

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (the “**Agreement**”) is entered into effective as of August 11, 2020 (the “**Effective Date**”) by and between: **(a)** Kelly Paving, Inc. (“**Kelly Paving**”); **(b)** the City of Beckley, the City of Bluefield, the City of Charleston, the City of Huntington, the City of Parkersburg, and the Kanawha County Commission (collectively, “**the Municipalities**”); and **(c)** the State of West Virginia *ex rel.* Patrick Morrissey, Attorney General; Byrd E. White, in his official capacity as Secretary of Transportation and Commissioner of Highways, West Virginia Department of Transportation (collectively, “**the State**”). Kelly Paving, the Municipalities, and the State are collectively referred to as “**the Parties**.”

RECITALS

This Agreement is entered into with reference to the following facts and recitals, which are true to the best of the Parties’ knowledge and belief, and are made part of this Agreement:

A. Beginning on October 12, 2016, the Municipalities filed the first in a series of six (6) putative class-action lawsuits against, *inter alia*, Kelly Paving, which were later consolidated into a single action, captioned *City of Charleston v. West Virginia Paving, Inc.*, Civil Action No. 16-C-1552, in the Circuit Court of Kanawha County, West Virginia, and subsequently referred to the Circuit Court of Kanawha County, West Virginia, Business Court Division (the “**Municipal Litigation**”).

B. On January 11, 2017, the State filed a parallel lawsuit against, *inter alia*, Kelly Paving, captioned *State of West Virginia ex rel. Morrissey v. CRH, plc*, Civil Action No. 17-C-41, in the Circuit Court of Kanawha County, West Virginia, which was subsequently referred to the Circuit Court of Kanawha County, West Virginia, Business Court Division (the “**Attorney General Action**”).

C. Both the Municipal Litigation and the Attorney General Action alleged violations of the West Virginia Antitrust Act arising from and relating to the formation of the Camden Materials, LLC (“**Camden**”) joint venture between Kelly Paving and West Virginia Paving, Inc. (“**WVP**”) in April 2006 and its subsequent operation by WVP.

D. Kelly Paving has unequivocally denied—and continues to unequivocally deny—the truth of the Municipalities’ and the State’s allegations.

E. On February 1, 2018, the Circuit Court of Kanawha County, West Virginia, Business Court Division entered an *Order Granting the Motions for Summary Judgment to Kelly Paving, Inc. for All Causes of Action Asserted by the Cities of Beckley, Bluefield, Charleston, Huntington and Parkersburg and the Kanawha County Commission*. The Order granted summary judgment in favor of Kelly Paving and against the Municipalities on all counts alleged against Kelly Paving in the Municipal Litigation. The Municipalities appealed the Order to the Supreme Court of Appeals of West Virginia.

F. On June 13, 2018, the Supreme Court of Appeals of West Virginia granted the Municipalities’ motion to hold the appeal in abeyance over Kelly Paving’s objection. Such appeal has been held in abeyance and remains pending as of the date of this Agreement.

G. On April 7, 2020, the Circuit Court of Kanawha County, West Virginia, Business Court Division entered its *Findings of Fact and Conclusions of Law Denying Plaintiff's and Defendant's Motions for Summary Judgment*, which denied competing motions for summary judgment directed to the West Virginia Antitrust Act claims alleged by the State against Kelly Paving.

H. On June 24, 2020, the Circuit Court of Kanawha County, West Virginia, Business Court Division entered an *Order Resetting Timeframes and Trial Date*, which, *inter alia*, scheduled trial in the Attorney General Action to commence on October 19, 2020.

I. The Parties wish to resolve the litigation brought against Kelly Paving to avoid further expense, inconvenience, the distraction of burdensome and protracted litigation, additional costs of defense and prosecution, and to put to rest with finality all claims that were or could have been asserted against Kelly Paving arising from or related to the Attorney General Action and/or the Municipal Litigation, without any admission whatsoever as to the truth of the allegations made against Kelly Paving.

J. The Parties understand that the Municipalities' and the State's claims in the Municipal Litigation and Attorney General Action will proceed against CRH, plc; Oldcastle, Inc.; West Virginia Paving, Inc.; Southern West Virginia Asphalt, Inc.; Southern West Virginia Paving, Inc.; Camden Materials, LLC; American Asphalt & Aggregate, Inc.; American Asphalt of West Virginia, LLC; and Blacktop Industries and Equipment Company (collectively, the "**Non-Settling Defendants**").

