

**Meeting Date:** 3/4/2014

**Report Type:** Consent

**Report ID:** 2014-00137

**Title: Agreement: First Amendment to the Ground Lease and License Agreement ("Agreement") for a Solar Facility at Sutter's Landing Park and Assignment of the Agreement**

**Location:** 20 28th Street, District 3

**Recommendation:** Pass a Motion 1) authorizing the City Manager or the City Manager's designee to execute the First Amendment to the Ground Lease and License Agreement ("Agreement") for a solar facility at Sutter's Landing Park; and 2) authorizing the City Manager or the City Manager's designee to execute an assignment of the Agreement with Conergy Projects, Inc. (Assignor) and CGY Sutter's Landing, LLC (Assignee).

**Contact:** Steve Harriman, Integrated Waste General Manager, (916) 808-4949, Department of General Services

**Presenter:** None

**Department:** General Services

**Division:** Landfill Operations

**Dept ID:** 13001771

**Attachments:**

1-Description/Analysis

2-Agreement

3-Assignment of Contract

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### **City Attorney Review**

Approved as to Form

Lan Wang

2/26/2014 10:11:50 AM

### **Approvals/Acknowledgements**

Department Director or Designee: Reina Schwartz - 2/12/2014 11:56:06 AM

## Description/Analysis

**Issue Detail:** On May 7, 2013, City Council adopted Resolution No. 2013-0142 authorizing the City Manager or the City Manager's designee to execute a 20-year ground lease and license agreement (Agreement) with Conergy, Inc. for the construction of a solar facility at Sutter's Landing Park. Conergy, Inc. wishes to amend the Agreement to extend the project completion date from December 31, 2013 to July 31, 2014 and modify several other minor/administrative issues in the Agreement including: 1) Section 7.J. regarding Mechanics Liens; 2) Section 10.D. regarding Condemnation Award; 3) Sections 18.B. and 18.C. regarding road maintenance and site security; 4) Section 18.F. regarding penetration of the asphalt cap on the West Site to allow for construction of the solar arrays; and 5) Exhibit I regarding environmental compliance. Additionally, as standard operating procedure for projects like this, Conergy, Inc. wishes to assign the Agreement to its wholly owned subsidiary or project company GCY Sutter's Landing, LLC.

**Policy Considerations:** The primary purpose of the project is to generate energy from a renewable source, which is consistent with City plans and policies on sustainability and climate change. The project location at Sutter's Landing Park also allows for educational opportunities and demonstrates the City's commitment to sustainability.

**Economic Impacts:** None

### Environmental Considerations:

**California Environmental Quality Act (CEQA):** On May 7, 2013, City Council adopted Resolution No. 2013-0143, adopted the Mitigated Negative Declaration (MND) and Mitigation Monitoring Program for the project. The proposed amendment to the Agreement does not impact the MND previously approved by Council, nor does it require further CEQA action.

**Sustainability:** The project is consistent with the City's Sustainability Master Plan by developing a green energy source on City property that is currently underutilized. All park development will make use of recycled materials and "green" products such as efficient irrigation systems, low water use plantings, added shade, solar power, and interpretive elements to educate visitors on ecology and sustainability principles. A source of renewable energy is proposed that will also be highly visible and have public education benefits. It is the only such facility ever proposed for a Sacramento park.

**Commission/Committee Action:** None

**Rationale for Recommendation:** The proposed amendment to the Agreement will allow sufficient time for the project to be completed and operational. The proposed extension to the project completion date from December 31, 2013 to July 31, 2014 is necessary due to delays in project approval from the regulatory agencies, including the Sacramento County Environmental Management Department serving as the Local Enforcement Agency under delegation from CalRecycle, and the Central Valley Regional Water Quality Control Board. The agencies have formally approved the project and construction is scheduled to begin shortly. The proposed assignment of the Agreement from Conergy, Inc. to its wholly owned subsidiary or project company GCY Sutter's Landing, LLC. will allow the project to go forward and it is necessary for Conergy's tax equity partner.

