



**TOWN OF LOS GATOS
COUNCIL AGENDA REPORT**

MEETING DATE: 06/15/2021

ITEM NO: 10

DATE: June 8, 2021
TO: Mayor and Town Council
FROM: Laurel Prevetti, Town Manager
SUBJECT: Authorize the Town Manager to Execute a Five-year Maintenance Agreement with Accela, Inc. for Cloud Migration, Maintenance, and Support of the Accela Automation Permitting Software System, and Authorize a FY 2021/22 Expenditure Budget Adjustment in the Amount of \$174,093 to Cover the Difference of the Two-year Upfront Payment of \$228,649.

RECOMMENDATION:

Authorize the Town Manager to Execute a Five-year Maintenance Agreement with Accela, Inc. for Cloud Migration, Maintenance, and Support of the Accela Automation Permitting Software System, and Authorize a FY 2021/22 Expenditure Budget Adjustment in the Amount of \$174,093 to Cover the Difference of the Two-year Upfront Payment of \$228,649.

BACKGROUND:

In 2006, the Town's Community Development Department upgraded its permitting system from PERMITS-Plus to Accela Automation system. The Accela Automation system tracks all building, planning, and engineering permits as well as code enforcement citations. The public has access to development data online and the Accela system allows for online permitting. The Department has had a maintenance agreement with Accela, Inc. since 2006.

DISCUSSION:

The Town's Community Development Department has requested an upgrade from the current on-premise version of Accela to a cloud hosted version. Migration to a cloud hosted environment will provide an enhanced citizen access portal that will improve the overall user

PREPARED BY: Joel Paulson
Community Development Director

Reviewed by: Town Manager, Assistant Town Manager, Town Attorney, and Finance Director

DISCUSSION (continued):

experience and function during application and monitoring of Town permits. Other benefits include the ability for field staff to utilize a mobile app version that will allow for offline access in areas where internet coverage may be weak or unavailable. The upgrade will also help eliminate the need to host and maintain the infrastructure currently required for our on-premise environment.

The cost for the migration, maintenance, and support for the cloud based Accela for five years is \$597,995. As a cost-effective measure, the multi-year Maintenance Agreement allows for a two-year upfront payment of \$228,649. and a three percent (3%) increase each year. The cost savings over the five-year term is \$44,411 (Attachment 4, Option B). Additionally, Option B, includes a slight discount for new license purchases.

The Community Development Department also requests a budget adjustment for the 2021/2022 fiscal year for Accela in the amount of \$174,093 to cover the two-year upfront payment. Funding for the contract will be provided by the collected four percent (4%) computer surcharge fee.

CONCLUSION:

Staff recommends Council authorize the Town Manager to execute a five-year agreement with Accela, Inc. and authorize a budget adjustment in the amount of \$174,093 to cover the two-year upfront payment.

COORDINATION:

This report was coordinated with the Town Manager's Office, Town Attorney's office, Information Technology Department, and Finance Department.

FISCAL IMPACT:

The cost for the Five-year agreement is \$597,995. These expenditures are budgeted in the Information Technology (IT) Internal Service fund) as part of the IT Support Program. There is sufficient funds available in the IT fund for the additional expenses.

ENVIRONMENTAL ASSESSMENT:

This is not a project defined under CEQA, and no further action is required.

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SUBJECT: Accela Inc.

DATE: June 8, 2021

Attachments:

1. Order Form
2. Subscription Services Agreement
3. Opencities-Subscription-Services-Agreement
4. Statement of Work
5. Cost Comparison Analysis

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2633 Camino Ramon, Suite 500
San Ramon, CA, 94583

Proposed by: Brad Jacobs
Contact Phone:
Contact Email: bjacobs@accela.com
Quote ID: Q-23396
Valid Through: 6/30/2021
Currency: USD

Order Form

Address Information

Bill To:

Town of Los Gatos
110 E. Main Street
Los Gatos, California 95030
United States

Ship To:

Town of Los Gatos
110 E. Main Street
Los Gatos, California 95030
United States

Billing Name: Chris Gjerde
Billing Phone: (408) 354-6814
Billing Email: cgjerde@losgatosca.gov

Services	Year	Start Date	End Date	Term (Months)	Price	Qty	Net Total
Multi User	Year 1	7/1/2021	6/30/2022	12	\$2,641.00	35	\$92,435.00
> Accela Building - SaaS	Year 1	7/1/2021	6/30/2022	12	\$0.00	35	\$0.00
> Accela Planning - SaaS	Year 1	7/1/2021	6/30/2022	12	\$0.00	35	\$0.00
OpenCities - OpenForms	Year 1	7/1/2021	6/30/2022	12	\$92.00	100	\$9,200.00
OpenCities - Department	Year 1	7/1/2021	6/30/2022	12	\$8,500.00	1	\$8,500.00
Accela Data Connector	Year 1	7/1/2021	6/30/2022	12	\$2,500.00	1	\$2,500.00
Training Unit - Training		7/1/2021		60	\$0.00	40	\$0.00
TOTAL:							\$112,635.00

Services	Year	Start Date	End Date	Term (Months)	Price	Qty	Net Total
Multi User	Year 2	7/1/2022	6/30/2023	12	\$2,720.23	35	\$95,208.05
> Accela Building - SaaS	Year 2	7/1/2022	6/30/2023	12	\$0.00	35	\$0.00
> Accela Planning - SaaS	Year 2	7/1/2022	6/30/2023	12	\$0.00	35	\$0.00
OpenCities - OpenForms	Year 2	7/1/2022	6/30/2023	12	\$94.76	100	\$9,476.00
OpenCities - Department	Year 2	7/1/2022	6/30/2023	12	\$8,755.00	1	\$8,755.00
Accela Data Connector	Year 2	7/1/2022	6/30/2023	12	\$2,575.00	1	\$2,575.00
TOTAL:							\$116,014.05

Services	Year	Start Date	End Date	Term (Months)	Price	Qty	Net Total
Multi User	Year 3	7/1/2023	6/30/2024	12	\$2,801.84	35	\$98,064.29

Services	Year	Start Date	End Date	Term (Months)	Price	Qty	Net Total
> Accela Building - SaaS	Year 3	7/1/2023	6/30/2024	12	\$0.00	35	\$0.00
> Accela Planning - SaaS	Year 3	7/1/2023	6/30/2024	12	\$0.00	35	\$0.00
OpenCities - OpenForms	Year 3	7/1/2023	6/30/2024	12	\$97.60	100	\$9,760.28
OpenCities - Department	Year 3	7/1/2023	6/30/2024	12	\$9,017.65	1	\$9,017.65
Accela Data Connector	Year 3	7/1/2023	6/30/2024	12	\$2,652.25	1	\$2,652.25
TOTAL:							\$119,494.47

Services	Year	Start Date	End Date	Term (Months)	Price	Qty	Net Total
Multi User	Year 4	7/1/2024	6/30/2025	12	\$2,885.89	35	\$101,006.22
> Accela Building - SaaS	Year 4	7/1/2024	6/30/2025	12	\$0.00	35	\$0.00
> Accela Planning - SaaS	Year 4	7/1/2024	6/30/2025	12	\$0.00	35	\$0.00
OpenCities - OpenForms	Year 4	7/1/2024	6/30/2025	12	\$100.53	100	\$10,053.09
OpenCities - Department	Year 4	7/1/2024	6/30/2025	12	\$9,288.18	1	\$9,288.18
Accela Data Connector	Year 4	7/1/2024	6/30/2025	12	\$2,731.82	1	\$2,731.82
TOTAL:							\$123,079.31

Services	Year	Start Date	End Date	Term (Months)	Price	Qty	Net Total
Multi User	Year 5	7/1/2025	6/30/2026	12	\$2,972.47	35	\$104,036.41
> Accela Building - SaaS	Year 5	7/1/2025	6/30/2026	12	\$0.00	35	\$0.00
> Accela Planning - SaaS	Year 5	7/1/2025	6/30/2026	12	\$0.00	35	\$0.00
OpenCities - OpenForms	Year 5	7/1/2025	6/30/2026	12	\$103.55	100	\$10,354.68
OpenCities - Department	Year 5	7/1/2025	6/30/2026	12	\$9,566.82	1	\$9,566.82
Accela Data Connector	Year 5	7/1/2025	6/30/2026	12	\$2,813.77	1	\$2,813.77
TOTAL:							\$126,771.68

Pricing Summary

Period	Net Total
Year 1	\$ 112,635.00
Year 2	\$ 116,014.05
Year 3	\$ 119,494.47
Year 4	\$ 123,079.31
Year 5	\$ 126,771.68
Total*	\$ 597,994.51

*Years 1 and 2 Subscription costs are due upon contract signature. Years 3, 4 and 5 will be invoiced annually at the time of contract anniversary.

Additional Terms:

1. No additional or conflicting terms or conditions stated in Customer's order documentation, including purchase orders, will be incorporated into or form any part of this Order Form or the governing agreement, and all such terms or conditions will be null.
2. Use of OpenCities products is subject to the applicable terms and conditions provided at <https://www.opencities.com/files/content/common/general-pages/terms-conditions-north-america/opencities-terms-of-service-north-america.pdf>. The necessary access URL and credentials will be provided to allow the Customer and its Authorized Users access to the subscription service.
3. This Order Form will be governed by the applicable terms and conditions. If those terms and conditions are non-existent, have expired or have otherwise been terminated, the following terms at <https://www.accela.com/terms/> will govern as applicable, based on the Customer's purchase.
4. All Software Licenses, Maintenance, and Subscription purchases are non-cancelable and non-refundable.
5. If Customer has a prior agreement with Accela, and this purchase is co-terming with that prior agreement, if the start date on this Order Form is before the actual delivery date of the purchase, Accela may pro-rate this purchase so that it can co-term with the prior agreement.
6. If this Order Form is executed and/or returned to Accela by Customer after the Order Start Date above, Accela may adjust the Order Start Date and Order End Date without increasing the total price based on the date Accela activates the products and provided that the total term length does not change.
7. Accela will provide Training to Town of Los Gatos employees at a mutually agreed upon facility and date. Customer shall be responsible for all other costs and expenses incurred in connection with the Training including, but not limited to, travel, meals, incidentals, and lodging on behalf of its personnel. All Training shall be conducted in English and, to the extent Customer's personnel do have adequate English language reading and comprehension skills, Customer shall be responsible for providing appropriate interpretation and translation services necessary to ensure its personnel can participate in a meaningful and effective way in the Training provided by Accela. Customer employees may be required to take a test(s) and document their attendance during the Training. If a test(s) is given, a certificate of completion will be awarded to those individuals that complete and pass the required test(s). Ownership of any and all Training materials, including, but not limited to, all copies and derivative works, shall remain with Accela.

IN WITNESS WHEREOF, the Town and Consultant have executed this Agreement.

Town of Los Gatos by:

Consultant By:

Laurel Prevetti Town Manager

Aaton Haggarty, Chief Legal Officer
Accela, Inc.

Recommended by:

Joel Paulson, Community Development
Director

Approved as to Form:

Robert Schultz, Town Attorney

Attest:

Shelley Neis, MMC, CPMC, Town Clerk



ACCELA SUBSCRIPTION SERVICES AGREEMENT

This Accela Subscription Services Agreement (this "**Agreement**") is entered into as of the date of the applicable Order, as defined below, that incorporates these terms (the "**Effective Date**") by and between Accela, Inc. and the entity identified in such Order ("**Customer**").

1. DEFINITIONS.

1.1 "**Accela System**" means the information technology infrastructure used by or on behalf of Accela in performing the Subscriptions Services, including all computers, software (including but not limited to Accela Software), hardware, databases, electronic systems (including database management systems), and networks, whether operated directly by Accela or its third party suppliers.

