INFORMATION CALENDAR
November 15, 2011

To: Honorable Mayor and Members of the City Council
From: Phil Kamlarz, City Manager
Submitted by: Zach Cowan, City Attorney
Subject: Settlement of Lawsuit: Gatzke v. City of Berkeley

INTRODUCTION
All settlements that are not announced at the conclusion of a closed session are provided to the Council and the public via an information report.

CURRENT SITUATION AND ITS EFFECTS
Pursuant to the Council’s authorization on September 26, 2011, the City Attorney has entered into the attached settlement agreement.

BACKGROUND
This case concerns the City’s termination of former Principal Planner Allan Gatzke in 2009. Mr. Gatzke filed suit in 2010, alleging that the City had harassed and discriminated against him based on a disability, seeking over $1 million in damages, as well as attorneys’ fees. The City denies those allegations, and believes it had good cause to terminate Mr. Gatzke. Earlier in 2011, he demanded $1.5 million. Shortly before trial was to occur in October 2011, the parties entered into settlement negotiations, during which Gatzke ultimately reduced his demand to $250,000. Under the settlement, the City will pay Gatzke $250,000 in return for dismissal of his lawsuit.

This case is unique in a few respects. The case had many key disputed facts, making it difficult to predict an outcome at trial. Further, based on pre-trial rulings, the court in this case was very sympathetic to the plaintiff, and the majority of the plaintiff’s claims survived summary judgment. Given the potential for large damage and attorneys’ fees awards and expenses that would be incurred by the City if it proceeded to trial, it was prudent to settle the case for $250,000.

The Release and Settlement Agreement is attached.

FISCAL IMPACTS
The settlement amount of $250,000 will be paid out of Permit Center Fund budget code 833-1702-410-8101 and will be officially appropriated as part of the First Amendment to the FY 2012 Annual Appropriations Ordinance.

CONTACT PERSON
Zach Cowan, City Attorney, 981-6998
Attachment:
   1: Release and Settlement Agreement
SETTLEMENT AGREEMENT AND GENERAL RELEASE

1. This Settlement Agreement and General Release ("Agreement") is entered into this 30th day of September 2011, by and between Allan E. Gatzke ("Gatzke") and the City of Berkeley, Debra Sanderson and Dan Marks, and their predecessors, successors, assigns, affiliates, representatives, officers, agents, managers and employees, including all persons with whom Gatzke worked (all of whom hereinafter referred to as "Releasees").

2. Non-Admission. This Agreement does not constitute an admission by Releasees of any violation of any law or statute and the parties agree that neither this Agreement nor the furnishing of consideration shall be deemed or construed for any purposes as evidence or an admission of liability or wrongful conduct of any kind.

3. On or about July 22, 2010, Gatzke filed a Complaint for Damages with the Superior Court of the State of California, County of Alameda, Civil Action No. RG10502193 (hereinafter "the Action"). Gatzke and Releasees desire fully and finally to resolve any and all claims or disputes, whether known or unknown, that have been made or could have been made by or on behalf of Gatzke against Releasees relating to Gatzke’s employment with the City of Berkeley, including those claims made in the Action. Further Gatzke and Releasees desire fully and finally to resolve any and all other claims or disputes that could be made by Releasees related to this litigation, specifically the recovery of any attorneys’ fees and/or costs associated with dismissal of the Action. Gatzke affirmatively states herein under penalty of perjury that he has been paid all wages, bonuses, expense reimbursements, and compensation due him during the entire period of his employment with City of Berkeley.

4. Payment to Gatzke. In consideration for signing this Settlement Agreement and General Release and the fulfillment of the promises herein, Releasees agree to make payment to Gatzke in the amount of Two Hundred Fifty Thousand Dollars ($250,000.00) by checks made payable to "Allan E. Gatzke and Mary Shea Hagebols, his attorney” as follows:

(a) A first payment in the amount of One Hundred Seventy Five Thousand Dollars ($175,000.00) delivered within twenty one (21) days after expiration of the revocation period described herein; and

(b) A second payment in the amount of Seventy Five Thousand Dollars ($75,000.00) delivered within ten (10) days of January 1, 2012.

Said payments are made for claims made for compensatory damages (including discrimination, medical special damages, emotional distress and wage loss), and shall be inclusive of all claims for attorneys’ fees and expenses related to the Action. Gatzke acknowledges and agrees that he is solely responsible for all liens, claims or demands for compensation from any and all attorneys related to services provided to him in this Action. Gatzke further agrees to indemnify and hold Releasees harmless from any claims, demands, deficiencies, levies, assessments, executions, judgments, penalties, taxes, attorneys’ fees or recoveries by anyone related to liens for services provided to him. Gatzke and his counsel agree to provide a completed IRS Form W-9 prior to receipt of each payment.
5. **Withdrawal of Claims/Dismissal With Prejudice.** Gatzke agrees to provide to Releasees, at the time of his execution of this Agreement, a Request For Dismissal with Prejudice in Civil Action No. RG10502193. Gatzke further agrees to withdraw any and all claims, charges, or complaints that Gatzke has initiated or others have initiated on his behalf against Releasees in any forum. Releasees and Gatzke agree that the Request for Dismissal may be filed after first payment set forth in paragraph 4 has been made.