TERMS AND RELEASES

In consideration of the foregoing and the mutual covenants contained in this Agreement, and for other valuable consideration the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. **Obligations of Kelly Paving, Inc.**

1.1. Payment by Kelly Paving. Kelly Paving shall cause payment to be made to counsel for the State and Municipalities by wire transfer of immediately available funds to the Client Trust account of Bailey & Glasser LLP in the total amount of one million seven hundred and fifty thousand dollars (\$1,750,000.00) no later than September 10, 2020 as full and final settlement, inclusive of all costs and attorneys' fees, of the Parties' disputes ("**the Settlement Payment**").

1.2. Structural Changes. Kelly Paving shall agree to the State's and WVP's previously negotiated and agreed-upon structural changes to the asphalt production market in and around Parkersburg, West Virginia, set forth in paragraphs 1.2.1 through 1.2.4 below, which are sought in order to improve competition in the Mid-Ohio Valley. The promises made by, and obligations of, Kelly Paving under this Subsection are expressly conditioned on the State securing such structural relief through either judgment or settlement with WVP and Camden in the Attorney General Action and/or Municipal Litigation:

1.2.1. For a period of seven years beginning on the date on which such relief is ordered, all asphalt manufactured by Camden Materials LLC shall be sold at restricted prices established by the West Virginia Department of Transportation, Division of Highways.

1.2.2. Asphalt manufactured by Camden Materials LLC during that period shall be offered and sold on a non-discriminatory basis to all customers.

1.2.3. The persons or entities responsible for operating Camden Materials LLC shall bear all the costs associated with complying with these structural changes and any others which may be obtained through settlement or judgment with the appropriate Non-Settling Defendants.

1.2.4. The foregoing requirements will not apply to any unaffiliated third party who acquires Camden Materials LLC or acquires substantially all of the assets of Camden Materials LLC. Neither Kelly Paving nor any parent, subsidiary, or affiliate of Kelly Paving shall be considered an unaffiliated third party.

1.3. Cooperation. Kelly Paving agrees to give full, continuing, and complete cooperation to the Municipalities and the State by: **(a)** giving full and truthful assistance in discovery and/or trial preparation relating to the Municipalities' and State's claims against the Non-Settling Defendants; **(b)** meeting and conferring on making available appropriate officers, agents, and employees for trial, as well as providing an in-person proffer of said witnesses testimony upon request; **(c)** producing at trial and, if necessary, at multiple trials, in-person representatives to provide truthful and complete testimony at the Municipalities' and State's expense (including mileage and lodging expenses); **(d)** making officers, agents, and employees reasonably available for interviews by the Municipalities' and State's counsel at the Municipalities' and State's expense (including mileage and lodging expenses); **(e)** making expert witnesses reasonably available for interviews by the Municipalities' and State's counsel at the Municipalities' and State's expense (including reimbursement of such witnesses at their regular hourly rate, including travel, for all work as of the Effective Date of this Agreement); **(f)** making expert witnesses available at trial and, if necessary, multiple trials, to provide truthful and complete testimony at the Municipalities' and State's expense (including reimbursement of such witnesses at their regular hourly rate for all work, including travel, as of the Effective Date of this Agreement). That notwithstanding, nothing in this Subsection shall require Kelly Paving to disclose privileged information, attorney work product, or expert work product which was not produced as of the Effective Date of this Agreement in either the Municipal Litigation or Attorney General Action.

1.4. Responses to Requests for Admission. Kelly Paving shall join in a motion brought by the State to withdraw or amend its responses to requests for admission propounded by Kelly Paving, provided the language of such motion is satisfactory to Kelly Paving's counsel, with the understanding that WVP has the right to oppose the withdrawal or amendment of such admissions, as well as the right to rely on any order entered by the Circuit Court of Kanawha County, West Virginia, Business Court Division related to such admissions.