1.2 "**Aggregate Data**" means data and information related to Customer's use of the Subscription Services, including anonymized analysis of all data processed in the Subscription Services, that is used by Accela in an aggregate and anonymized manner, including compiling statistical and performance information related to the provision and operation of the Services.

1.3 "**Authorized User**" means one named employee, contractor or agent of Customer (each identified by a unique email address) for whom Customer has purchased a subscription to the Subscription Services and who is authorized by Customer to access and use the Services under the rights granted to Customer pursuant to this Agreement.

1.4 "**Consulting Services**" means packaged or time and materials consulting, review, training or other services (but excluding Subscription and Support Services) delivered by Accela to Customer pursuant an Order. The current Consulting Services Policy is available at www.accela.com/terms/.

1.5 "**Customer Data**" means the content, materials, and data that Customer, Authorized Users, and External Users enter into the Subscription Services. Customer Data does not include any component of the Subscription Services, material provided by or on behalf of Accela, or Aggregate Data.

1.6 "**Documentation**" means the then-current technical and functional user documentation in any form made generally available by Accela for the Subscription Services.

1.7 "**External Users**" means third party users of the Subscription Services that access the public-facing interfaces of the Subscription Services to submit queries and requests to facilitate communications between such third party and Customer.

1.8 "**Intellectual Property Rights**" means any patent rights (including, without limitation, patent applications and disclosures), copyrights, trade secrets, know-how, and any other intellectual property rights, in all cases whether or not registered or registrable and recognized in any country or jurisdiction in the world.

1.9 "**Order**" means an Accela order form or other mutually acceptable document fully executed between Customer and Accela that incorporates this Agreement.



1.10 “**Service Availability Policy**” means the Service Availability and Security Policy located at www.accela.com/terms/.

1.11 “**Subscription Services**” means the civic administration services, comprised of the Accela System, Software, and Support Services, to which Customer may license access to in accordance with the terms herein.

1.12 “**Software**” means any licensed software (including client software for Authorized Users’ devices) and Documentation that Accela uses or makes available as part of the Subscription Services.

1.13 “**Support Services**” means those technical and help services provided by Accela in accordance with the Software Support Services Policies (SaaS) located at www.accela.com/terms/.

1.14 “**Subscription Period**” means the duration of Customer’s authorized use of the Subscription Services as designated in the Order.

2. **USAGE AND ACCESS RIGHTS.**

2.1 Right to Access. Subject to the terms and conditions of this Agreement, Accela hereby grants to Customer a limited, non-exclusive, non-transferable right and license during the Subscription Period, to permit: (i) Authorized Users to access and use the internal and administrative interfaces of the Subscription Services in accordance with the Documentation to support Customer’s internal business purposes and (ii) its External Users the ability to access and use the publicly available interfaces to submit requests and information to Customer. Each instance of the Subscription Service shall be provisioned with the amount of storage set forth in the Order and additional storage may be purchased at the then-current rates.

2.2 Support Services & Service Availability. During the Subscription Period, Accela shall provide to Customer the Support Services specified in the Order and shall make all commercially reasonable efforts to attain the service levels specified in the applicable policies. The remedies set forth in the Support Services and Service Availability Policy are the sole and exclusive remedies for any breach of the service levels. Customer grants Accela a royalty-free, worldwide, transferable, sub- licensable, irrevocable, perpetual license to use or incorporate into its software or services any suggestions or other feedback provided by Customer or Authorized Users relating to the operation or features of the Subscription Services.

2.3 Purchasing Consulting Services. Customer may purchase Consulting Services from Accela by executing an Order for such services. All prices are exclusive of travel and expenses, which will be invoiced at actual cost, without markup, and will comply with the Consulting Services Policy located at www.accela.com/terms/ or as otherwise agreed in the applicable Order. If applicable, one Consulting Services day shall be equal to eight (8) hours.

2.4 Restrictions on Use. Customer shall not, and shall not permit others to: (i) use or access the Subscription Services in any manner except as expressly permitted by the Agreement, including but not limited to, in a manner that circumvents contractual usage restrictions set forth in this Agreement; (ii) license, sub-license, sell, re-sell, rent, lease, transfer, distribute, time share or otherwise make any portion of the Subscription Services available for access by third parties except as otherwise expressly provided herein; (iii) use the Subscription Service in a way that: (a) violates or infringes upon the rights



of a third party; or (b) stores or transmits libelous, tortious, or otherwise unlawful material or malicious code or viruses; (iv) create derivative works, reverse engineer, decompile, disassemble, copy, or otherwise attempt to derive source code or other trade secrets from or about any of the Subscription Services (except to and only to the extent such rights are proscribed by law); (v) interfere with or disrupt the security, integrity, operation, or performance of the Subscription Services; (vi) access, use, or provide access or use to the Subscription Services or Documentation for the purposes of competitive analysis or the development, provision, or use of a competing software, SaaS or product or any other purpose that is to Accela's detriment or commercial disadvantage; (vii) provide access to the Subscription Services to competitors of Accela; (viii) access or use components of the Subscription Service not licensed by Customer; (ix) use or allow the use of the Subscription Services by anyone located in, under the control of, or that is a national or resident of a U.S. embargoed country or territory or by a prohibited end user under Export Control Laws (as defined in Section 12.3, Compliance with Laws); (x) remove, delete, alter or obscure any trademarks, Documentation, warranties, or disclaimers, or any copyright, trademark, patent or other intellectual property or proprietary rights notices from any Subscription Services; or (xi) access or use the Subscription Services in, or in association with, the design, construction, maintenance, or operation of any hazardous environments, systems or applications, any safety response systems or other safety-critical applications, or any other use or application in which the use or failure of the Subscription Services could lead to personal injury or severe physical or property damage.

2.5 Ownership. Accela retains all Intellectual Property Rights, including all rights, title and license to the Subscription Service, Software, Accela System, Support Services, Consulting Services, and Aggregate Data, any related work product of the foregoing and all derivative works thereof by whomever produced; provided however, that to the extent such materials are delivered to Customer as part of the Subscription Services, Consulting Services or Support Services then Customer shall receive a limited license consistent with the terms of Section 2 to use such materials during the Subscription Period.

2.6 Customer's Responsibilities. Customer will: (i) be responsible for meeting Accela's applicable minimum system requirements for use of the Subscription Services set forth in the Documentation; (ii) be responsible for Authorized Users' compliance with this Agreement and for any other activity (whether or not authorized by Customer) occurring under Customer's account; (iii) be solely responsible for the accuracy, quality, integrity and legality of Customer Data; (iv) use commercially reasonable efforts to prevent unauthorized access to or use of the Subscription Services and Customer Data under its account, and notify Accela promptly of any such unauthorized access or use, and; (v) use the Subscription Services only in accordance with the applicable Documentation, laws and government regulations.

3. PAYMENT TERMS.

3.1 Purchases Directly from Accela. Except as otherwise set forth in an Order, Subscription fees shall be invoiced annually in advance and such fees shall be due and payable on the first day of the Subscription and on each anniversary thereafter for each renewal, if any. All other invoices shall be due and payable net thirty (30) from the date of the applicable invoice. All amounts payable to Accela under this Agreement shall be paid by Customer in full without any setoff, deduction, debit, or withholding for any reason. Any late payments shall be subject to an additional charge of the lesser of 1.5% per month or the maximum permitted by law. All Subscription Services fees are exclusive of any taxes, levies, duties,



withholding or similar governmental assessments of any nature (collectively, "**Taxes**"). If any such Taxes are owed or payable for such transactions, they shall be paid separately by Customer without set-off to the fees due Accela.

3.2 Purchases from Authorized Resellers. In the event that Customer has purchased any products or services through a reseller, subject to these terms, any separate payment arrangements and terms shall be exclusively through such reseller and Accela is not a party to such transactions. Accela's sole obligations are set forth herein and Customer acknowledges that its rights hereunder may be terminated for non-payment to such third party.

4. **CONFIDENTIALITY.** As used herein, "**Confidential Information**" means all confidential information disclosed by a one party to this Agreement to the other party of this Agreement whether orally or in writing, that is designated as confidential or that reasonably should be understood to be confidential given the nature of the information and the circumstances of disclosure. However, Confidential Information will not include any information that: (i) is or becomes generally known to the public without breach of any obligation owed to the disclosing party; (ii) was known to the receiving party prior to its disclosure without breach of any obligation owed to the disclosing party; (iii) is received without restriction from a third party without breach of any obligation owed to the disclosing party; or (iv) was independently developed by the receiving party. Each party will use the same degree of care that it uses to protect the confidentiality of its own confidential information of like kind (but in no event less than reasonable care) not to disclose or use any Confidential Information except as permitted herein, and will limit access to Confidential Information to those of its employees, contractors and agents who need such access for purposes consistent with this Agreement and who are bound to protect such Confidential Information consistent with this Agreement. The receiving party may disclose Confidential Information if it is compelled by law to do so, provided the receiving party gives the disclosing party prior notice of such compelled disclosure (to the extent legally permitted) and reasonable assistance, at the disclosing party's request and cost, to contest, limit, or protect the disclosure.

5. **CUSTOMER DATA.**

5.1 Ownership. Customer reserves all its rights, title, and interest in and to the Customer Data. No rights are granted to Accela hereunder with respect to the Customer Data, except as otherwise set forth explicitly in Section 5.

5.2 Usage. Customer shall be responsible for Customer Data as entered in to, applied or used in the Subscription Services. Customer acknowledges that Accela generally does not have access to and cannot retrieve lost Customer Data. Customer grants to Accela the non-exclusive right to process Customer Data (including personal data) for the sole purpose of and only to the extent necessary for Accela: (i) to provide the Subscription Services; (ii) to verify Customer's compliance with the restrictions set forth in Section 2.4 (Restrictions on Use) if Accela has a reasonable belief of Customer's non-compliance; and (iii) as otherwise set forth in this Agreement. Accela may utilize the information concerning Customer's use of the Subscription Services (excluding any use of Customer's Confidential Information) to improve Subscription Services, to provide Customer with reports on its use of the Subscription Services, and to compile aggregate statistics and usage patterns by customers using the Subscription Services.

5.3 Use of Aggregate Data. Customer agrees that Accela may collect, use and disclose Aggregate Data derived from the use of the Subscription Services for industry analysis, benchmarking, analytics,



marketing and other business purposes. All Aggregate Data collected, used and disclosed will be in aggregate form only and will not identify Customer, its Authorized Users or any third parties utilizing the Subscription Services.

6. WARRANTIES AND DISCLAIMERS.

6.1 Subscription Services Warranty. During the Subscription Period, Accela warrants that Subscription Services shall perform materially in accordance with the applicable Documentation. As Customer's sole and exclusive remedy and Accela's entire liability for any breach of the foregoing warranty, Accela will use commercially reasonable efforts to: (a) repair the Subscription Services in question; (b) replace the Subscription Services in question with those of substantially similar functionality; or (c), after making all commercially reasonable attempts to do the foregoing, terminate the applicable Subscription Services and refund all unused, prepaid fees paid by Customer for such non-compliant Subscription Services.

6.2 Consulting Services Warranty. For ninety (90) days from the applicable delivery, Accela warrants that Consulting Services shall be performed in a professional and workmanlike manner. As Customer's sole and exclusive remedy and Accela's entire liability for any breach of the foregoing warranty, Accela will use commercially reasonable efforts to (a) re-perform the Consulting Services in a compliant manner; or, after making all commercially reasonable attempts to do the foregoing, (b) refund the fees paid for the non-compliant Consulting Services.

6.3. Disclaimers. EXCEPT AS EXPRESSLY PROVIDED HEREIN, ACCELA MAKES NO WARRANTY OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, AND SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY, SECURITY, FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW.