**Financial Considerations:** The proposed amendment has no financial impacts. Project construction will be funded by Conergy, Inc. and a Department of Energy grant; ongoing maintenance will be the responsibility of Conergy, Inc. Annual lease payments made to the City for use of park property will be six percent of gross revenues, or approximately \$15,000 per year, over a fixed lease term of 20 years, which will be used by the Parks and Recreation Department (General Fund, Fund 1001) for future projects at Sutter's Landing Park.

**Local Business Enterprise (LBE):** Not Applicable.

**Exhibit A**

**FIRST AMENDMENT TO  
GROUND LEASE AND LICENSE AGREEMENT**

THIS FIRST AMENDMENT TO GROUND LEASE AND LICENSE AGREEMENT (this “Amendment”), dated effective as of January 31, 2014, is between the CITY OF SACRAMENTO, a municipal corporation (the “City”), and CONERGY PROJECTS, INC., a California corporation (“Conergy”). The City and Conergy are sometimes referred to herein together, as the “Parties” and individually, as a “Party.”

**Recitals**

A. The Parties entered into that certain Ground Lease and License Agreement (the “Agreement”), dated effective as of May 15, 2013, pursuant to which Conergy leased and licensed from the City certain real property for the construction, maintenance and operation of the Conergy Solar Project. Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Agreement.

B. The Parties desire to amend the Agreement in accordance with the terms and conditions hereof.

**Amendment**

In consideration of the premises, the mutual promises and covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the Parties, the City and Conergy hereby agree as follows:

1. ***Amendments.***

(a) The Parties hereby amend and restate the first sentence of Recital G of the Agreement to read in its entirety as follows: “The construction period of the Conergy Solar Project is anticipated to be four months ending July 31, 2014.”

(b) The second paragraph of Section 1 of the Agreement is amended by replacing the words “December 31, 2013” with the words “July 31, 2014”.

(c) Section 2.A. of the Agreement is amended by replacing each instance of the words “this Section 2.B.” with the words “this Section 2.A.”.

(d) Section 2.A.(1) of the Agreement is amended by adding the following immediately prior to the period at the end of the first sentence thereof: “(the “Percentage Rent”).”

(e) Section 7.J. of the Agreement is amended by adding the following immediately prior to the period at the end of the first sentence thereof: “, except for inchoate liens and liens and claims for amounts not yet delinquent or that are being contested in good faith by Conergy.”

(f) The Parties hereby amend and restate Section 10.D. of the Agreement to read in its entirety as follows:

**“D. Condemnation Award.**

All compensation awarded upon any condemnation shall go to the City, except such compensation attributable to the Conergy Solar Project, including, without limitation: (1) loss of or damages to fixtures owned by Conergy, including the Conergy Solar Project; (2) business interruption; (3) loss of profits, tax benefits or credits, environmental incentives or attributes, grants, or other allowances of any kind attributable to the Conergy Solar Project; or (4) removal and moving expenses.”

(g) The Parties hereby amend and restate Section 18.B. of the Agreement to read in its entirety as follows: “B. [Omitted intentionally]”.

(h) The Parties hereby amend and restate Section 18.C. of the Agreement to read in its entirety as follows: “C. [Omitted intentionally]”.

(i) The Parties hereby amend and restate Section 18.F. of the Agreement to read in its entirety as follows:

“F. (1) Conergy is not allowed to construct below grade under the ground based solar array or penetrate the asphalt cap on the West Site by any means; provided, however, that Conergy may affix the Conergy Solar Project to the West Site using screws that will penetrate the asphalt cap in some places and may penetrate the asphalt cap for purposes of installing shade structures, running conduit and placing grounding facilities and inverters, subject to any required approvals of any regulatory agency, including, but not limited to, agencies of federal, state, county, and municipal government.