1.5. Stipulation of Facts. Kelly Paving (including fact witnesses subject to its control on account of their employment by Kelly Paving) shall testify consistent with the Stipulation of Facts set forth below:

- Prior to 2006, Kelly Paving and WVP operated competing asphalt plants in Parkersburg, West Virginia.
- In 2006, Kelly Paving entered into a joint venture agreement with its competitor, WVP.
- As a result of that joint venture, Kelly Paving and WVP no longer operate competing asphalt plants in Parkersburg.
- Pursuant to that joint venture agreement, Kelly Paving and WVP created a new entity called Camden, which would be the only asphalt manufacturing plant in Parkersburg.
- That joint venture agreement had the effect of eliminating competition in the market for manufacturing asphalt.
- One effect of that joint venture agreement is that the production, manufacture, sale, and supply of asphalt in Parkersburg is controlled by the joint venture, which, in turn, is controlled by WVP as the Contract Operator pursuant to the applicable Administrative Services Agreement.
- Pursuant to that joint venture agreement, Kelly Paving and WVP each own an equal fifty percent (50%) share of Camden.
- The joint venture agreement required Camden's sales to Members to be at "arms' length." Kelly Paving routinely received the lowest average prices and consistently received prices from Camden that were lower on average than the prices offered to would-be competitors.
- The joint venture agreement generally prohibited Camden from disclosing sensitive pricing information to Kelly Paving. Camden disclosed pricing information to Kelly Paving, including lists of Camden's top twenty (20) customers and the average asphalt prices that those customers paid to Camden.
- Pursuant to that joint venture agreement, WVP is paid an administrative fee for managing Camden. All net profits from Camden are split equally between Kelly Paving and WVP.
- WVP controls Camden. Through Camden, WVP possesses the ability to charge supra-competitive prices for asphalt in the relevant geographic market, which are prices greater than those that could be charged in a competitive marketplace.
- Prior to the joint venture agreement, Kelly Paving operated an asphalt plant in Letart, Mason County, West Virginia.

- Prior to the joint venture agreement, Kelly Paving’s asphalt plant in Letart was capable of supplying asphalt for some jobs within its service area and was a direct competitor to WVP.
- As part of the joint venture agreement, Kelly Paving agreed to contribute its asphalt plant in Letart with the understanding that the plant would be dismantled and its parts and land sold to fund Kelly Paving’s purchase of a one-half ownership interest in Camden.
- After the formation of the joint venture and continuing through the Effective Date of this Agreement, Kelly Paving never bid or won a single West Virginia Department of Transportation, Division of Highways’ asphalt project in Mason County.

2. Obligations of the State of West Virginia

2.1. Dismissal by the State. The State shall cause its claims against Kelly Paving in the Attorney General Action to be dismissed with prejudice by executing and filing the Agreed Order of Dismissal incorporated into this Agreement as **Exhibit A**. The Agreed Order of Dismissal shall not be presented until signed by counsel for the State and for Kelly Paving; provided, however, that the Agreed Order of Dismissal must be presented and entered prior to the commencement of trial in the Attorney General Action.

2.2. No Debarment by the State. The State agrees not to cause, pursue, recommend, or take any act in furtherance of the debarment of Kelly Paving for any reason, known or unknown, arising out of or related to the Attorney General Action and/or Municipal Litigation which predates the Effective Date of this Agreement.

2.3. The State’s Release. In consideration of the recitals, covenants, and promises set forth in this Agreement, and other good and valuable consideration receipt of which is hereby acknowledged, upon the Effective Date of this Agreement, the State, on behalf of itself and any other person, entity, department, division, or subdivision who could claim through it (collectively, “**the State Releasers**”) hereby unconditionally, irrevocably, forever and fully releases, acquits, and forever discharges Kelly Paving—in addition to Kelly Paving’s respective past, present, and future directors, officers (whether acting in such capacity or individually), shareholders, owners, principals, trustees, creditors, attorneys, representatives, employees, managers, parents, subsidiaries, divisions, subdivisions, departments, affiliates, predecessors, successors, assigns and assignees (collectively, “**the Releasees**”)—of and from any and all claims, demands, actions, causes of action, suits, liens, debts, obligations, promises, agreements, costs, damages, liabilities, and judgments of any kind, nature, or amount, whether in law or equity, whether known or unknown, anticipated or unanticipated, liquidated or unliquidated, including any and all claimed or unclaimed compensatory damages, consequential damages, statutory damages, treble damages, interest, costs (including investigative costs), expenses, and fees (including reasonable or actual attorneys’ fees) that have accrued as of the Effective Date of this Agreement which were or could have been raised in and which arise out of, relate to, or in any way, directly or indirectly, involve the Attorney General Action (collectively, “**the State’s Released Matters**”).