6.4. Cannabis-Related Activities. If Customer purchases any Subscription Services for use with any cannabis-related activities, the following additional disclaimers shall apply: Accela is considered a software service provider to its customers and not a cannabis related business or agent thereof. In addition to the foregoing, Accela only retains Subscription Services fees of this Agreement from its Customer for general software services, a state or local government agency, and does not retain these fees from any type of External Users. It is the sole responsibility of the Customer to offer state law compliant services, which may be coordinated and facilitated through the use of the Subscription Services. Accela makes no representations, promises, or warranties with respect to the legality, suitability, or otherwise regarding any third party provider, including partners, and have no responsibility or liability with respect to services provided to Customer by such third parties.

7. INDEMNIFICATION. Accela will defend (or at Accela's option, settle) any third party claim, suit or action brought against Customer to the extent that it is based upon a claim that the Subscription Services, as furnished by Accela hereunder, infringes or misappropriates the Intellectual Property Rights of any third party, and will pay any costs, damages and reasonable attorneys' fees attributable to such claim that are finally awarded against Customer, provided that Customer provides: (a) Accela notice of such claim as soon practical and in no event later than would reasonably permit Accela to respond to such claim, (b) reasonable cooperation to Accela, at Accela's expense, in the defense and/or settlement of such claim and (c) Accela the sole and exclusive control of the defense, litigation and settlement of such claim. In the event that Accela reasonably believes, in its sole discretion, that such claim may



prevail or that the usage of the Subscription Services may be joined, Accela may seek to: (a) modify the Subscription Services such that it will be non-infringing (provided such modification does not materially reduce the functionality or performance of Customer's installed instance); (b) replace the Subscription Services with a service that is non-infringing and provides substantially similar functionality and performance; or, if the first two options are not commercially practicable, (c) terminate the remainder of the Subscription Period and refund any, pre-paid, unused fees received by Accela. Accela will have no liability under this Section 7 to the extent any claims arise from (i) any combination of the Subscription Services with products, services, methods of a third party; (ii) a modification of the Subscription Services that were either implemented by anyone other than Accela or implemented by Accela in accordance with Customer specifications; (iii) any use of the Subscription Services in a manner that violates this Agreement or the instructions given to Customer by Accela; (iv) a version of the Subscription Services other than the current, fully patched version, provided such updated version would have avoided the infringement; or (v) Customer's breach of this Agreement. THIS SECTION 7 STATES THE ENTIRE OBLIGATION OF ACCELA AND ITS LICENSORS WITH RESPECT TO ANY ALLEGED OR ACTUAL INFRINGEMENT OR MISAPPROPRIATION OF INTELLECTUAL PROPERTY RIGHTS RELATED TO THIS AGREEMENT.

8. **LIMITATION OF LIABILITY.** EXCEPT FOR LIABILITY ARISING OUT OF EITHER PARTY'S LIABILITY FOR DEATH OR PERSONAL INJURY OR CUSTOMER'S BREACH OF SECTION 2, NEITHER PARTY'S AGGREGATE LIABILITY FOR DAMAGES ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR FROM THE USE OF OR INABILITY TO USE THE SERVICE, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, SHALL EXCEED THE TOTAL AMOUNT PAID BY CUSTOMER HEREUNDER IN THE TWELVE (12) MONTH PERIOD IMMEDIATELY PRECEDING THE INCIDENT. EXCEPT FOR LIABILITY ARISING OUT OF CUSTOMER'S BREACH OF SECTION 2 OR EITHER PARTY'S LIABILITY FOR DEATH OR PERSONAL INJURY, IN NO EVENT SHALL EITHER PARTY OR ANY OTHER PERSON OR ENTITY INVOLVED IN CREATING, PRODUCING OR DELIVERING THE SERVICE BE LIABLE FOR ANY INCIDENTAL, SPECIAL, EXEMPLARY OR CONSEQUENTIAL DAMAGES, INCLUDING LOST PROFITS, LOSS OF DATA OR LOSS OF GOODWILL, SERVICE INTERRUPTION, COMPUTER DAMAGE OR SYSTEM FAILURE OR THE COST OF SUBSTITUTE PRODUCTS OR SERVICES, ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR FROM THE USE OF OR INABILITY TO USE THE SUBSCRIPTION SERVICES, WHETHER BASED ON WARRANTY, CONTRACT, TORT (INCLUDING NEGLIGENCE), PRODUCT LIABILITY OR ANY OTHER LEGAL THEORY. THE FOREGOING EXCLUSIONS APPLY WHETHER OR NOT A PARTY HAS BEEN INFORMED OF THE POSSIBILITY OF SUCH DAMAGE, AND EVEN IF A LIMITED REMEDY SET FORTH HEREIN IS FOUND TO HAVE FAILED OF ITS ESSENTIAL PURPOSE.

9. **SECURITY.** Accela has implemented commercially viable and reasonable information security processes, policies and technology safeguards to protect the confidentiality and integrity of Customer Data, personal data protect against reasonably anticipated threats. Customer acknowledges that, notwithstanding security features of the Subscription Services, no product, hardware, software or service can provide a completely secure mechanism of electronic transmission or communication and that there are persons and entities, including enterprises, governments and quasi- governmental actors, as well as technologies, that may attempt to breach any electronic security measure. Subject only to its limited warranty obligations set forth in Section 6, Accela will have no liability for any such security breach. Customer further acknowledges that the Subscription Services is not guaranteed to operate without interruptions, failures, or errors. If Customer or Authorized Users use the Subscription Services



in any application or environment where failure could cause personal injury, loss of life, or other substantial harm, Customer assumes any associated risks and will indemnify Accela and hold it harmless against those risks.

10. **THIRD PARTY SERVICES.** Customer may choose to obtain a product or service from a third party that is not directly produced by Accela as a component of the Subscription Services ("**Third Party Services**") and this may include third party products resold by Accela. Accela assumes no responsibility for, and specifically disclaims any liability, warranty or obligation with respect to, any Third Party Service or the performance of the Subscription Services (including Accela's service level commitment) when the Subscription Services are used in combination with or integrated with Third Party Services.

11. **TERM AND TERMINATION.**

11.1 **Agreement Term.** This Agreement shall become effective on the Effective Date and shall continue in full force and effect until the expiration of any Subscription Periods set forth in an applicable Order governed by the Agreement.

11.2 **Subscription Periods & Renewals.** Subscription Periods begin as specified in the applicable Order and, unless terminated earlier in accordance with this Agreement, continue for the term specified therein. Except as otherwise specified in the applicable Order, (a) all Subscription Services will automatically renew for additional Subscription Periods equal to the expiring Subscription Period, unless either party gives the other at least sixty (60) days' notice of non-renewal before the end of the relevant Subscription Period and (b), Orders may only be cancelled or terminated early in accordance with Section 11.3. Subscription Services renewals may be subject to an annual increase, for which Accela shall provide Customer notice prior to the renewal of the Subscription Period. In the event of any non-renewal or other termination, Customer's right to use the Subscription Services will terminate at the end of the relevant Subscription Period.

11.3 **Termination or Suspension for Cause.** A party may terminate this Agreement and Subscription Services license granted hereunder for cause upon thirty (30) days' written notice to the other party of a material breach if such breach remains uncured at the expiration of such thirty (30) day period. Either party may terminate immediately if the other party files for bankruptcy or becomes insolvent. Accela may, at its sole option, suspend Customer's or any Authorized User's access to the Subscription Services, or any portion thereof, immediately if Accela: (i) suspects that any person other than Customer or an Authorized User is using or attempting to use Customer Data; (ii) suspects that Customer or an Authorized User is using the Subscription Services in a way that violates this Agreement and could expose Accela or any other entity to harm or legal liability; (iii) is or reasonably believes it is required to do so by law or court order or; (iv) Customer's payment obligations are more than ninety (90) days past due, provided that Accela has provided at least thirty (30) days' notice of such suspension for delinquent payment. Should Customer terminate this Agreement for cause, Accela will refund a pro-rata portion of unused, pre-paid fees.

11.4 **Effect of Termination.** If this Agreement expires or is terminated for any reason: (i) within thirty (30) calendar days following the end of Customer's final Subscription Period, upon Customer's request Accela provided Customer Data and associated documents in a database dump file; provided that Customer pays (a) all costs of and associated with such copying, as calculated at Accela's then-current time-and-materials rates, and (b) any and all unpaid amounts due to Accela; (ii) licenses and use rights



granted to Customer with respect to Subscription Services and intellectual property will immediately terminate; and (iii) Accela's obligation to provide any further services to Customer under this Agreement will immediately terminate, except as mutually agreed between the parties. If the Subscription Services are nearing expiration date or are otherwise terminated, Accela will initiate its data retention processes, including the deletion of Customer Data from systems directly controlled by Accela. Accela's current Data Storage Policy can be accessed www.accela.com/terms/.

11.5 Survival. Sections 2.5 (Ownership and Proprietary Rights), 4 (Confidentiality), 6.3 (Disclaimer), 8 (Limitation of Liability), 11.4 (Effect of Termination), 11.5 (Surviving Provisions), and 12 (General Provisions) will survive any termination or expiration of this Agreement.

12. GENERAL.

12.1 Notice. Except as otherwise specified in this Agreement, all notices, permissions and approvals hereunder will be in writing and will be deemed to have been given upon: (i) personal delivery; (ii) three days after sending registered, return receipt requested, post or; (iii) one day after sending by commercial overnight carrier. Notices will be sent to the address specified by the recipient in writing when entering into this Agreement or establishing Customer's account for the Subscription Services.

12.2 Governing Law and Jurisdiction. This Agreement and any action related thereto will be governed by the laws of the State of California without regard to its conflict of laws provisions. The exclusive jurisdiction and venue of any action related to the subject matter of this Agreement will be the state and federal courts located in the Northern District of California and each of the parties hereto waives any objection to jurisdiction and venue in such courts.

12.3 Compliance with Laws. Each party will comply with all applicable laws and regulations with respect to its activities under this Agreement including, but not limited to, export laws and regulations of the United States and other applicable jurisdictions. Further, in connection with the services performed under this Agreement and Customer's use of the Subscription Services, the parties agree to comply with all applicable anti-corruption and anti-bribery laws, statutes and regulations.

12.4 Assignment. Customer may not assign or transfer this Agreement, whether by operation of law or otherwise, without the prior written consent of Accela, which shall not be unreasonably withheld. Any attempted assignment or transfer, without such consent, will be null and void. Subject to the foregoing, this Agreement will bind and inure to the benefit of the parties, their respective successors and permitted assigns.

12.5 Publicity. Notwithstanding anything to the contrary, each party will have the right to publicly announce the existence of the business relationship between parties without disclosing the specific terms of the Agreement.

12.6 Miscellaneous. No failure or delay by either party in exercising any right under this Agreement will constitute a waiver of that right. Other than as expressly stated herein, the remedies provided herein are in addition to, and not exclusive of, any other remedies of a party at law or in equity. If any provision of this Agreement is held by a court of competent jurisdiction to be contrary to law, the provision will be modified by the court and interpreted so as best to accomplish the objectives of the original provision to the fullest extent permitted by law, and the remaining provisions of this Agreement will remain in effect. Accela will not be liable for any delay or failure to perform under this Agreement to the extent such



delay or failure results from circumstances or causes beyond the reasonable control of Accela. This Agreement does not create a partnership, franchise, joint venture, agency, fiduciary or similar relationship between the parties. This Agreement, including any attachments hereto as mutually agreed upon by the parties, constitute the entire agreement between the parties concerning its subject matter and it supersedes all prior communications, agreements, proposals or representations, written or oral, concerning its subject matter. No modification, amendment, or waiver of any provision of this Agreement will be effective unless in writing and signed by a duly authorized representative of each party against whom the modification, amendment or waiver is to be asserted. Notwithstanding any language to the contrary, no additional or conflicting terms or conditions stated in any of Customer's purchase order documentation or otherwise will be incorporated into or form any part of this Agreement, and all such terms or conditions shall be null and void.

