Agenda Item No.: **12.**

AGENDA SUMMARY PAGE

CITY COUNCIL MEETING OF: NOVEMBER 4, 2009

DEPARTMENT: CITY ATTORNEY
DIRECTOR: BRADFORD R. JERBIC

☒ **Consent** ☐ **Discussion**

SUBJECT:
Approval for final funding of arbitration expenses and for the law firm of Kemp, Jones & Coulthard, LLP to represent the City of Las Vegas in an arbitration filed against it by Asphalt Products Corporation over the construction of Washington Buffalo Park Phases 1-A and 1-B for an amount not to exceed $200,000 - Ward 4 (Anthony)

Fiscal Impact

☐ **No Impact** ☐ **Augmentation Required**
☐ **Budget Funds Available**

Amount: $200,000
Funding Source: General Fund
Dept./Division: City Attorney

PURPOSE/BACKGROUND:
Asphalt Products Corporation (APCO) contracted with the City to construct the Washington Buffalo Park Phases 1-A and 1-B in December 17, 2003. APCO constructed the park and the City staff found the construction to be defective. APCO demanded that the City pay millions of dollars in addition to the contract price. City staff refused. Pursuant to the contract, APCO filed for arbitration in December 2005. The arbitration commenced on September 5, 2007. The parties completed the entire presentation of their respective cases early this year. On October 9, 2009, the City received the final Decision and Award from the Nevada Arbitration Association. The final cost to the City for the arbitration is estimated to be $189,000.

RECOMMENDATION:
Approval

BACKUP DOCUMENTATION:
Submitted at Meeting - Written Comments by Charleston Neighborhood Preservation for Items 12, 15, 21-23, 26, 38 and 39, 43, 48, 53-56, 64 and 65, 68 and 69 and 72-76

Motion made by GARY REESE to Approve the final payment

Passed For: 6; Against: 0; Abstain: 1; Did Not Vote: 0; Excused: 0
RICKI Y. BARLOW, LOIS TARKANIAN, STEVE WOLFSON, GARY REESE, STEVEN D. ROSS, STAVROS S. ANTHONY; (Against-None); (Abstain-OSCAR B. GOODMAN); (Did Not Vote-None); (Excused-None)

NOTE: Under Item 13, MAYOR GOODMAN disclosed that he would abstain from voting on Items 12, 40 and 41 due to his partnership with one or more partners associated with APCO in a real estate investment on property in APEX.

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Minutes:
MAYOR GOODMAN requested the item be pulled to be heard with Items 40 and 41. CITY ATTORNEY BRAD JERBIC recommended that the decision to award Asphalt Products Corporation (APCO) not be appealed. If the City chose to appeal, then only errors of law and not errors of fact could be appealed. He gave a brief account on the arbitration process, which lasted for over two years and, in his opinion, a portion of the Findings were conflicting.

He referred to several pages of the Findings as he discussed them. APCO was seeking approximately $7 million in alleged damages. In this process, the City has spent approximately $3.2 million and APCO spent approximately $4 million. The net judgment in APCOS favor is $980,000.00, plus interest; a good portion of this amount was for subcontracting. APCOS arbitrator requested sanctions against the City for attorney fees to no avail. In addition, he requested the Citys arbitrators testimony be disregarded because he was a City employee and, therefore, he was prejudiced, yet an APCO employee was allowed to testify and was also awarded a contingency fee. The average cost for each arbitrator was approximately $1,000.00. COUNCILMAN REESE believed the only winners in this case were the arbitrators, as the process was belabored, which he felt was wrong.

In reviewing the arbitrators fees with counsel, COUNCILMAN WOLFSON confirmed that each party pays for its own arbitrator, but the cost is split equally for the neutral party. The Councilman pointed out that APCO expended the same amount of monies as the City of Las Vegas for their arbitrator. CITY ATTORNEY JERBIC agreed and referred to Assembly Bill 48, which changed the law concerning construction contracts. Non-binding arbitration has to be provided. If the matter is not resolvable, the dispute is heard in court. Since the judges salaries are already paid, it is an incentive to move cases along quicker and it provides for a more efficient system. In essence, it would have been less expensive had this case been heard in court. COUNCILMAN REESE emphasized that APCO is receiving a lesser amount of monies than what was initially offered as a settlement fee.

Referring to the funds available to pay APCO, MARK VINCENT, Director of Finance and Business Services, clarified that the retention, $980,000.00 and interest, amounting to $2,201,586.00, is what the City owes. There are funds readily available from approved billings and project fund balances left over that were not used; these two sources combine for a total of $1,982,186.00, leaving a balance of $219,339.70, which is not funded in the project. He recommended augmenting the remaining balance with a transfer from parks capital projects, Bid Reserve Fund.

COUNCILMAN REESE attested to former COUNCILMAN LARRY BROWNS character and his love of sports, as he is a champion for parks and recreational facilities. In his opinion, the former Councilman was unjustifiably accused. CITY ATTORNEY JERBIC agreed and using the overhead, he described how the posts should have operated to allow the courts to float during extreme weather conditions. Over a period of six months, the posts did not give and the courts began to crack.

Former COUNCILMAN LARRY BROWN felt compelled to respond to the Findings in the document, as an accusation unanswered becomes the truth. The document is entitled Findings and Fact and Conclusion of Laws, as if he and his staff created this pressure-cooker situation. During this two-year process, it was never brought to his attention that his involvement was a legal issue. He would hope that the Citys legal team would have given him an opportunity to testify if deemed necessary, being that he probably was more aware of the stakeholders and the community. He has not dealt with high profile projects any differently than his other projects. He gave direction to his former staff, but none of them have ever spoken for him. He agreed that the Citys arbitrator is detailed and is as independent as can be. The former Councilman made no apologies for being detailed as well and engaged with every one of his projects, but by no means was he placing pressure on the developers. He had no influence on the bidding process; staff provided him with spreadsheets that included target dates, and he would simply hold the developers accountable with what was promised. It is the elected officials obligation and within his right to follow up with staff on developments. These parks are internationally recognized and taxpayers dollars are being put towards what constituents prefer most. He thanked Council for the opportunity to respond to these Findings.

COUNCILMAN WOLFSON confirmed through CITY ATTORNEY JERBIC that the hearings were recorded. The City Attorney added that it is not unique to have changes take place during the course of development. In this case, it was decided to change from Astroturf to artificial turf, and this change was absolutely acceptable. In his opinion, the Findings were unbelievable and an excuse to cover up what should have happened, which was to put the light standards inside the ports rather than on the exterior.

COUNCILMAN ROSS remarked that he has been in the construction industry for a long time, and this situation could have been remedied by simply repairing the concrete. He was disappointed in that resources and time have been exhausted. He thanked former COUNCILMAN BROWN for his dedication and contributions to Las Vegas.

COUNCILMAN ANTHONY invited everyone to visit the Darling Tennis Courts, as the facility is world known and an outstanding addition to Ward 4.

COUNCILWOMAN TARKANIAN was pleased to see former COUNCILMAN BROWN respond to such accusations and to let the facts be known. She encouraged him to hold in his heart all the good he has done.

ANTHONY HODGES stated the mistake is by no means the fault of former COUNCILMAN BROWN.

MAYOR GOODMAN disagreed with awarding APCO and would rather have the company justify every dollar it requested. In his opinion, this is fraud and stressed to staff that this cannot happen again.

See Item 13 for related discussion.