2.4. The State’s Covenant Not to Sue. The State agrees not to cause claims to be made in any court or other forum against the Releasees for any matter within the scope of the releases contained in this Agreement for any cause of action which has accrued as of the Effective Date of this Agreement, including any claim by the Attorney General as a *parens patriae* action under West Virginia Code § 47-18-17 based on any act or omission of the Releasees arising from or related to the Attorney General Action and/or Municipal Litigation.

3. Obligations of the Municipalities

3.1. Dismissal by the Municipalities. The Municipalities shall cause their appeal in the Municipal Litigation, presently pending before the Supreme Court of Appeals of West Virginia as Case No. 18-0129, to be dismissed with prejudice by executing and filing the Agreed Order of Dismissal incorporated into this Agreement as **Exhibit B**. The Agreed Order of Dismissal shall not be presented until signed by counsel for the Municipalities and for Kelly Paving; provided, however, that the Agreed Order of Dismissal must be presented and entered prior to the commencement of trial in the Attorney General Action.. The Municipalities shall be responsible for paying the costs, if any, necessary to effectuate such dismissal. The *Order Granting the Motions for Summary Judgment to Kelly Paving, Inc. for All Causes of Action Asserted by the Cities of Beckley, Bluefield, Charleston, Huntington and Parkersburg and the Kanawha County Commission* shall stand.

3.2. No Debarment by the Municipalities. The Municipalities agree not to cause, pursue, recommend, or take any act in furtherance of debarment of Kelly Paving for any reason, known or unknown, arising out of or related to the Municipal Litigation and/or Attorney General Action which predates the Effective Date of this Agreement.

3.3. The Municipalities’ Release. In consideration of the recitals, covenants, and promises set forth in this Agreement, and other good and valuable consideration receipt of which is hereby acknowledged, upon the Effective Date of this Agreement, the Municipalities, on behalf of themselves and any other person, entity, department, division, or subdivision who could claim through them (collectively, “**the Municipal Releasors**”) hereby unconditionally, irrevocably, forever and fully release, acquit, and forever discharge the Releasees of and from any and all claims, demands, actions, causes of action, suits, liens, debts, obligations, promises, agreements, costs, damages, liabilities, and judgments of any kind, nature, or amount, whether in law or equity, whether known or unknown, anticipated or unanticipated, liquidated or unliquidated, including any and all claimed or unclaimed compensatory damages, consequential damages, statutory damages, treble damages, interest, costs (including investigative costs), expenses, and fees (including reasonable or actual attorneys’ fees) that have accrued as of the Effective Date of this Agreement which were or could have been raised in, or which arise out of, relate to, or in any way, directly or indirectly, involve the Municipal Litigation (collectively, “**the Municipalities’ Released Matters**”).

3.4. The Municipalities’ Covenant Not to Sue. The Municipalities agree not to cause claims to be made in any court or other forum against the Releasees for any matter within the scope of the releases contained in this Agreement for any cause of action which has accrued as of the Effective Date of this Agreement.

4. Additional Terms and Provisions

4.1. No Admission of Liability. Each of the Parties understands and agrees that this Agreement (inclusive of the Settlement Payment) is intended to compromise disputed claims and to avoid time and expense associated with continued litigation. This Agreement (inclusive of the Settlement Payment) shall not be construed or viewed as an admission by any Party of liability or wrongdoing, such liability or wrongdoing being expressly denied. This Agreement (inclusive of the Settlement Payment) shall not be admissible in any lawsuit, administrative action, or judicial or administrative proceeding if offered to show, demonstrate, evidence, or support a contention that any of the Parties acted illegally, improperly, or in breach of law.

4.2. No Civil Penalty. No portion of the Settlement Payment shall be considered a civil penalty subject to the provisions of West Virginia Code § 47-18-18.