IN WITNESS WHEREOF, the Town and Consultant have executed this Agreement.

Town of Los Gatos by:

Consultant By:

Laurel Prevetti Town Manager

Aaton Haggarty, Chief Legal Officer
Accela, Inc.

Recommended by:

Joel Paulson, Community Development
Director

Approved as to Form:

Robert Schultz, Town Attorney

Attest:

Shelley Neis, MMC, CPMC, Town Clerk

OPENCITIES SERVICES AGREEMENT

1. DEFINITIONS. The following capitalized terms will have the following meanings whenever used in this Agreement.

- 1.1. “Acceptable Use Policy” (“AUP”) means, as of any date, the version of OpenCities’ acceptable use policy posted at <http://help.OpenCities.com> as of such date.
- 1.2. “Business Day” means a day other than a Saturday or a Sunday on which banks in the State of California are open for business.
- 1.3. “Core Module” means the individual modules that are included within the Services. From time to time, new Core Modules will be introduced to the Services via Version Updates which are included in the Fees paid by Customer.
- 1.4. “Customer Data” means any and all data and information, including text, graphics, photographs, audio-visual elements, music, illustrations, video or other content, domain names, email, chat room content, bulletin board postings, or any other items or materials of Customer, any user or any other third party provided or permitted by Customer to be made available by or to reside within the Services or Customer’s Website.
- 1.5. “Customer’s Website” means the website(s) created by or on behalf of Customer through use of the Services for Customer’s internal business purposes.
- 1.6. “Customizations” has the meaning ascribed to it in Section 2.2(f).
- 1.7. “Documentation” means OpenCities’ standard user documentation and any other operating, training and reference manuals related to the Services, all of which are contained in the OpenCities Help Center.
- 1.8. “Integrations” means optional enhancements to the Services involving third party products or services, which are offered separately by OpenCities and are available for purchase by Customer via the OpenCities Help Center.
- 1.9. “Intellectual Property Rights” means all intellectual or industrial property, including without limitation any copyright, trade or service mark, patent, moral right, trade secret, logo, know how, rights in relation to inventions, drawings, discoveries, improvements, technical data, formulae, computer programs, know-how, logos, designs, circuit layouts, domain names, business names, software, whether or not now existing, and whether or not registered or unregistered rights, and rights in respect of Confidential Information.
- 1.10. “Malicious Code” means code, files scripts, agents or programs intended to do harm, including, for example, viruses, worms, time bombs and Trojan horses.
- 1.11. “Order” means an OpenCities, or an OpenCities’ authorized reseller, order form or other mutually acceptable document that expressly incorporates this Agreement and is duly executed by Customer and, as applicable, OpenCities or an OpenCities authorized reseller.
- 1.12. “OpenCities Help Center” means the Documentation and the specifications for the Services (the “Specifications”) currently posted at <http://help.OpenCities.com>.

- 1.13. “Privacy Policy” means, as of any date, OpenCities’ privacy policy posted at <http://help.OpenCities.com> as of such date.
- 1.14. “Scheduled Maintenance Window” means the date and time slot identified by OpenCities in a written notice given to Customer via the OpenCities Help Center no later than 5 Business Days prior to the proposed Scheduled Maintenance Window to enable maintenance work and Version Updates to be performed. The Scheduled Maintenance Window will be outside of Customer’s normal business hours and periods of peak demand, whenever reasonably possible.
- 1.15. “Services” means the components of OpenCities’ proprietary content management system set forth in the Order, including, as applicable, data traffic management, website publishing and web hosting services, and any Version Updates and Core Modules released by OpenCities, and all related Specifications and Documentation.
- 1.16. “SLA” or “Service Level Agreement” means, as of any date, OpenCities’ service level agreement, the current version of which is set forth in Schedule A.
- 1.17. “Support Services” means the support and maintenance services provided by OpenCities in accordance with Article 3.
- 1.18. “Term” is defined in Section 12.1 below.
- 1.19. “Version Updates” means updated versions of the Services (indicated by a higher numerical version number) developed by OpenCities with enhancements or additions to the functionality, and/or performance improvements and bug fixes.

2. SCOPE AND USAGE OF SERVICES.

- 2.1. Use of Services. During the Term and upon payment of the applicable Fees set out in the applicable Order, OpenCities shall make the Services available to Customer in accordance with the terms of this Agreement solely for Customer’s internal business purposes. Customer may permit an unlimited number of its employees and its contractors to use the Services provided their use is solely for Customer’s internal business purposes and at all times in compliance with the terms of this Agreement. Customer agrees to be responsible for any breach of this Agreement by its contractors.
- 2.2. Provision of Services. Upon payment of the applicable Fees and subject to the terms of the applicable Order and the other terms and conditions hereof, OpenCities will use commercially reasonable efforts to provide the Services to Customer during the Term and to ensure the Services are available in accordance with the then applicable Service Level Agreement.
- 2.3. Professional Services. Upon payment of the applicable Fees and subject to the terms of the applicable Order and the other terms and conditions hereof, OpenCities may provide certain professional services to Customer, including developer training and custom development services (“Professional Services”). Any Professional Services to be supplied by OpenCities will be provided pursuant to a separate statement of work executed by Customer and OpenCities. Except as otherwise provided in an Order, all such Professional Services will be charged on a time and materials basis at OpenCities then-current rates for the applicable Professional Services.

OpenCities agrees that any custom software developed by OpenCities (“Custom Software”) will be compatible with the then-current version of the Services in accordance with the terms set forth in the applicable statement of work. Customer acknowledges that the support and maintenance services set out in Article 3 will not be provided for any Custom Software and that Custom Software is not covered by the Service Level Agreement. If Customer desires to obtain support for any Custom Software, any support offered by OpenCities will be charged on a time and materials basis at OpenCities’ then-current rates for such support. Any Custom Software developed by OpenCities shall be the property of OpenCities. Effective upon delivery of any such Custom Software to Customer, OpenCities grants Customer a nonexclusive, non-transferable, fully paid license to copy, modify, create derivative works of and use such Custom Software solely as part of Customer’s Website during the Term. All modifications and derivative works of the Services by whomever produced shall be the property of OpenCities.

2.4. Use of Third-Party Service Providers. Customer acknowledges that OpenCities has, and in the future may, retain one or more third party service providers to supply certain aspects of the Services, including certain of the facilities, equipment, products, services and connectivity necessary to offer the Services. Customer acknowledges that OpenCities currently obtains web hosting services from a third party, and that OpenCities has no responsibility or liability for any third-party services.

2.5. Documentation: Customer may reproduce and use the Documentation solely as necessary to support its use of the Services during the Term.

2.6. Users of Customer’s Website. Customer may authorize an unlimited number of users to access and use Customer’s Website. Customer agrees that it is not authorized to, and agrees not to, make any representations or warranties regarding the Services or OpenCities to any user or third party, and further agrees not to otherwise create or purport to create any obligations or liabilities on the part of OpenCities. Customer agrees to indemnify OpenCities for its and any user’s acts and omissions related to Customer’s Website and/or the Services. OpenCities has no obligation to provide support or any other services, or any SLA or other remedies, to such users.

3. MAINTENANCE AND SUPPORT SERVICES.

3.1. Maintenance and Support; SLA. Subject to the other provisions of the Order, this Article 3 and Customer’s payment of all applicable Fees, during the Term:

- (a) OpenCities will provide the remedies listed in the SLA for any defect, error, or failure of the Services or in the Documentation in accordance with the SLA. Such remedies are Customer’s sole remedy for any failure of or defect in the Services or the Documentation, and Customer recognizes and agrees that if the SLA does not list a remedy for a given failure, it has no remedy. Any credits issued pursuant to the SLA for failure to meet the uptime guarantee specified in the SLA will apply to outstanding or future invoices only and are forfeited upon termination of this Agreement. OpenCities is not required to issue refunds or to make payments against such credits under any circumstances, including without limitation after termination of this Agreement.
- (b) OpenCities may revise the SLA or the features and functions of the Services at any time, provided no such revision materially reduces the features or functionality provided to

Customer as set forth herein.

- (c) OpenCities will provide Customer with Version Updates. Customer acknowledges that Version Updates are mandatory and necessary for the proper function and security of the Services. Customer agrees to the implementation of all Version Updates by OpenCities. Implementation will occur during a Scheduled Maintenance Window. Any SaaS downtime or functionality issues arising during a Scheduled Maintenance Window will not be subject to the Service Level Agreement.
- (d) OpenCities grants Customer personnel unlimited access to the OpenCities Help Center to review the Documentation and Specifications. Customer acknowledges and agrees that it does not have an unlimited right to request maintenance and support services through the OpenCities Help Center; requests for maintenance and support must be made in compliance with paragraph (e) hereof.
- (e) OpenCities will make available to Customer an online and telephone help desk service, which will allow 2 designated support representatives of Customer who have received training in the Services to request maintenance and support services in accordance with the Service Level Agreement. Requests from other personnel will not be accepted. The contact details for the online and telephone help desk support services are set out in Schedule A.
- (f) Notwithstanding the provisions of paragraphs (d) and (e) above, where Customer's Website is experiencing a Severity 1 problem, any Customer personnel may contact OpenCities via the telephone help desk to report the Severity 1 problem.

3.2. Scheduled and Emergency Maintenance. OpenCities agrees to use commercially reasonable efforts to conduct all SaaS maintenance within a Scheduled Maintenance Window. However, Customer acknowledges that an unplanned event may occur that will require the need for OpenCities to perform maintenance on the Services on an emergency basis outside of a Scheduled Maintenance Window. OpenCities will use reasonable efforts to give Customer advance notice of emergency maintenance, but it is possible that advance notification of emergency maintenance will not occur. Any SaaS downtime or functionality issues during the Scheduled Maintenance Window or during emergency maintenance will not be subject to the Service Level Agreement.

3.3 Conditions. OpenCities provision of the maintenance and support services set forth in this Article 3 is subject to the following conditions: (a) Customer must document and promptly report all errors or malfunctions of the Services to OpenCities or its assigned agents and representatives; (b) Customer must carry out procedures to rectify errors or malfunctions within a reasonable period after receiving instructions from OpenCities on such procedures; and (c) Customer must provide OpenCities with reasonable access to Customer's personnel, its assigned agents and representatives as required by OpenCities to meet its obligations under this Agreement.

3.4 Exclusions. OpenCities is under no obligation to provide the maintenance and support services specified in this Article 3 if they are requested as a result of or related to: (a) operation of

the Services with other media and hardware, or services or interfaces not authorized or maintained in accordance with this Agreement or the Documentation; (b) use of the Services that is not in accordance with the Documentation; (c) any modification, alteration or addition or attempted modification, alteration or addition to the Services (unless such modifications were developed by OpenCities or authorised by OpenCities in writing); (d) failure of any data service, internet service, hosting service or any other third-party service, or failure of a telecommunications connection, hardware, software, web services, or third party content, software, or equipment; or (e) any non-reproducible error or defect reported by Customer.

3.5 Abuse of Maintenance Services. In the event Customer abuses the maintenance and support services offered by OpenCities (e.g. by declaring a problem Severity Level 1 when it is only Severity Level 2, 3 or 4, unless such distinction could not reasonably have been determined, or by reporting problems which are not Severity 1 during non-business hours) an "Abuse Incident" will be noted, and OpenCities will inform Customer of such.