6. **Waiver and Release of Claims.** Gatzke, on behalf of himself, his spouse, his descendants, dependents, heirs, executors, administrators, assigns, and successors, fully, finally and forever releases and discharges Releasees, and their respective past and present predecessors, successors, assigns, representatives, officers, agents, family members, attorneys and employees, from any and all claims and rights of any kind that he may have, whether now known or unknown, suspected or unsuspected, including, but not limited to, arising out of or in any way connected with his employment with Releasees. These claims and rights released include, but are not limited to, claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981, the California Fair Employment and Housing Act, the Equal Pay Act, the Americans With Disabilities Act, the Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act of 1974, as amended ("ERISA"), the Occupational Safety and Health Act, the Workers' Adjustment and Retraining Notification Act, the California Labor Code, the California Civil Code, the California Business & Professions Code, the California Constitution, California Labor Code Section 132(a), the Age Discrimination in Employment Act, Sections 503 and 504 of the Rehabilitation Act of 1973, the Older Workers' Benefit Protection Act; all state, civil or statutory laws, including any and all human rights laws and laws against discrimination, harassment, sex harassment, and wrongful termination; any other federal, state or local fair employment statute, code or ordinance; all employment related common law claims; any and all contract related claims; and all personal injury claims, including claims for emotional distress; and all tort claims of each and every type. Gatzke represents that he knows of no claim that he has or might have that has not been released by this paragraph.

   Releasees, on behalf of themselves, their descendants, dependents, heirs, executors, administrators, assigns, and successors, fully, finally and forever release and discharge Gatzke, his spouse, and his respective past and present predecessors, successors, assigns, representatives, officers, agents, family members and attorneys, from any and all claims and rights of any kind that they have related to claims made in or the litigation of the Action, including but not limited to any and all claims for malicious prosecution, abuse of process, defamation, attorneys' fees and costs, including fees and costs related to the dismissal of the Action. Releasees represent that they know of no claim that they have or might have that has not been released by this paragraph.

7. **Non-interference.** Nothing in this Agreement shall interfere with Gatzke's right to file a charge with, or cooperate or participate in an investigation or proceeding conducted by the Equal Employment Opportunity Commission, or other federal or state regulatory or law enforcement agency. However, the consideration provided to Gatzke in this Agreement shall be the sole relief provided to Gatzke for the claims that are released by Gatzke herein and he will not be entitled to recover and agrees to waive any monetary benefits or recovery against Releasees in connection with any such claim, charge or proceeding without regard to who has brought such Complaint or
8. **Payment of Applicable Taxes.** Gatzke is and shall be solely responsible for all federal, state and local taxes that may be owed by him by virtue of the receipt of any portion of the monetary payment provided under this Agreement. Gatzke agrees to indemnify and hold Releasees harmless from any and all liability, including, without limitation, all penalties, interest and other costs that may be imposed by the Internal Revenue Service or other governmental agencies regarding any tax obligations that may arise from the monetary consideration made to Gatzke under this Agreement.

9. **Discovery Materials.** Releasees agree that by November 15, 2011, Releasees shall remove from Releasees' premises any and all materials produced to them by Gatzke in this litigation, including (a) all copies of documents or other materials produced by Gatzke in this litigation, (b) all deposition testimony including videotapes of plaintiff and Kathleen Kelly, and (c) all documents or materials subpoenaed by Releasees from Gatzke’s medical providers (i.e., Dr. Lowell Cooper, Dr. Mary Sears, Dr. Donald K. Stanford, Dr. Satoko Miyamoto, etc.). Said materials shall be returned to Gatzke and/or provided to counsel for Releasees for retention at their premises for a period of no greater than four (4) years. Releasees further agree that the entire IME file of Dr. Jeff Gould, including audio recordings, shall be removed from its premises at this same time and provided to Releasees counsel for retention consistent with this paragraph.

10. **Transfer of Claims.** Gatzke represents and warrants that he has not assigned, transferred, or purported to assign or transfer, to any person, firm, corporation, association or entity whatsoever, any released claim. Gatzke agrees to indemnify and hold Releasees harmless against, without any limitation, any and all rights, claims, warranties, demands, debts, obligations, liabilities, costs, court costs, expenses (including attorneys' fees), causes of action or judgments based on or arising out of any such assignment or transfer. Gatzke further warrants that there is nothing that would prohibit him from entering into this Agreement.