(2) Conergy acknowledges and agrees that the City is entering into this Agreement in its proprietary capacity as the holder of fee title to the West Site, and not in its capacity as a governmental regulatory agency and that the status, rights and obligations of the City, in such proprietary capacity, are separate and independent from the status, functions, powers, rights and obligations of the City in its governmental regulatory capacity, and that nothing in this Agreement shall be deemed to limit or restrict the City in the exercise of its governmental regulatory powers and authority with respect to Conergy, the West Site, or otherwise, or to render the City obligated or liable under this Agreement for any acts or omissions of the City in connection with the exercise of its independent governmental regulatory powers and authority.

(3) The Parties acknowledge that the Conergy Solar Project and Conergy's contemplated uses of and activities on the West Site, any subsequent changes in such uses and activities, and any construction or alteration of improvements, may require that regulatory approvals be obtained from governmental agencies with jurisdiction over the West Site or the Conergy Solar Project. Conergy shall be solely responsible for obtaining any required regulatory approval.”

(j) The Parties hereby amend Exhibit I to the Agreement by re-designating subsection (c) of Section 1 thereof as subsection (d) and adding the following as new subsection (c) thereof:

“The Parties hereby represent and warrant to the best of their knowledge that, as of January 31, 2014, the permissible activity described in Section 18.F.(1) of the Agreement will not violate any Environmental Law or other restriction to which the permissible activity is subject.”

2. ***Representations; Interpretation; Conflicts.*** Each Party represents and warrants to the other that the person executing this Amendment on behalf of such Party is duly authorized and has all necessary power and authority to execute and deliver this Amendment on behalf of such Party. As amended hereby, the Agreement is in full force and effect and valid and binding upon the Parties. In the event of a conflict between the terms and conditions of this Amendment and the terms and conditions of the Agreement, the terms and conditions of this Amendment shall control and govern the point in conflict. Notwithstanding anything to the contrary, failure of this Amendment to address a point in the Agreement shall not be deemed a conflict.

3. ***Miscellaneous.*** This Amendment shall be binding upon and inure to the benefit of the Parties and their respective successors and assigns. This Amendment may not be altered or amended, nor any rights hereunder waived, except by written agreement executed by the Parties. This Agreement is made and shall be interpreted and enforced in accordance with the laws of the State of California, without giving effect to any choice or conflict of law provisions. If one or more of the provisions of this Amendment are deemed by a court of competent jurisdiction, arbitrator or mediator to be unenforceable, in whole or in part, the scope of such provisions shall be reduced to the extent necessary to make them enforceable or, if such reduction is not possible for any reason, such provisions shall be severed from this Amendment entirely, without effect upon the balance hereof. The words “this Amendment,” “herein,” “hereby,” “hereunder” and “hereof,” and words of similar import, refer to this Amendment as a whole and not to any particular Section, subsection or other subdivision unless expressly so limited. This Amendment may be executed in one or more counterparts, all of which taken together shall constitute one and the same amendment and each of which shall be deemed an original. This Amendment may be executed by electronic signatures (in .pdf format) and such signatures shall be valid and binding upon the Parties.

[Signature page follows.]

IN WITNESS WHEREOF, the Parties have executed this Amendment as of the date first above written.

CONERGY:

**CONERGY PROJECTS, INC.**

By: \_\_\_\_\_

Anthony C. Fotopoulos

President and Chief Executive Officer

CITY:

**CITY OF SACRAMENTO**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

APPROVED AS TO FORM:

By: \_\_\_\_\_

Senior Deputy City Attorney

RECOMMENDED FOR APPROVAL:

By: \_\_\_\_\_

ATTEST:

By: \_\_\_\_\_

City Clerk

## ASSIGNMENT OF CONTRACT

This Assignment of Contract (this "Assignment") is made as of February 18, 2014, by CONERGY PROJECTS, INC., a California corporation ("Assignor"), to CGY SUTTER'S LANDING, LLC, a Colorado limited liability company ("Assignee"). Assignor and Assignee are sometimes referred to herein individually, as a "Party" and collectively, as the "Parties."