4. FEES AND PAYMENT TERMS.

4.1 Subscription Fees. Except as otherwise provided in the Order, Customer will pay OpenCities the annual subscription and other fees set forth in the Order (the "Fees") during the Initial Term and the applicable Fees for each Renewal Term, which Fees are based on the resident population of Customer. Except as otherwise expressly provided in this Agreement, all Fees are non-cancelable and non-refundable. Except as otherwise provided in the Order, the Fees for the first year of the Initial Term are payable within 30 days of execution of this Agreement, and the Fees for each successive year during the Initial Term and each Renewal Term shall be payable net 30 days from the date of OpenCities' invoice.

4.2 Fee Adjustments. Upon expiration of the Initial Term, Fees may be adjusted for each Renewal Term to take into account any increases in the Consumer Price Index for all Items as published by the US Bureau of Labor Statistics. OpenCities shall notify Customer of any Fees adjustments made pursuant to this Section 4.2 at least seventy (70) days prior to the commencement of the applicable Renewal Term.

4.3 Overdue Charges. Except as otherwise provided in the Order, if any invoiced amount is not received by OpenCities by the due date, then without limiting OpenCities' rights or remedies, (a) those charges may accrue late interest at the rate of 1.5% of the outstanding balance per month, or the maximum rate permitted by law, whichever is lower, and/or (b) OpenCities may condition future subscription renewals on payment terms shorter than those specified herein. Customer will be liable for all costs of collection of any undisputed, overdue amounts including, without limitation, all court costs, legal fees and other costs incurred by OpenCities.

4.4 Taxes. The Fees charged by OpenCities do not include any taxes, levies, duties or similar governmental assessments of any nature, including, value-added, sales, use or withholding taxes, assessable by any jurisdiction whatsoever (collectively, "Taxes"). Customer is responsible for paying all Taxes associated Customer's purchase of the Services. If OpenCities has the legal obligation to pay or collect any Taxes for which Customer is responsible under this Section 4(e), then Customer agrees that OpenCities will invoice Customer that amount unless Customer

provides OpenCities with a valid tax exemption certificate authorized by the appropriate taxing authority. For clarity, OpenCities is responsible for taxes assessable against it based on its income, property and employees.

4.5 Purchases from Authorized Resellers. Notwithstanding the foregoing, in the event that Customer has purchased Services through an authorized OpenCities reseller pursuant to an Order that incorporates these terms, the payment arrangements and related terms set forth in the Order shall control, such terms shall be exclusively by and between such reseller and Customer, and OpenCities' sole obligation will be to provide the Services set forth in the Order to Customer on the other terms and conditions, and subject to the limitations, set forth in this Agreement.

4.6 Future Functionality. Customer agrees that its purchase is not contingent on the delivery of any future functionality or features, or dependent on any oral or written public comments made by OpenCities, or any authorized reseller or other third party regarding future functionality or features.

5. CUSTOMER DATA & SECURITY.

5.1. Customer Rights to Data. Customer retains all right, title and interest (including any Intellectual Property Rights) in and to all data and content supplied by or on behalf of Customer in connection with the Services and Customer's Website, including data uploaded by users thereof (collectively, the "Customer Data"). Customer hereby grants OpenCities a limited, non-exclusive, royalty-free, non-transferable license to host, reproduce, transmit, cache, store, exhibit, publish, display, distribute, perform, and otherwise use the Customer Data solely as necessary to provide the Services for Customer.

5.2. Responsibility for Customer Data. Customer is solely responsible for Customer Data, including the accuracy, quality, appropriateness and legality of all Customer Data and the means by which the Customer Data is acquired, and OpenCities shall have no responsibility or liability therefor. Customer represents and warrants to OpenCities that Customer owns or has the right to use Customer Data, and has the rights necessary to grant OpenCities the licence set forth in Section 5.1, all Customer Data will be "server ready" and otherwise remain fully compatible with OpenCities' SaaS (including all software and operating systems); and Customer has obtained all necessary rights, releases and consents to allow the Customer Data to be collected, used and disclosed in the manner contemplated by this Agreement and to grant OpenCities the rights herein.

5.3. OpenCities' Use of Customer Data. Unless it receives Customer's prior written consent, OpenCities: (a) will not access, process, or otherwise use Customer Data other than as necessary to facilitate the Services; and (b) will not intentionally grant any third party access to Customer Data, except subcontractors that are subject to a reasonable nondisclosure agreement. Notwithstanding the foregoing, OpenCities may disclose Customer Data, including, without limitation, user profile information (i.e. name, e-mail address, etc.), IP addressing and traffic information, and usage history, as required by applicable law or by proper legal or governmental authority. OpenCities will give Customer prompt notice of any such legal or governmental demand and reasonably cooperate with Customer in any effort to seek a protective order or otherwise to contest such required disclosure, at Customer's expense.

5.4. Protection of Customer Data. OpenCities will use commercially reasonable, industry standard administrative, physical and technical safeguards for the protection of the security, confidentiality and integrity of the Customer Data, including implementation of measures designed to prevent unauthorized access, use, modification, disclosure and loss of the Customer Data. OpenCities will archive Customer Data on a regular basis during the Term by performing 6 daily and 8 weekly backups for the purposes of disaster recovery. In the event of equipment failure or data corruption, OpenCities will restore from the most recent uncorrupted archive. In the event of corruption of all of OpenCities' archives, or in the event that an old archive is used to restore data, Customer will have the responsibility of uploading new Customer Data to Customer's Website. OpenCities will not be liable for incomplete, out-of-date, corrupt or otherwise deficient Customer Data recovered from OpenCities' backups.

5.5. No Obligation to Monitor; Right to Remove. OpenCities may, but has no obligation to, monitor, review or edit Customer Data. In all cases, OpenCities reserves the right to remove, delete or disable access to any Customer Data that OpenCities determines, in the exercise of its sole discretion, violates this Agreement (including the Acceptable Use Policy) or is illegal, damaging, problematic, objectionable or otherwise inappropriate. OpenCities may take such action without prior notification of Customer.

5.6. Privacy Policy. The Privacy Policy applies only to the Services and does not apply to any third-party website or service linked to the Services or recommended or referred to through the Services or by OpenCities staff.

5.7. Risk of Exposure. Customer recognizes and agrees that hosting data online involves risks of unauthorized disclosure or exposure and that Customer, by accessing and using the Services, assumes such risks. OpenCities offers no representation, warranty, or guarantee that Customer Data will not be exposed or disclosed through errors or the actions of third parties.

5.8. Aggregate Data. Notwithstanding the provisions of this Article 5, OpenCities may use, reproduce, sell, publicize, or otherwise exploit Aggregate Data in any way, in its sole discretion. ("Aggregate Data" refers to Customer Data with the following removed: personally identifiable information and the names and addresses of Customer and any of its users.)

6. CUSTOMER'S OBLIGATIONS & RESTRICTIONS.

6.1 Acceptable Use. Customer will comply with OpenCities' AUP as in effect from time to time. Customer will not: (a) sell, resell, license, sublicense, distribute, make available, rent or lease the Services or use the Services for service bureau or time-sharing purposes or in any other way allow third parties to exploit or access the Services, except users accessing Customer's Website as specifically authorized by this Agreement; (b) use the Services to store or transmit infringing, libelous, or otherwise unlawful or tortious material, or to store or transmit material in violation of third-party privacy rights; (c) use the Services to store or transmit Malicious Code; (d) share non-public SaaS features or content with any third party; (e) frame or mirror any part of the Services other than framing on Customer's own intranets or otherwise for Customer's internal business purposes; (f) reverse engineer any portion of the Services, or (g) access the Services in order to build a competitive product or service, to build a product using similar ideas, features,

functions or graphics of the Services, or to copy any ideas, parts, features, functions or graphics of the Services. In the event that it suspects any breach of the requirements of this Section 6.1, including without limitation by Customer's users, OpenCities may suspend or terminate Customer's access to the Services without advance notice, in addition to such other remedies as OpenCities may have. Neither this Agreement nor the AUP requires that OpenCities take any action against Customer or any user or other third party for violating the AUP, this Section 6.1, or this Agreement, but OpenCities is free to take any such action it sees fit. Any breach of the AUP or any of the provisions of this Article 6 will entitle OpenCities to elect to terminate this Agreement immediately upon written notice to Customer.

6.2 Unauthorized Access; Security. Customer will take reasonable steps to prevent unauthorized access to the Services and the network, including without limitation by protecting its passwords and other log-in information. Customer will notify OpenCities immediately of any known or suspected unauthorized access to or use of the Services or breach of its security and will use best efforts to stop said breach. Customer shall not:

- (a) interfere with or disrupt the integrity or performance of the Services or attempt to gain unauthorized access to the Services, or OpenCities' or its suppliers' related systems and networks;
- (b) commit, cause or allow any breach (or do anything which might put us in breach) of any applicable law, regulation, government direction or industry standard or code;
- (c) attempt to or actually access the Services by any means other than through the portals or interfaces provided by OpenCities;
- (d) attempt to or actually override any security component included in or underlying the Services; or
- (e) attempt or engage in any action that directly or indirectly interferes with the proper working of or place an unreasonable load on OpenCities' infrastructure.

6.3 Customer Data. Customer agrees that (a) the Customer Data and its use will not violate, misappropriate or infringe any Intellectual Property Rights or any other personal, privacy or moral right arising under the laws of any jurisdiction, nor will same constitute a libel or defamation of any person or entity; and (b) the Customer Data will not contain any harmful components, including, but not limited to, viruses, trap doors, hidden sequences, hot keys, or time bombs.

6.4 Compliance with Laws. In its use of the Services, Customer will comply with all applicable laws, including without limitation export control, decency, privacy and intellectual property laws, laws governing the protection of personally identifiable information and other laws applicable to the protection of Customer Data.

6.5 Responsibility for Users; Access to Services. Customer is responsible and liable for: (a) its own and its users use of the Services, including without limitation for any unauthorized user conduct and any user conduct that would violate the AUP or the requirements of this Agreement applicable to Customer; and (b) any use of the Services through Customer's account, whether

authorized or unauthorized. Customer agrees to indemnify OpenCities against any loss or damage that OpenCities suffers as a result of any unauthorized access to OpenCities' SaaS or network or those of OpenCities' suppliers.

6.6 Required Third Party Services.

- (a) Customer will establish and maintain, at its own expense, all telecommunications equipment and access lines necessary to gain access to the Services.
- (b) In order for OpenCities to provide some of the Services under this Agreement, Customer may at times, be required to give OpenCities access to or provide login information and password information for accounts or services Customer may have with third party providers. When Customer provides OpenCities with this information or provides OpenCities with access to these third-party accounts, Customer warrants that it has all the necessary contractual and legal rights to give OpenCities such access, login information and passwords.
- (c) Customer acknowledges that OpenCities will not have any responsibility or liability with regard to any third party services used by the Customer on or through the Services, as part of Customer's Website or otherwise, such as payment and e-commerce services, and any use of such third party services will be at Customer's own risk. Customer further acknowledges that the technical ability to link to such third-party services (such as the possibility of a 'PayPal' button), is provided only as part of the Services but will not be deemed to create any liability or responsibility on behalf of OpenCities.
- (d) Where any third-party software or services integration to the Services is found to cause performance, stability or security issues, OpenCities reserves the right to disable or remove such software or services in order to restore the Services to acceptable levels.

6.7 Customer Representative. Customer will appoint a designated representative who will be authorized to act as the primary point of contact for Customer in dealing with OpenCities with respect to each party's obligations under this Agreement and on a timely basis.

7. OPENCITIES IP & FEEDBACK.

7.1 IP Rights in the Services. OpenCities retains all Intellectual Property Rights and all other right title and interest in the Services, the Documentation, the Support Services, the Professional Services, the Custom Software and the Aggregate Data, including without limitation all software used to provide the Services, all graphics, user interfaces, logos, and trademarks reproduced through the Services, and all work product and derivative works thereof by whomever produced. This Agreement does not grant Customer any intellectual property license or rights in or to the Services or any of its components or any Documentation. Customer recognizes that the Services and its components and the Documentation are protected by copyright and other laws.