4.3. Full Satisfaction. The Settlement Payment is in full satisfaction of each and every claim that has been or could have been brought against Kelly Paving in the Attorney General Action or in the Municipal Litigation. The Settlement Payment includes all attorneys' fees, expenses, and costs (including investigative costs) that the State or Municipalities may have incurred in connection with the Attorney General Action and Municipal Litigation.

4.4. Partial Settlement. This Agreement does not settle or compromise any claim by the Municipalities, the State, or Kelly Paving against any of the Non-Settling Defendants, or any entity or Defendant other than Kelly Paving. All rights against such other entities and Defendants are specifically reserved.

4.5. Compliance. Nothing in this Agreement shall relieve the Parties of their obligations to comply with all federal, state, and local laws and regulations.

4.6. Adequate Consideration. The Parties acknowledge and agree that the consideration received in connection with this Agreement is fair, adequate, and substantial and consists only of the terms set forth in this Agreement.

4.7. Further Assurances. Each Party agrees to take all reasonable steps necessary to effectuate the terms of this Agreement.

4.8. Waiver. The failure of any Party to perform any act under this Agreement shall not be construed as a waiver of that Party's right to perform such act at any subsequent time. The failure of any Party to demand the performance of any act under this Agreement shall not be construed as a waiver of that Party's right to demand, at any subsequent time, such performance.

4.9. Choice of Law. This Agreement and all matters arising out of or relating thereto shall be construed in accordance with, and shall be controlled by, the laws of the State of West Virginia without regard to West Virginia's choice-of-law rules.

4.10. No Interpretation of Captions or Headings. The captions and headings within this Agreement are for ease of reference only and are not intended to create any substantive meaning or to modify the terms and clauses either following them or contained in any other provision of this Agreement.

4.11. Severability. If any provision of this Agreement or the application thereof is held invalid by a court, arbitrator, or government agency of competent jurisdiction, the Parties agree that such a determination of invalidity shall not affect other provisions or applications of this Agreement that can be given effect without the invalid provisions.

4.12. Neutral Interpretation. The Parties shall be deemed to have cooperated in the drafting and preparation of this Agreement such that it shall not be construed against any Party. To the extent any term or provision of this Agreement is deemed ambiguous, no Party shall benefit from the construction of the Agreement in its favor on the ground that the Party did not draft the Agreement.

4.13. Counterparts. This Agreement may be executed in counterparts, and each executed counterpart shall be effective as the original. All faxed, e-mailed, or electronic signatures affirming this Agreement shall be considered an original signature.

4.14. Integration/Single Agreement. This Agreement constitutes a single, integrated, written contract expressing the entire understanding and agreement between the Parties as it relates to the settlement of the Attorney General Action and Municipal Litigation. The terms of this Agreement are contractual and not merely recitals. There is no other agreement, written or oral, expressed or implied, between the Parties with respect to the subject-matter of this Agreement. The Parties declare and represent that no promise, inducement, or other agreement not expressly contained in this Agreement has been made conferring any benefit upon them or upon which they have relied in any way. The terms and conditions of this Agreement may not be contradicted by evidence of any prior or contemporaneous agreement, and no extrinsic evidence may be introduced in any judicial proceeding to interpret this Agreement.

4.15. Amendment. This Agreement shall not be altered, amended, or modified by oral representation made before or after the execution of this Agreement. All amendments or changes of any kind must be made in writing signed by all Parties.

4.16. Advice of Counsel. Each Party to this Agreement acknowledges that it has had the benefit of advice of competent legal counsel or the opportunity to retain such counsel with respect to its decision to enter into this Agreement.

4.17. Authority. The individuals whose signatures are affixed to this Agreement in a personal or representative capacity represent that they are competent and authorized to enter into this Agreement and are doing so freely and without coercion.

4.18. Successors. This Agreement shall inure to the benefit of the respective successors and assigns of the Parties, and each and every one of the Releasees shall be deemed to be intended third-party beneficiaries of this Agreement.

4.19. Attorneys' Fees. If any Party institutes legal proceedings over the enforcement of this Agreement or any provision of it, the prevailing Party shall be entitled to recover from the losing Party its reasonable attorneys' fees, at both the trial and appellate levels, taxable court costs, and non-taxable litigation expenses. Attorneys' fees are separate from, and not treated as, costs or expenses.