In consideration of the mutual premises and covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the Parties, Assignor hereby assigns, transfers, conveys and sets over to Assignee, and Assignee hereby accepts and assumes, all of Assignor's rights, titles, interests, duties, and responsibilities in, to and under that certain Ground Lease and License Agreement between the Assignor and the City of Sacramento ("City"), dated May 15, 2013, including any and all amendments thereto executed by Assignor prior to the date of this Assignment (hereafter collectively referred to as the "Contract").

In accordance with Section 11 of the Contract, City, as evidenced by its signature below, hereby consents to this Assignment in its entirety by Assignor to Assignee. By accepting this Assignment, Assignee agrees to perform all duties and responsibilities and hereby assumes all liabilities and obligations that Assignor has under the Contract, as if Assignee had been an original party to the Contract, and Assignor is hereby released therefrom. Any notices to be sent to Assignee pursuant to Contract shall be sent to:

CGY Sutter's Landing, LLC  
c/o Conergy Projects, Inc.  
3947 Lennane Drive, Suite 275  
Sacramento, California 95834  
Attention: Director of Project Management

Time is of the essence in this Assignment, which shall be binding on and inure to the benefit of the Parties and their respective successors and assigns. This Assignment may be amended only by a writing signed by the Party against whom or against whose successors enforcement of the change is sought. ASSIGNOR MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND OR NATURE, EXPRESS OR IMPLIED, WITH RESPECT TO THE CONTRACT. ASSIGNEE ACKNOWLEDGES THAT (i) THE CONTRACT IS BEING TRANSFERRED IN "AS IS, WHERE IS" CONDITION AND (ii) ASSIGNEE SHALL HAVE NO RECOURSE AGAINST ASSIGNOR FOR THE CONTRACT. Each Party shall (a) use commercially reasonable efforts to take, or cause to be taken, all actions reasonably necessary, proper or advisable to consummate and make effective the transactions contemplated by this Assignment, (b) execute any documents, instruments or conveyances of any kind which may be reasonably necessary or advisable to carry out any of the transactions contemplated hereunder, and (c) cooperate with the other Party in connection with the foregoing. If one or more of the provisions of this Assignment are deemed by a court of competent jurisdiction, arbitrator or mediator to be unenforceable, in whole or in part, the scope of such provisions shall be reduced to the extent necessary to make them enforceable or, if such reduction is not possible for any reason, such provisions shall be severed from this Assignment entirely, without effect upon the balance hereof. This Assignment shall be governed by, and construed in accordance with, the laws of the State of California, without reference to conflict of laws principles. This Assignment may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one assignment. Each Party hereby agrees that facsimile or electronic (.pdf) signatures shall be valid and binding on the Parties.

*[Signature page follows.]*

EXECUTED to be effective as of the date forth set forth above.

**CONERGY PROJECTS, INC.**  
a California corporation

By: Anthony C. Fotopoulos  
Anthony C. Fotopoulos  
President and Chief Executive Officer

AND

By: Gina M. DiMatteo  
Name: Gina M DiMatteo  
Title: Treasurer

Consented to and Approved by:

**CITY OF SACRAMENTO**  
a municipal corporation

By: \_\_\_\_\_

Title: \_\_\_\_\_

Approved as to form:

\_\_\_\_\_  
City Attorney

**CGY SUTTER'S LANDING, LLC**  
a Colorado limited liability company

By: Conergy Projects, Inc.  
Its: Sole Member

By: Anthony C. Fotopoulos  
Anthony C. Fotopoulos  
President and Chief Executive Officer

AND

By: Gina M. DiMatteo  
Name: Gina M DiMatteo  
Title: Treasurer

Attest:

\_\_\_\_\_  
City Clerk