7.2 Feedback. OpenCities has not agreed to and does not agree to treat as confidential any Feedback (as defined below) that Customer or other users provide, and nothing in this Agreement or in the parties' dealings arising out of or related to this Agreement will restrict OpenCities's right

to use, profit from, disclose, publish, keep secret, or otherwise exploit Feedback, without compensating or crediting Customer or the user in question. Customer hereby grants OpenCities a perpetual, irrevocable right and license to exploit Feedback in any and every way. (“Feedback” refers to any suggestion or idea for improving or otherwise modifying any of OpenCities’s products or services.)

8. CONFIDENTIAL INFORMATION.

8.1 “Confidential Information” refers to the following items: (a) any document either party marks “Confidential”; (b) any information either party orally designates as “Confidential” at the time of disclosure, provided the disclosing party confirms such designation in writing within ten (10) Business Days; (c) any OpenCities software and all Documentation and other information in the OpenCities Help Center, whether or not marked or designated confidential; and (d) any other nonpublic, sensitive information the receiving party should reasonably consider a trade secret or otherwise confidential. Notwithstanding the foregoing, Confidential Information does not include information that: (i) is in the receiving party’s possession at the time of disclosure; (ii) is independently developed by the receiving party without use of or reference to Confidential Information; (iii) becomes known publicly, before or after disclosure, other than as a result of the receiving party’s improper action or inaction; or (iv) is approved for release in writing by the disclosing party.

8.2 Nondisclosure. Neither OpenCities nor Customer will use Confidential Information for any purpose other than in performance of this Agreement (the “Purpose”). Each of OpenCities and Customer agrees that it: (a) will not disclose Confidential Information to any of its employees or contractors unless such persons need access in order to facilitate the Purpose and, in the case of a contractor, such contractor executes a nondisclosure agreement with the appropriate party with terms no less restrictive than those of this Article 8; and (b) will not disclose Confidential Information to any other third party without the disclosing party’s prior written consent. Without limiting the generality of the foregoing, each party will protect Confidential Information with the same degree of care it uses to protect its own confidential information of similar nature and importance, but with no less than reasonable care. Each party agrees that it will promptly notify the other party of any misuse or misappropriation of the other party’s Confidential Information that comes to its attention. Notwithstanding the foregoing, each party may disclose Confidential Information as required by applicable law or by proper legal or governmental authority, provided such party gives the other party prompt notice of any such legal or governmental demand and reasonably cooperates with the other party in any effort to seek a protective order or otherwise to contest such required disclosure, at the other party’s expense.

8.3 Injunction. The parties agree that breach of this Article 8 would cause the disclosing party irreparable injury, for which monetary damages would not provide adequate compensation, and that in addition to any other remedy, and that the disclosing party will be entitled to injunctive relief against such breach or threatened breach, without proving actual damage or posting a bond or other security.

8.4 Termination & Return. With respect to each item of Confidential Information, the obligations of Section 8.1 above will terminate five (5) years after the date of disclosure; provided that such obligations related to Confidential Information of a party constituting trade secrets will continue so long as such information remains subject to trade secret protection pursuant to

applicable law. Upon termination of this Agreement, each party will return all copies of the other party's Confidential Information to the other party or certify, in writing, the destruction thereof.

8.5 Retention of Rights. This Agreement does not transfer ownership of Confidential Information or grant a license thereto. Each party will retain all right, title, and interest in and to all of its Confidential Information.

9. WARRANTY DISCLAIMER.

9.1 Warranty Disclaimers. THE SERVICES ARE PROVIDED "AS IS" AND AS AVAILABLE, WITHOUT REPRESENTATION OR WARRANTY OF ANY KIND, WHETHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NONINFRINGEMENT AND QUIET ENJOYMENT, AND ANY IMPLIED WARRANTY ARISING FROM STATUTE, COURSE OF DEALING, COURSE OF PERFORMANCE, OR USAGE OF TRADE, AND OPENCITIES DISCLAIMS SUCH WARRANTIES TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING: (a) OPENCITIES DOES NOT REPRESENT OR WARRANT THAT THE SYSTEM WILL PERFORM WITHOUT INTERRUPTION OR ERROR OR IN A TIMELY FASHION; AND (b) OPENCITIES DOES NOT REPRESENT OR WARRANT THAT THE SYSTEM IS SECURE FROM HACKING OR OTHER UNAUTHORIZED INTRUSION OR THAT CUSTOMER DATA WILL REMAIN PRIVATE OR SECURE. OPENCITIES DISCLAIMS ALL LIABILITY AND INDEMNIFICATION OBLIGATIONS FOR ANY HARM OR DAMAGES CAUSED BY ANY THIRD-PARTY HOSTING PROVIDERS.

10. INDEMNIFICATION.

10.1 Indemnification of Customer. Subject to the other provisions of this Section 10.1, OpenCities will defend Customer and Customer's Associates (as defined below in Section 10.3) against any third party claim, suit, or proceeding alleging that the Services or the permitted use thereof infringes any U.S. trademark, patent, copyright, or trade secret right of a third party (collectively, "Customer Indemnified Claims") and will indemnify Customer and Customer's Associates from any damages, attorney's fees and costs finally awarded against Customer and Customer's Associates for any Customer Indemnified Claim, or, as applicable, for amounts paid by Customer and Customer's Associates in a settlement approved by OpenCities in writing of a Customer Indemnified Claim.

- (a) If in OpenCities reasonable judgment any Customer Indemnified Claim, or threat of any such Claim, materially interferes with Customer's use of the Services, OpenCities will, after consultation with Customer, at OpenCities' option and in its sole discretion, either (i) substitute functionally equivalent non-infringing Services or Documentation; (ii) modify the Services to make them non-infringing, (iii) obtain for Customer at OpenCities' expense the right to continue using the infringing Services; or, (iv) if OpenCities determines that it cannot achieve any of the foregoing on a reasonable commercial basis, it may, by written notice, require Customer to cease using the Services, in which case OpenCities, or, as applicable, its authorized reseller, shall refund Customer a pro-rata portion of the Fees paid for the Services for such period of

time for which Customer was unable to use the Services.

- (b) OpenCities' obligations set forth in this Section 10.1 do not apply to the extent that a Customer Indemnified Claim arises out of: (a) Customer's breach of this Agreement; (b) revisions or modifications to the Services or any components thereof made by a party other than OpenCities if such infringement would not have occurred but for such revisions or modifications; (c) Customer's failure to incorporate or use any Version Updates, or any other updates or upgrades that would have avoided the alleged infringement; (d) inclusion of the Customer Data; (e) the use of the Services other than for its intended purposes or contrary to OpenCities' Specifications; or (f) the combination, operation or use of the Services with equipment, programs, hardware or software not provided by OpenCities if in OpenCities reasonable judgment such infringement is caused thereby.
- (c) The provisions of this Section 10.1 state OpenCities entire liability and Customer's sole and exclusive remedy in the event of any Customer Indemnified Claim.

10.2 Indemnification of OpenCities. Customer will indemnify and defend OpenCities and OpenCities' Associates (as defined below in Section 10.3) against any and all claims, liabilities, losses, damages, costs and expenses (including attorneys fees and costs) (a) arising out of or related to Customer's or its users' alleged or actual use or misuse of, or failure to use the Services, including without limitation: (b) claims by Customer's users or by Customer's employees or agents; (c) claims related to unauthorized disclosure or exposure of personally identifiable information or other private Confidential Information, including Customer Data; (d) claims related to infringement or violation of a copyright, trademark, trade secret, or privacy or confidentiality right by any Customer Data; and (e) claims that use of the Services harasses, defames, or defrauds a third party or violates the CAN-Spam Act of 2003 or any other law or restriction on electronic advertising (collectively, "OpenCities Indemnified Claims").

10.3 Litigation & Additional Terms. The obligations of the indemnifying party ("Indemnitor") pursuant to Section 10.1 or 0 above will be excused to the extent that the indemnified parties (the "Indemnified Parties") or any Indemnified Party's Associates fails to provide prompt written notice to the Indemnitor of the applicable claim or to reasonably cooperate with the Indemnitor if such failure or lack of cooperation materially prejudices the defense. Indemnitor will control the defense of any Indemnified Claim, including appeals, negotiations, and any settlement or compromise thereof; provided that the Indemnified Party will have the right, not to be exercised unreasonably, to reject any settlement or compromise that requires that it admit wrongdoing or liability or subjects it to any ongoing affirmative obligations. (A party's "Associates" are its officers, directors, shareholders, parents, subsidiaries, agents, successors, and assigns.)

11. LIMITATION OF LIABILITY.

11.1 LIMITATION OF LIABILITY. THE TOTAL LIABILITY OF OPENCITIES AND ITS AFFILIATES FOR ALL CLAIMS ARISING OUT OF OR RELATED TO THIS AGREEMENT WILL NOT EXCEED THE ACTUAL FEES RECEIVED BY OPENCITIES DIRECTLY OR INDIRECTLY FROM CUSTOMER DURING THE TWELVE-MONTH PERIOD LEADING UP TO THE APPLICABLE CLAIM.

11.2 Exclusion of Consequential Damages. IN NO EVENT WILL OPENCITIES OR ITS AFFILIATES BE LIABLE TO CUSTOMER FOR ANY CONSEQUENTIAL, INDIRECT, SPECIAL, INCIDENTAL, OR PUNITIVE DAMAGES, INCLUDING ANY DAMAGES FOR LOSS OF REVENUES OR GOODWILL, BUSINESS INTERRUPTION, LOSS OR INACCURACY OF DATA, COST OF PROCUREMENT OF SUBSTITUTE GOODS, SERVICES OR TECHNOLOGY, OR LOST PROFITS, ARISING OUT OF OR RELATED TO THIS AGREEMENT.

11.3 Clarifications & Disclaimers. THE LIABILITIES LIMITED BY THIS ARTICLE 11 APPLY (a) REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT, STRICT PRODUCT LIABILITY, OR OTHERWISE, (b) EVEN IF OPENCITIES IS ADVISED IN ADVANCE OF THE POSSIBILITY OF THE DAMAGES IN QUESTION AND EVEN IF SUCH DAMAGES WERE FORESEEABLE; AND (c) EVEN IF CUSTOMER'S REMEDIES FAIL OF THEIR ESSENTIAL PURPOSE. NOTWITHSTANDING THE FOREGOING, THE LIABILITIES LIMITED BY THIS ARTICLE 11 SHALL NOT INCLUDE LIABILITY (i) UNDER THE INDEMNITY PROVIDED IN SECTION 10.1, (ii) FOR DEATH OR PERSONAL INJURY RESULTING FROM NEGLIGENCE, (iii) FOR DAMAGE TO TANGIBLE PERSONAL PROPERTY, OR (iv) FOR FRAUD OR WILLFUL MISCONDUCT. If applicable law limits the application of the provisions of this Article 11, OpenCities' liability will be limited to the maximum extent permissible. For the avoidance of doubt, OpenCities' liability limits and other rights set forth in this Article 11 apply likewise to OpenCities' affiliates, licensors, suppliers, advertisers, agents, sponsors, directors, officers, employees, consultants, and other representatives.

12. TERM & TERMINATION.

12.1 Term. The initial term of this Agreement (the "Initial Term") will commence on the Effective Date and continue for the period set forth in the Order. Thereafter, the Agreement will automatically renew for successive one-year periods (each such period, a "Renewal Term"), unless either party notifies the other party in writing of its decision not to renew the Agreement at least 60 or more days before the applicable renewal date. The Initial Term and all Renewal Terms are herein referred to as the "Term".

