REPORT/RECOMMENDATION TO THE BOARD OF SUPERVISORS
OF THE COUNTY OF SAN BERNARDINO
AND RECORD OF ACTION

June 22, 2021

FROM
LARRY AINSWORTH, Chief Information Officer, Innovation and Technology Department

SUBJECT
Apple Developer Program License Agreement

RECOMMENDATION(S)
1. Approve the Apple Developer Program License **Agreement No. 21-463** with Apple Inc., including the non-standard terms, to be accepted electronically for application software development and distribution utilizing Apple's App Store for use on Apple-branded products for an indefinite contract period.
2. Designate the Chief Information Officer, or designee, to sign documents and accept online agreements as they pertain to changes to the Apple Developer Program License, subject to review by County Counsel, provided that such documents do not substantively modify the terms applicable to the County.
3. Direct the Chief Information Officer to transmit copies of all documents, when applicable, in relation to this agreement to the Clerk of the Board of Supervisors within 30 days of execution.

(Presenter: Larry Ainsworth, Chief Information Officer, 388-5501)

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES
Operate in a Fiscally-Responsible and Business-Like Manner.

FINANCIAL IMPACT
Approval of the Apple Developer Program License Agreement (Agreement) will not result in the use of Discretionary General Funding (Net County Cost). This agreement is non-financial in nature for the publication and distribution of County application software utilizing Apple's App Store.

BACKGROUND INFORMATION
Several County departments are developing application software to assist in providing County services based on each department's mission. There are various distribution outlets that provide access to a wide variety of application software, including Apple's App Store. Apple requires registration as an Apple Developer under the terms of its Developer Program License Agreement in order to publish and support application software, publicly or privately, via the Apple App Store. Approval of this Agreement would authorize the Chief Information Officer to establish an Apple Developer Account (Account), granting him authority to accept all legal agreements related to the Account, subsequent to County Counsel review and approval of all agreements related to the Account, required to publish application software through the Apple App Store. Once the Account is activated, the Chief Information Officer, or designee, will be

able to manage user access to the Account, as well as the ability to publish County application software applicable to the department's mission.

The Apple Developer Program License Agreement is Apple's standard commercial contract, which includes terms that differ from the standard County contract and omits certain County standard contract terms. The non-standard and missing terms include the following:

1. Apple may modify the Agreement, including any rules and policies without notice at any time.
   - The County standard contract requires that any changes to the contract to be reduced to writing, executed and attached to the original Contract and approved by the person(s) authorized to do so on behalf of Contractor and County.
   - Potential Impact: Apple may change the Terms and Conditions and privacy policy without notice at any time. The County could be agreeing to new terms without review by anyone, including County Counsel, and without the approval of the new terms by the Board of Supervisors.

2. There are no restrictions of Apple ability to assign the contract.
   - The County must approve any assignment of the contract.
   - Potential Impact: Apple may assign the contract without notice and without the County's approval to a third party or business with which the County is legally prohibited from doing business due to issues of Federal debarment or suspension and conflict of interest, without the County's knowledge.

3. The contract does not require Apple to indemnify the County, including for intellectual property infringement claims.
   - The County standard contract indemnity provision requires the Contractor to indemnify, defend, and hold the County harmless from third party claims arising out of the acts, errors or omissions of any person. The standard contract provision for intellectual property indemnity is: Contractor will indemnify, defend, and hold harmless County and its officers, employees, agents and volunteers, from any and all third party claims, costs (including without limitation reasonable attorneys' fees), and losses for infringement of any United States patent, copyright, trademark or trade secret (Intellectual Property Rights) by any goods or services.
   - Potential Impact: Apple is not required to defend, indemnify or hold the County harmless from any claims, including indemnification for claims arising from Apple's negligent or intentional acts and intellectual property infringement. If the County is sued for any claim, including intellectual property infringement based on its use of Apple's software or services, the County may be solely liable for the costs of defense and damages, which could exceed the total contract amount.

4. The contract requires the County to indemnify Apple for (i) the County's breach of any certification, covenant, obligation, representation or warranty in the Agreement; (ii) any claims that the County's Product or the distribution, sale, offer for sale, use or importation of the County's Product, Licensed Application Information, metadata, or Pass Information violate or infringe any third party intellectual property or proprietary rights; (iii) the County's breach of any obligations under the End-User License Agreement (EULA) for the County's application; (iv) Apple's permitted use, promotion or

delivery of the County's Application, Licensed Application Information, Safari Push Notification, Safari Extension (if applicable), Pass, Pass Information, metadata, related trademarks and logos, or images and other materials that the County provides to Apple under the Agreement; (v) any claims regarding the County's Product, Licensed Application Information, Pass Information, or related logos, trademarks, content or images; or (vi) the County's use of the Apple Software or services, Licensed Application Information, Pass Information, metadata, Your Authorized Test Units, Registered Devices, Covered Products, or development and distribution of any of the foregoing.

- The County standard contract does not include any indemnification or defense by the County of a Contractor.
- <u>Potential Impact</u>: By agreeing to indemnify Apple, the County could be contractually waiving the protection of sovereign immunity. Claims that may otherwise be barred against the County, time limited, or expense limited could be brought against Apple without such limitations and the County would be responsible to defend and reimburse Apple for costs, expenses, and damages, which could exceed the total contract amount.

5. The contract does not require Apple to meet the County's insurance standards.
   - The County standard contract requires contractors to carry appropriate insurance at limits and under conditions determined by the County's Risk Management Department.
   - <u>Potential Impact</u>: The contract does not include County standard insurance requirements. This means that the County has no assurance that Apple will be financially responsible for claims that may arise from the County's use of the software, which could result in expenses to the County that exceed the total contract amount.

6. Apple's total liability to the County for any claim arising under the Agreement is $50, except as may be required by applicable law in cases involving personal injury.
   - The County standard contract does not include a limitation of liability.
   - <u>Potential Impact</u>: Claims would likely exceed the liability cap and the contract amount leaving the County financially liable for the excess. In addition, the County's liability under the contract is not similarly limited.

7. Venue is in Santa Clara County, California.
   - The County standard contract requires venue for disputes in Superior Court of California, County of San Bernardino, San Bernardino District.
   - <u>Potential Impact</u>: Having a venue in Santa Clara County, California may result in additional expenses that exceed the amount of the contract.

The Innovation and Technology Department recommends approval of the Agreement, including the non-standard terms, to allow County departments to distribute application software at no cost via the Apple App Store.

PROCUREMENT
There is no procurement activity related to this Agreement.

REVIEW BY OTHERS
This item has been reviewed County Counsel (Bonnie Uphold, Deputy County Counsel, 387-5455) on May 21, 2021; Purchasing (Bruce Cole, Supervising Buyer, 387-2148) on May 20, 2021; Finance (Carolina Mendoza, Administrative Analyst, 387-0294) on May 27, 2021; and County Finance and Administration (Kelly Welty, Deputy Executive Officer, 387-5423) on May 27, 2021.

Record of Action of the Board of Supervisors
County of San Bernardino

APPROVED (CONSENT CALENDAR)

Moved: Joe Baca, Jr.   Seconded: Dawn Rowe
Ayes: Col. Paul Cook (Ret.), Janice Rutherford, Dawn Rowe, Curt Hagman, Joe Baca, Jr.

Lynna Monell, CLERK OF THE BOARD

BY _Lynna Monell_____
DATED: June 22, 2021

cc: IT- Bird w/agree
      Contractor- C/O IT w/agree
      File- w/agree

LA   06/24/2021