costs.

B. A late payment fee of ten percent (10%) will be assessed if CITY receives any payment later than the thirtieth (30<sup>th</sup>) day after that payment is due but unpaid. In addition, one and one-half percent (1½) interest per month shall be added for each month the payment hereunder is due but unpaid.

C. CITY shall provide APPLICANT with copies of monthly invoices for the professional services rendered in defense of the LAWSUIT within seven (7) days of its receipt of said invoices.

2. DEFENSE OF THE LAWSUIT

CITY and APPLICANT agree that their respective legal counsel will cooperate and coordinate with each other in the joint defense of the LAWSUIT. This includes, but is not limited to, cooperation in the preparation of the administrative record and consultation with one another in good faith in the preparation of court filings, to avoid unnecessary expense to the extent reasonably practical. Notwithstanding the foregoing, the Parties acknowledge that CITY directs and maintains controls of its legal counsel and APPLICANT directs and maintains control of its legal counsel. Nothing in this AGREEMENT:

A. Shall be deemed to establish an attorney-client relationship between CITY and APPLICANT.

B. Shall be deemed to limit, in any respect whatsoever, CITY's sole authority to direct and control the City's action and its response to LAWSUIT.

C. Shall be deemed to impose any liability on CITY different from any liability as may otherwise be established by law.

3. NOTICES

Any notices, certificates, or other communications hereunder shall be given either by personal delivery to APPLICANT's agent or to CITY as the situation shall warrant, or by enclosing the same in a sealed envelope, postage prepaid, and depositing the same in the United States Postal Service, to the addresses specified below; provided that CITY and APPLICANT, by notice given hereunder, may designate different addresses to which subsequent notices, certificates or other communications will be sent:

TO CITY:

City of Newport Beach  
ATTN: Aaron C. Harp  
P.O. Box 1768  
3300 Newport Blvd.  
Newport Beach, CA 92658-8915

TO APPLICANT:

Newport Banning Ranch LLC  
Attn: Michael Mohler  
1300 Quail Street, Suite 100  
Newport Beach, CA 92660

WITH A COPY TO:

Manatt Phelps & Phillips, LLP  
Attn: Susan K. Hori  
695 Town Center Drive, 14th Floor  
Costa Mesa, CA 92626

4. MODIFICATION

No waiver or modification of any language in this AGREEMENT shall be valid unless in writing and duly executed by both parties.

5. INTERPRETATION OF THIS AGREEMENT

The language of all parts of this AGREEMENT shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the parties. If any provision of this AGREEMENT is held by an arbitrator or court of competent jurisdiction to be unenforceable, void, illegal or invalid, such holding shall not invalidate or affect the remaining covenants and provisions of this AGREEMENT. No covenant or provision shall be deemed dependent upon any other unless so expressly provided here. As used in this AGREEMENT, the masculine or neuter gender and singular or plural number shall be deemed to include the other whenever the context so indicates or requires. Nothing contained herein shall be construed so as to require the commission of any act contrary to law, and wherever there is any conflict between any provision contained herein and any present or future statute, law, ordinance or regulation contrary to which the parties have no right to contract, then the latter shall prevail, and the provision of this

AGREEMENT which is hereby affected shall be curtailed and limited only to the extent necessary to bring it within the requirements of the law.

6. DUPLICATE ORIGINAL

The original of this AGREEMENT and one or more copies hereto have been prepared and signed in counterparts as duplicate originals, each of which so executed shall, irrespective of the date of its execution and delivery, be deemed an original. Each duplicate original shall be deemed an original instrument as against any party who has signed it.

7. ATTORNEY'S FEES

In the event suit is brought by either party to construe, interpret and/or enforce the terms and/or provisions of this AGREEMENT or to secure the performance hereof, each party shall bear its own attorney's fees.

8. GOVERNING LAW

This AGREEMENT shall be governed and construed in accordance with the laws of the State of California.

9. SIGNATORIES

Each undersigned represents and warrants that its signature hereinbelow has the power, authority and right to bind their respective parties to each of the terms of this AGREEMENT, and shall indemnify CITY fully for any injuries or damages to CITY in the event that such authority or power is not, in fact, held by the signatory or is withdrawn.

10. ENTIRETY

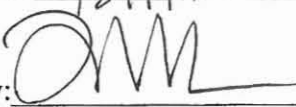
This AGREEMENT, and the attached exhibits, contains the entire agreement between the parties respecting the subject matter of this AGREEMENT and supersedes all prior understanding and agreements whether oral or in writing between the parties respecting the subject matter hereof.

IN WITNESS WHEREOF, the parties hereto have caused this AGREEMENT to be executed by and through their authorized officers on FEBRUARY 11, 2013.

[SIGNATURES ON THE FOLLOWING PAGE]

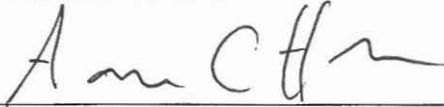
**APPROVED AS TO FORM:  
CITY ATTORNEY'S OFFICE**

Date: 1/31/13

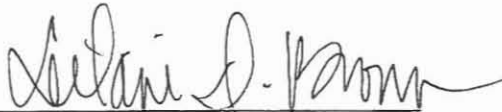
By:   
Leonie Mulvihill  
Assistant City Attorney

**CITY OF NEWPORT BEACH,  
A California municipal corporation**

Date: 1/31/13

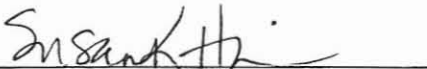
By:   
Aaron C. Harp  
City Attorney

**ATTEST:**  
Date: 2-11-13

By:   
Leilani I. Brown  
City Clerk

**MANATT, PHELPS & PHILLIPS, LLP  
A limited liability partnership**

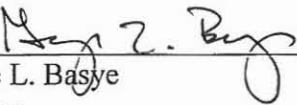
Date: 1/30/13

By:   
Susan K. Hori  
Attorney for Applicant

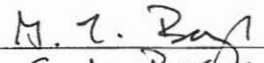


**NEWPORT BANNING RANCH LLC  
A California limited liability corporation**

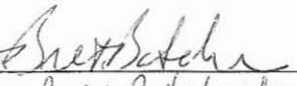
Date: 1/28/13

By:   
George L. Basye  
Manager

**AERA ENERGY LLC  
A California limited liability corporation**

By:   
Name: G. L. Basye  
Its: Vice President

**CHEROKEE NEWPORT BEACH, LLC  
A Delaware limited liability corporation**

By:   
Name: Bret Batchelder  
Its: Vice President