12.2 Termination for Cause. Either party may terminate this Agreement for the other's material breach by written notice, effective in 30 days unless the other party first cures such breach, or immediately upon written notice if the other party becomes subject to any insolvency, bankruptcy or similar proceeding, whether voluntary or involuntary. Without limiting OpenCities' other rights and remedies, OpenCities may suspend or terminate any user's access to the Services at any time, without advance notice, if OpenCities reasonably concludes such user has conducted him, her or itself in a way that is not consistent with the requirements of the AUP or the other requirements of this Agreement or in a way that subjects OpenCities to potential liability.

12.3 Effects of Termination. Upon termination of this Agreement, Customer will cease all use of the Services and delete, destroy, or return all copies of the Documentation in its possession or control, and Customer will have the right to access the Services for 30 days following termination of this Agreement to download Customer Data. If requested by Customer in writing, at the Customer's expense on a time-and-materials basis, OpenCities will provide Customer an export of the Customer Data in an industry standard format. Upon the expiration of the thirty-day period following termination of this Agreement, all Customer Data in the Services will no longer be

available, and OpenCities shall have the right to delete and/or destroy all such Customer Data (including all data supplied by third parties), unless otherwise agreed by the parties in writing.

12.4 The following provisions will survive termination or expiration of this Agreement: (a) any obligation of Customer to pay Fees incurred before termination; (b) Article 1, Sections 2.3 and 6.5, and Articles 7, 8, 9, 10, 11 and 12; and (c) any other provision of this Agreement that must survive to fulfill its essential purpose.

13. MISCELLANEOUS.

13.1 Independent Contractors. The parties are independent contractors and will so represent themselves in all regards. Neither party is the agent of the other, and neither may make commitments on the other's behalf. The parties agree that no OpenCities employee or contractor is or will be considered an employee of Customer.

13.2 Notices. OpenCities may send notices pursuant to this Agreement to Customer's email address provided by Customer, and such notices will be deemed received 24 hours after they are sent. Customer may send notices pursuant to this Agreement to the person identified in the Order at the email address provided for such person, and such notices will be deemed received 72 hours after they are sent.

13.3 Force Majeure. No delay, failure, or default, other than a failure to pay fees when due, will constitute a breach of this Agreement to the extent caused by acts of war, terrorism, hurricanes, earthquakes, other acts of God or of nature, strikes or other labor disputes, riots or other acts of civil disorder, embargoes, or other causes beyond the performing party's reasonable control.

13.4 Assignment & Successors. Customer may not assign this Agreement or any of its rights or obligations hereunder without OpenCities' express written consent. Except to the extent forbidden in this Section 13.4, this Agreement will be binding upon and inure to the benefit of the parties' respective successors and assigns.

13.5 Severability. To the extent permitted by applicable law, the parties hereby waive any provision of law that would render any clause of this Agreement invalid or otherwise unenforceable in any respect. In the event that a provision of this Agreement is held to be invalid or otherwise unenforceable, such provision will be interpreted to fulfill its intended purpose to the maximum extent permitted by applicable law, and the remaining provisions of this Agreement will continue in full force and effect.

13.6 No Waiver. Neither party will be deemed to have waived any of its rights under this Agreement by lapse of time or by any statement or representation other than by an authorized representative in an explicit written waiver. No waiver of a breach of this Agreement will constitute a waiver of any other breach of this Agreement.

13.7 Choice of Law; Venue. This Agreement will be governed by laws of the State of California. The parties consent to the personal and exclusive jurisdiction of the federal and state courts of San Francisco, California. This Section 13.7 governs all claims arising out of or related to this Agreement, including without limitation tort claims. The United Nations Convention for the International Sale of Goods does not apply to this Agreement.

13.8 Dispute Resolution. If at any time a dispute arises out of or in connection with this Agreement, the parties will have their respective designated representatives meet in good faith with a view to resolving the dispute within a period of 15 Business Days from the issue of a written notice of dispute by one party to the other party. Should the parties not be able to resolve the dispute within the 15 Business Days, then both parties will refer the matter to their own appropriate level of senior executive management respectively for resolution. If the relevant senior executive management are unable to resolve the dispute within a further 10 Business Days, then the parties agree that the dispute must then be referred to mediation. The parties will agree on a suitable person to act as mediator having industry knowledge and expertise to facilitate resolution. Failing agreement on such appointment, either party may apply to JAMS to appoint a mediator. The dispute for mediation must be heard within 20 Business Days of a mediator being appointed. Nothing in this clause is intended to preclude a party from seeking equitable or injunctive relief. Neither party shall have the right to initiate litigation until 30 Business Days after the second mediation conference held by the parties, unless the other party has materially breached its obligation to mediate.

13.9 Construction. The parties agree that the terms of this Agreement result from negotiations between them. This Agreement will not be construed in favor of or against either party by reason of authorship.

13.10 Technology Export. Customer will not: (a) permit any third party to access or use the Services in violation of any U.S. or foreign law or regulation; or (b) export any software provided by OpenCities or otherwise remove it from the United States or Canada except in compliance with all applicable laws and regulations. Without limiting the generality of the foregoing, Customer will not permit any third party to access or use the Services in, or export such software to, a country subject to an applicable embargo.

13.11 Entire Agreement. This Agreement sets forth the entire agreement of the parties and supersedes all prior or contemporaneous writings, negotiations, and discussions with respect to its subject matter. Neither party has relied upon any such prior or contemporaneous communications.

13.12 Modifications. OpenCities may modify the terms of this Agreement, the Privacy Policy, AUP and SLA at any time and from time to time by posting a revised version on OpenCities' website. The modified terms will become effective upon posting. By continuing to use the Services after the effective date of any modification to the terms of this Agreement, Customer agrees to be bound by the modified terms. It is Customer's responsibility to check OpenCities' website regularly for such modifications. OpenCities last modified the terms of this Agreement and the applicable Policies and SLA on the dates listed at the tops of the applicable documents on OpenCities' website.

13.13 Marketing. Customer agrees to permit OpenCities to make reasonable reference to the Customer's status as a user of the Services, including captioned quotations in product literature or advertisements, websites, articles, press releases, marketing literature, presentations and the like, and occasional use as a reference for potential new users.

SCHEDULE A – SERVICE LEVEL AGREEMENT

Subject to the terms and conditions of the Agreement, OpenCities provides a guarantee of 99.9% uptime availability, calculated monthly. In a typical 30 day/730 hour month, this equates to no more than 1 hour of downtime per month (not inclusive of Scheduled and emergency Maintenance).

For confirmed downtime during any month during the Term, Open Cities will credit Customer 1% of Customer's pro-rata monthly Base Subscription Fee for every hour of Customer's public facing website downtime over and above the 99.9% uptime guarantee, up to a maximum of 100% of the pro rata monthly Base Subscription Fee for that month.

Issue Severity Level and Measure/Guide	Resolution Process and Contact Information	Resolution Target
Priority 1 – Downtime (Your public facing website or critical intranet is experiencing Downtime)	<ul style="list-style-type: none">• Reportable 24 x 7 via Telephone – (877-466-7756 – Extension 3)• Acknowledgement and assignment of the problem for resolution within an hour.	Within 4 hours.
Priority 2 – Urgent (Important publishing functionality fails to work as intended, and there is no work-around available - you cannot publish content to the site).	<ul style="list-style-type: none">• Reportable 24 x 7 via Online helpdesk, or• Telephone during business hours (7x6 PT). (877-466-7756 – Extension 2)• Acknowledgement and assignment of the problem for resolution within one business day.	Provide a workaround to the problem or release a Version Update to fix the problem by close of next business day.
Priority 3 – High (Important publishing functionality fails to work as intended, but workarounds are available)	<ul style="list-style-type: none">• Reportable 24 x 7 via Online helpdesk.• Acknowledgement and assignment of the problem for resolution within one business day.	Scheduled or next Version Update.
Priority 4 – Normal (Functionality is not working as intended)	<ul style="list-style-type: none">• Reportable 24 x 7 via Online helpdesk.• Acknowledgement and assignment of the problem for resolution within 3 business days	Within specified Version Update.

IN WITNESS WHEREOF, the Town and Consultant have executed this Agreement.

Town of Los Gatos by:

Consultant By:

Laurel Prevetti Town Manager

Aaton Haggarty, Chief Legal Officer
Accela, Inc.

Recommended by:

Joel Paulson, Community Development
Director

Luke Norris, Sr Vice President,
Government Relations & Growth
OpenCities

Approved as to Form:

Robert Schultz, Town Attorney

Attest:

Shelley Neis, MMC, CPMC, Town Clerk

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Statement of Work

Los Gatos California SaaS Migration Services

6/8/2021

Version 1.0

Accela, Inc.
2633 Camino Ramon
Suite 120
San Ramon, CA 94583
Tel: 925-659-3200

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DOCUMENT CONTROL

Date	Author	Version	Change Reference
4/20/2021	J. White	1.0	SOW Creation
6/8/2021	J. White	1.1	Clarified OpenCities vs Accela responsibilities

INTRODUCTION

OVERVIEW

This Statement of Work ("SOW") dated 6/8/2021 sets forth the scope and definition of the project-based professional services (collectively, the "Services") to be provided by Accela, Inc., its affiliates and/or agents ("Accela") to Los Gatos California ("Agency" or "Customer").

Agency has selected OpenCities, Inc., a Delaware limited liability company, to provide certain products and/or Services, as set forth in this SOW. Agency acknowledges and agrees that Accela is not liable or responsible for any products and/or Services provided by OpenCities.

This SOW details the deliverables that will be performed by Accela Professional Services (Deliverable 1, 2.1, and 2.4) and OpenCities Professional Services (Deliverable 2.2, 2.4, and 2.5).

This SOW is governed by the Accela Consulting Services Policy (attached) found at www.accela.com/terms for Accela deliverables and by the OpenCities Consulting Services Policy found at <https://www.opencities.com/files/content/common/general-pages/terms-conditions-north-america/opencities-terms-of-service-north-america.pdf> for OpenCities deliverables.

This statement of work represents a Fixed Fee based engagement.

SCOPE OF SERVICES

Deliverable 1: Accela will provide services to the Agency for migrating the Accela on-premise Land Management instance to the Accela Cloud based on the materials provided by the Agency in the SaaS Migration Questionnaire.

- Import/upgrade of MS SQL DBs (up to 3 environments: Support, Test, Production)
- Assistance migrating 6 specific interfaces:
 - GIS
 - DigEplan
 - Credit Card Payment Adapter (PayPal)
 - EDMS (ADS)
 - GIS data export
 - Azure SSO (optional)
- Migration of up to 45 SSRS/RTF reports
- Up to 20 hour of issue resolution and testing assistance
- Go live planning and cutover assistance

Deliverable 2: Once migrated to Accela SaaS, Premium Citizen Experience (OpenCities) will be implemented.

Standard setup includes:

- Design of the OpenCities web site with up to 100 pages
- Training on OpenCities and OpenForms

Products

The following Accela products are in scope for this Project:

- *Accela Automation*
- *Accela Citizen Access*
- *Accela GIS*
- *Accela Mobile*
- *Premium Citizen Experience (OpenCities)*

WORK DESCRIPTION

Deliverable 1: Accela will perform a migration of the customer's on-premise Accela environments using MS SQL (up to 3 environments: Support, Test, Production) to the Accela SaaS platform.