11. **Breach.** Gatzke and Releasees acknowledge that if they materially breach this Agreement, and/or commence a suit or action or complaint in contravention of this release and waiver of claims, Releasees' obligations to pay the monies and/or provide the benefits referred to above shall immediately cease and Releasees shall be entitled to all other remedies allowed in law or equity, including but not limited to the return of any payments made under this Agreement. Similarly Gatzke shall be entitled to all other remedies allowed in law and equity.

12. **Entire Agreement.** This Agreement contains the entire agreement and understanding between Gatzke and Releasees with respect to any and all disputes or claims that Gatzke has, or could have had, against Releasees, and any claims Releasees may have related to the litigation of this Action, as of the date this Agreement is executed. This Agreement supersedes all other agreements between Gatzke and Releasees with regard to such disputes or claims. This Agreement shall not be changed unless in writing and signed by both Gatzke and Releasees.

13. **Severability.** The invalidity or unenforceability of any provision of this Agreement shall not affect or impair any other provisions, which shall remain in full force and effect. If any portion of this Agreement is found invalid, the parties agree to enter into a full and general
Release that is not invalid.

14. **Gatzke’s and Releasees’ Acknowledgement.** Gatzke and Releasees acknowledge that no representation, promise or inducement has been made other than as set forth in this Agreement, and that Gatzke and Releasees enter into this Agreement without reliance upon any other representation, promise or inducement not set forth herein. Gatzke and Releasees further acknowledges and represent that (a) they are of sound mind and understand and acknowledge the significance and consequences of this Agreement; (b) they are making this Agreement voluntarily. Knowingly, willingly, and without duress, coercion, fraud or mistake of fact now known or unknown; and (c) the terms of this Agreement are fully understood and voluntarily accepted. Gatzke and Releasees also acknowledge that they had the opportunity to consult with their attorneys concerning this Agreement; and that they have read and understand this Agreement, are fully aware of its legal effect, and have entered into it freely and voluntarily based on their own judgment and/or their attorney’s advice. Gatzke and Releasees acknowledge that they have been given a reasonable time to consider the terms of this Agreement. Gatzke and Releasees acknowledge that they are receiving adequate consideration for the terms agreed in this Agreement. Gatzke and Releasees acknowledge that any terminology used in this Agreement and/or the proceeds paid to Gatzke as described in this Agreement shall not be cause for the recomputation of any of his rights to benefits provided by Releasees to employees of Releasees, including but not limited to, salary, health care, retirement benefits, profit sharing, stock options or other benefits. Gatzke and Releasees further understand and acknowledge that they are releasing claims that arose prior to the execution of this Agreement.

15. **Headings.** The headings contained in the Agreement are for reference purposes only and shall not in any way affect the meaning or interpretation of this Agreement.

16. **Choice of Law.** This Settlement Agreement and General Release is to be interpreted pursuant to the laws of the State of California, except where the application of federal law applies.

17. **Civil Code of the State of California §1542.** Gatzke and Releasees expressly waive all rights under Section 1542 of the Civil Code of the State of California, which reads as follows:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

Notwithstanding the provisions of Section 1542, and for the purpose of implementing a full and complete release and discharge of each and all of the Releases, Gatzke and Releasees expressly acknowledge that this Agreement is intended to include and does include in its effect, without limitation, all claims which Gatzke and Releasees do not know or suspect to exist in their favor at the time they signed this Agreement and that this Settlement Agreement contemplates the extinguishments of all such claims.

18. **Twenty-One Day Consideration Period.** Gatzke acknowledges that he has been given a period of at least twenty-one (21) days to consider the terms of this Agreement and, if Gatzke
should execute it prior to the expiration of the twenty-one day consideration period, knowingly waives the right to consider this Agreement for twenty-one days.

19. **Seven-Day Revocation Period.** Gatzke acknowledges that he may, for a period of seven (7) days following the execution of this Agreement, revoke acceptance thereof. This revocation must be done in writing and delivered to Releasees' counsel Foster Employment Law, 3000 Lakeshore Avenue, Oakland, CA, 94610, by the expiration of the seventh day. This Agreement shall not become effective until the expiration of this seven-day revocation period.

ALLAN E. GATZKE  
\[Signature\]  
Date: **Oct 6**, 2011

CITY OF BERKELEY  
By: \[Signature\]  
Date: **10/4/11**, 2011

DEBRA SANDERSON  
\[Signature\]  
Date: **10/11**, 2011

DAN MARKS  
\[Signature\]  
Date: **10/14**, 2011