

ENCROACHMENT AGREEMENT

An Encroachment Agreement is entered into on this 12th day of September, 2017, by and between the City of Concord, a municipal Corporation (hereinafter referred to as "CITY") and CONTRA COSTA COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT (hereinafter referred to as "PERMITTEE").

WHEREAS, a public right of way was dedicated to the City for use for storm water drainage, including construction, access or maintenance or works, improvement and structures as part of Diamond Boulevard Bridge over Walnut Creek near Willow Pass Road, as described more fully below; and

WHEREAS, PERMITTEE has requested entry into the said right of way to install and maintain a stream gauge and related equipment ("Equipment") in the said right of way; and

WHEREAS, CITY has determined that the private improvements will not affect CITY's ability to access and maintain any public facilities and is consistent with the purposes of the public right of way; and

WHEREAS, CITY is willing to authorize such encroachment subject to the parties entering into an Encroachment Agreement pursuant to Title 12, Chapter 12.15, Sections 12.15.010 *et seq.* (Street Encroachments) of the Concord Municipal Code.

NOW THEREFORE, in consideration of the faithful performance of the terms and conditions herein, the parties hereto agree as follows:

1. **Description of Real Property.** The real property affected by this Agreement is described in Exhibit "A" which is attached hereto and incorporated herein by reference.

2. **Encroachment Affected.** The encroachment affected by this Agreement is the storm water drainage right of way referred to above, the location and description of which are set forth in Exhibit "B" and incorporated herein by reference.

3. **Encroachment Ordinance.** The CITY's Street Encroachment Ordinance as contained in Title 12, Chapter 12.15, Sections 12.15.010 *et seq.* of the Concord Municipal Code, is hereby incorporated and made a part of this Agreement by reference. The above-described real property and the encroachments shall be subject to the terms and conditions of such ordinance as incorporated

1 herein. The requirements of Section 12.15.130 (a) – (g) in connection with the requirement of a cash
2 deposit or bond is waived pursuant to subsection (h) of Section 12.15.130. However, the obligation to
3 provide Commercial General Liability insurance or self-insurance in the amount of \$1,000,000.00 and
4 name the CITY as an additional insured under said policy in a manner determined acceptable by the
5 City Attorney as required by Section 12.15.130(i) (“Insurance”) of the Concord Municipal Code
6 remains in full force and effect.

7 4. **Permits.** Upon execution of this Agreement, CITY will issue an encroachment permit to
8 PERMITTEE pursuant to the Encroachment Permit Ordinance hereinabove referred to and provided
9 that all appropriate approvals have been given by CITY for the allowance of the encroachment.

10 5. **Maintenance of Encroachment.** PERMITTEE shall be solely responsible for the
11 inspection, repair, and maintenance of the encroachment and Equipment during the period the
12 encroachment remains in the right of way area and shall comply with all applicable terms and
13 conditions of the Encroachment Permit, a copy of which is attached hereto and made a part hereof and
14 marked Exhibit “C”. The City assumes no responsibility for loss or damage to the Equipment or other
15 property of PERMITTEE.

16 6. **Term of Agreement.** The term of this Encroachment Agreement shall commence on the
17 date first set forth above, and shall be terminated by either party upon thirty (30) days written notice to
18 the other party.

19 7. **Indemnification.** PERMITTEE shall indemnify, defend, and hold harmless CITY against
20 any and all claims or suits for damages or injury arising from PERMITTEE’s use of the encroachment
21 area or from any activity, work, or thing done, permitted, or suffered by PERMITTEE in or about the
22 encroachment area, and shall further indemnify, defend, and hold harmless CITY against and from
23 any and all claims or suits arising from any breach or default of any performance of any obligation of
24 PERMITTEE hereunder, and against and from all costs, attorney’s fees, expenses, and liabilities
25 related to any claim or any action or proceeding brought within the scope of this indemnification.

26 8. **Failure to Comply.** If PERMITTEE fails to comply with the requirements of this
27 Agreement, CITY shall have the option of either terminating this Agreement or invoking the rights
28 under Paragraph 9. Prior to termination, CITY shall notify PERMITTEE in writing of the date of

1 termination and the reasons for such action, at least thirty (30) days prior to its occurrence. If
2 PERMITTEE corrects the deficiencies identified by CITY prior to the expiration date, or commences
3 such correction prior to the expiration date and diligently prosecutes same to completion, then this
4 Agreement shall remain in effect.

5 9. **Attorney's Fees.** In the event that it becomes necessary for either party to bring a lawsuit
6 to enforce any of the provisions of this Agreement, the parties agree that a court of competent
7 jurisdiction may determine and fix a reasonable attorney's fee to be paid to the prevailing party.

8 10. **Relocation or Removal of Encroachment.** When any encroachment authorized
9 hereunder is found to be in conflict with existing or proposed facilities or improvements owned,
10 maintained, or operated by CITY, such encroachment shall, upon written demand of the City
11 Engineer, be relocated in such a way as to eliminate the conflict. Said relocation to be at the sole
12 expense of PERMITTEE.

13 11. **Notice.** All notices required herein shall be sent via First Class U.S. Mail with postage
14 prepaid thereon to the parties as follows:

15 TO CITY: City of Concord
16 1950 Parkside Drive, M/S 03 ____
17 Concord, CA 94519-2578
Attn: City Clerk

18 TO PERMITTEE: Contra Costa County Flood Control
19 and Water Conservation District
20 255 Glacier Drive
Martinez, CA 94553
Attn: Karen A. Laws

21 Notices shall be deemed effectively served upon deposit in the United States Mail.

22 12. **Recordation.** This Agreement shall be recorded by the CITY OF CONCORD with the
23 Office of the Contra Costa County Recorder upon execution by all parties hereto.

24 13. **Entire Agreement.** This Agreement contains the entire agreement between the parties
25 hereto. No promise, representation, warranty or covenant not included in this Agreement has been or
26 is relied on by any party hereto. If any term of this Agreement conflicts with a term of the
27 Encroachment Permit issued under this Agreement, the term of this Agreement shall prevail over the
28 conflicting term of the Encroachment Permit.

1 **IN WITNESS WHEREOF**, the parties have executed this Agreement the date and year first written
2 above.

3 CONTRA COSTA FLOOD CONTROL AND
4 WATER CONSERVATION DISTRICT

5
6 By: _____
Permittee

7
8 CITY OF CONCORD, a municipal Corporation

9
10 By: _____
Valerie Barone, City Manager

11 ATTEST:

12
13 By: _____
Joelle Fockler, City Clerk

14 APPROVED AS TO FORM:

15
16 _____
Susanne Meyer Brown, City Attorney