Migration Steps:

1. Customer provides an updated backup of the MS SQL databases for the environments to be migrated
2. Perform the database migration (Accela, Jetspeed, AGIS, and ADS databases as required)
 - a. Copy database to Accela site
 - b. Execute preparation and remediation scripts; drop any custom objects
 - c. Import data from the MS SQL DB into Accela SaaS SQL instance
3. Execute validation scripts to confirm the schema
4. Provision tenant instance in Accela SaaS
5. Update environment specific data in the databases
6. Start Accela services and validate the system is functional i.e. login, search, create records, etc.
7. Execute automated test tool to ensure proper system functionality
8. Customer performs migration validation
9. Remediate any data issues that found from the migration
10. Provide the customer with a backup of the revised SQL DB
11. Migrate and Test integrations
 - o Repoint service endpoints to new URLs
 - o Adjust firewall rules and network topologies as necessary
 - o Update interface EMSE scripting dependences for Azure compatibility
12. Migrate and update SSRS reports (maximum of 200)
 - o Import reports into the Accela SaaS environment
 - o Update reports to remove dependencies on custom objects (stored procedures, functions)
 - o Facilitate customer testing and remediate any issues found resulting from migration
13. Develop go live plan
14. Final go-live/roll back decision
15. Execute go live plan

Deliverable 2: After migration of a non-production environment, Accela will begin the implementation of the Premium Citizen Experience (OpenCities). This SOW details the deliverables that will be performed by Accela Professional Services (Deliverables 2.1 and 2.3) and OpenCities Professional Services (Deliverables 2.2, 2.4, and 2.5).

Deliverables for Accela and OpenCities	Tasks
Accela Deliverables 2.1: Project Kick Off	<ul style="list-style-type: none"> • Project Kick Off • Provide use of task management tool • Discovery of statements and/or images capturing the intention of the look/feel of new Website • Designer feedback or recommendations
OpenCities Deliverable 2.2: Design and Configuration	<ul style="list-style-type: none"> • Collect asset such as logos and images • Create and review analytics report • Departmental Portal Page & Theme Light Design Review
Accela Deliverable 2.3: Design, Configuration, & Training	<ul style="list-style-type: none"> • ACA assessment and Premium Citizen Experience configuration • Accela Integration training and consultation
OpenCities Deliverable 2.4: Training & Handover	<ul style="list-style-type: none"> • Content Publisher training • OpenCities Help Center 24 x 7 • OpenForms training • Site Administrator training
OpenCities Deliverable 2.5: Content Service Creation and Curation	<ul style="list-style-type: none"> • Content creation and building • Coordinate full launch of Departmental Portal with Agency Team to assure transition.

OUT OF SCOPE

Any Coding, conversion or additional services not specifically described in this document is the responsibility of Agency.

PROJECT ASSUMPTIONS

GENERAL PROJECT ASSUMPTIONS

- Accela and OpenCities remain responsible for their own services, warranty, and terms and conditions related to the SOW.
- Agency will provide the necessary tools, accounts, and permissions that will enable Accela to access the Agency's internal network for remote installation and testing. This access must be provided through industry standard tools such as Virtual Private Network (VPN). Failure to provide this access in a timely fashion will result in a project delay. Such a delay will result in a Change Order.
- Agency will ensure that Accela resources have access to a Dev or Test version of the 3rd party systems for interface development. All interfaces will be developed against 1 (one), agreed upon version of the 3rd party system.

SAAS MIGRATION ASSUMPTIONS

- Migration of the GIS data export under this agreement is dependent on the purchase of the Enhanced Reporting Database (ERD). Should Los Gatos opt not to include the ERD in their SaaS license agreement, then the Los Gatos would assume responsibility for migrating the GIS data export.

- Las Gatos will provide an on-premise SQL Server to host the GIS data export interface. The on-premise SQL server will have connectivity to ERD SQL DB for a “linked server” topology.

PREMIUM CITIZEN EXPERIENCE ASSUMPTIONS

- Implementation and Training Services will be completed over a 12-week period.
- This will serve as a Digital Front Door for one department
For instance, assuming Community Development: <https://www.losgatosca.gov/46/Community-Development>
- Additional design services will be needed if more than one department

PROJECT TIMELINE

The project is estimated to take 20 weeks. The projected start date for the Project is forty-five (45) calendar days after mutual acceptance and signature of this SOW.

PROJECT COMPLETION

Upon completion of the work defined above, this contract will be closed.

PROJECTS PUT ON HOLD

It is understood that sometimes Agency priorities are revised requiring the Agency to place the Accela implementation on hold. The Agency must send a formal written request sent to Accela to put the project on hold. Delays of 2 weeks or more that have a tangible impact to Accela’s resource plan are subject to change order.

If an Agency-based delay puts the project on hold for more than 90 days, Accela reserves the right to terminate the contract and negotiate new terms. If an Agency-based delay puts the project on hold past the termination period, Accela reserves the right to terminate the contract at the time of the delay. After that time, Accela can choose to cancel the rest of the Statement of Work. To finish the project will require a new Statement of Work at new pricing.

PAYMENT TERMS

The cost of services is:

SaaS Migration	\$25,000
Premium Citizen Experience	\$21,000
Total	\$46,000

PAYMENT SCHEDULE

- 50% due at contract signing \$23,000.
- 50% invoiced at completion \$23,000.
- Invoices are due net 30 of invoice date.

EXPENSES

There is no provision for travel expenses or travel time in this SOW because Agency does not need any onsite resources. Travel to the Agency will not be conducted unless a Change Order, inclusive of travel expense terms and conditions, is signed prior to travel commencing to cover the cost of the travel.

CONTRACT SUM

The total estimated amount payable under this SOW, as calculated from the above-mentioned fees, is **\$46,000**. This estimated price is based on the information available at time of signing and the assumptions, dependencies and constraints, and roles and responsibilities of the Parties, as stated in this SOW.

ADMINISTRATION

CHANGE ORDERS

In order to make a change to the scope of Professional Services in this SOW, and subject to the Disclaimers below, Agency must submit a written request to Accela specifying the proposed changes in detail. Accela will submit to Agency an estimate of the charges and the anticipated changes in the delivery schedule that will result from the proposed change in the Professional Services Change Order. Accela will continue performing the Professional Services in accordance with the SOW until the parties agree in writing on the change in scope of work, scheduling, and fees therefore. Any Change Order will be agreed to by the parties in writing prior to implementation of the Change Order. If Accela's effort changes due to changes in timing, roles, responsibilities, assumptions, scope, etc. or if additional support hours are required, a change order will be created that details these changes, and impact to project and cost (if any). Any change order will be signed by Accela and Agency prior to commencing any activities defined in the change order. Standard blended rate for Accela resources is **\$250** per hour. The Change Order Template is attached hereto as Appendix A.

EXPIRATION

The scope and terms of this SOW must be executed as part of the Professional Services Agreement within sixty (60) calendar days of the date of this SOW. If the SOW is not executed, the current scope and terms can be renegotiated.

DISCLAIMERS

Accela makes no warranties in respect of the Services described in this SOW except as set out in the Professional Services Agreement. Any configuration of or modification to the Product that can be consistently supported by Accela via APIs, does not require direct database changes and is capable of being tested and maintained by Accela will be considered a "Supported Modification". Accela's obligations and warranties in respect of its Services, Products, and maintenance and support, as set out the agreement between Accela and Agency, does not extend outside the Supported Modifications or to any Agency manipulation of implemented scripts, reports, interfaces and adaptors.

In the event Agency requires significant changes to this SOW (including cumulative revisions across any one or more Change Orders) which Accela reasonably determines (a) is a material modification of the nature or scope of Services as initially contemplated by the Parties under this SOW and/or (b) is significantly outside the Supported Modifications, Accela may, upon no less than thirty (30) days' notice to Agency, suspend or terminate this SOW and/or any Change Order issued hereunder. In the event of any such termination or suspension, the parties will work together in finalizing agreed-upon Deliverables.

APPENDIX A: CHANGE ORDER FORM

Agency:
Project Code:
Contract ID:
Initiating Department:
Initiated By:

CO #:
Date:

A. PROJECT CHANGE DESCRIPTION/TASK SUMMARY:

1. [Description of Change #1 – Issue details/scope impact, add as many as needed]
 - Schedule impact:
 - Resource impact:
 - Cost impact:
2. Etc.

Total Project Schedule Impact: [Enter]

Total Project Resource Impact: [Enter]

Total Project Cost Impact: [Enter]

B. BILLING TERMS:

Please describe the method by which Accela may bill the customer. Typically for CO's this is T&M.

C. EXPIRATION:

If this is a CO for a bucket of T&M hours there needs to be an expiration date

SIGNATURE AND ACCEPTANCE

The above Services will be performed in accordance with this Change Order, Work Authorization and the provisions of the Contract for the purchase, modification, and maintenance of the Accela systems. The approval of this Change Order will act as a Work Authorization for Accela and/or Agency to perform work in accordance with this Change Order, including any new payment terms identified in this Change Order. This Change Order takes precedent and supersedes all other documents and discussions regarding this subject matter.

Accepted By:	Accepted By: Accela, Inc.
By:	By:
Print Name:	Print Name:
Title:	Title:
Date:	Date:

IN WITNESS WHEREOF, the Town and Consultant have executed this Agreement.

Town of Los Gatos by:

Consultant By:

Laurel Prevetti Town Manager

Aaton Haggarty, Chief Legal Officer
Accela, Inc.

Recommended by:

Joel Paulson, Community Development
Director

Luke Norris, Sr Vice President,
Government Relations & Growth
OpenCities

Approved as to Form:

Robert Schultz, Town Attorney

Attest:

Shelley Neis, MMC, CPMC, Town Clerk

Option A:**5-Year Cloud with Free Training and without 2-year Upfront***Support and Maintenance, Hosting, Upgrades, Mobile, GIS, ACA Included*

		Price	Quantity	Total			
Year 1							
Cloud MultiApp		\$2,880	35	\$100,800			
Premium Citizen Experience		\$20,200	1	\$20,200			
Total				\$121,000			
Year 2							
Cloud MultiApp		\$2,966.40	35	\$103,824			
Premium Citizen Experience		\$20,806.00	1	\$20,806			
Total				\$124,630			
Year 3							
Cloud MultiApp		\$3,055.39	35	\$106,938.72			
Premium Citizen Experience		\$21,430.18	1	\$21,430.18			
Total				\$128,368.90			
Year 4							
Cloud MultiApp		\$3,147.05	35	\$110,147			
Premium Citizen Experience		\$22,073.09	1	\$22,073			
Total				\$132,220			
Year 5							
Cloud MultiApp		\$3,241.47	35	\$113,451.29			
Premium Citizen Experience		\$22,735.28	1	\$22,735.28			
Total				\$136,186.57			
Total Five-Year Contract							
<u>without</u> Two-Years Upfront Payment				\$642,405.43			
Free Training		\$0.00	40	\$0.00			
New License Purchase		\$2,880					

Option B:**5-Year Cloud with Free Training and 2 Years Upfront***Support and Maintenance, Hosting, Upgrades, Mobile, GIS, ACA Included*

		Price	Quantity	Total			
Year 1							
Cloud MultiApp		\$2,641	35	\$92,435			
Premium Citizen Experience		\$20,200	1	\$20,200			
Total				\$112,635.00			
Year 2							
Cloud MultiApp		\$2,720.23	35	\$95,208.05			
Premium Citizen Experience		\$20,806.00	1	\$20,806			
Total				\$116,014.05			
Year 3							
Cloud MultiApp		\$2,801.84	35	\$98,064.29			
Premium Citizen Experience		\$21,430.18	1	\$21,430.18			
Total				\$119,494.47			
Year 4							
Cloud MultiApp		\$2,885.89	35	\$101,006.22			
Premium Citizen Experience		\$22,073.09	1	\$22,073.09			
Total				\$123,079.31			
Year 5							
Cloud MultiApp		\$2,972.47	35	\$104,036.41			
Premium Citizen Experience		\$22,735.28	1	\$22,735.27			
Total				\$126,771.68			
Total Five-Year Contract							
<u>with</u> Two-Years Upfront Training				\$597,994.51			
Free Training		\$0.00	40	\$0.00			
Total Contract Savings for 2 Years Upfront				\$44,410.92			
New License Purchase		\$2,641					

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