4.20. Warranties and Representations. The Parties warrant and represent that they have read this Agreement and understand all of its terms, and that they are knowingly and voluntarily entering into this Agreement without any duress or undue influence on the part of, or on behalf of, any of them, based on the advice of their own counsel and not upon any representations of any other Party or its counsel.

4.21. Survival of Representations. The representations, warranties, agreements, and acknowledgements contained in this Agreement shall survive dismissal of the Attorney General Action and the Municipal Litigation.

5. Waiver of Trial by Jury

5.1. THE PARTIES KNOWINGLY, VOLUNTARILY, AND INTENTIONALLY WAIVE THE RIGHT TO A TRIAL BY JURY REGARDING ANY LITIGATION ARISING OUT OF, OR RELATING TO, THIS AGREEMENT.

KELLY PAVING, INC.

By: *Michael W. Gore*

Its: COO

Date: 9-11-20

THE STATE OF WEST VIRGINIA

By: *Charles L. Davis*

Its: Assistant Attorney General

Date: September 4, 2020

**THE WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION**

By: _____

Its: _____

Date: _____

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KELLY PAVING, INC.

By: _____

Its: _____

Date: _____

THE STATE OF WEST VIRGINIA

By: _____

Its: _____

Date: _____

**THE WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION**

By: Nathanial Sawyer

Its: General Counsel

Date: September 8, 2020

THE CITY OF BECKLEY, WEST VIRGINIA

By: William H. Pile, III

Its: City Solicitor

Date: 9-10-20

THE CITY OF BLUEFIELD, WEST VIRGINIA

By: _____

Its: _____

Date: _____

THE CITY OF CHARLESTON, WEST VIRGINIA

By: _____

Its: _____

Date: _____

THE CITY OF HUNTINGTON, WEST VIRGINIA

By: _____

Its: _____

Date: _____

THE CITY OF PARKERSBURG, WEST VIRGINIA

By: _____

Its: _____

THE CITY OF BECKLEY, WEST VIRGINIA

By: _____

Its: _____

Date: _____

THE CITY OF BLUEFIELD, WEST VIRGINIA

By: *Colin W. [Signature]*

Its: *CITY SOLICITOR*

Date: *9/11/20*

THE CITY OF CHARLESTON, WEST VIRGINIA

By: _____

Its: _____

Date: _____

THE CITY OF HUNTINGTON, WEST VIRGINIA

By: _____

Its: _____

Date: _____

THE CITY OF PARKERSBURG, WEST VIRGINIA

By: _____

Its: _____

THE CITY OF BECKLEY, WEST VIRGINIA

By: _____

Its: _____

Date: _____

THE CITY OF BLUEFIELD, WEST VIRGINIA

By: _____

Its: _____

Date: _____

THE CITY OF CHARLESTON, WEST VIRGINIA

By: _____

Its: _____

Date: _____

[Handwritten signature]
City Manager
September 10, 2020

THE CITY OF HUNTINGTON, WEST VIRGINIA

By: _____

Its: _____

Date: _____

THE CITY OF PARKERSBURG, WEST VIRGINIA

By: _____

Its: _____

THE CITY OF BECKLEY, WEST VIRGINIA

By: _____

Its: _____

Date: _____

THE CITY OF BLUEFIELD, WEST VIRGINIA

By: _____

Its: _____

Date: _____

THE CITY OF CHARLESTON, WEST VIRGINIA

By: _____

Its: _____

Date: _____

THE CITY OF HUNTINGTON, WEST VIRGINIA

By: *Scott Damron* *Scott Damron*

Its: *City Attorney*

Date: *9/10/2020*

THE CITY OF PARKERSBURG, WEST VIRGINIA

By: _____

Its: _____

THE CITY OF BECKLEY, WEST VIRGINIA

By: _____

Its: _____

Date: _____

THE CITY OF BLUEFIELD, WEST VIRGINIA

By: _____

Its: _____

Date: _____

THE CITY OF CHARLESTON, WEST VIRGINIA

By: _____

Its: _____

Date: _____

THE CITY OF HUNTINGTON, WEST VIRGINIA

By: _____

Its: _____

Date: _____

THE CITY OF PARKERSBURG, WEST VIRGINIA

By: Joseph T. Senter

Its: City Attorney

