

RECORDING REQUESTED BY  
AND WHEN RECORDED MAIL TO:

City of San Marcos  
ATTN: City Clerk  
1 Civic Center Drive  
San Marcos, CA 92069-2949

Recorded Without Fee Per GC §27383

Above Space Reserved for Recorder's Use

A.P.N. \_\_\_\_\_

Permit/Ref No.: \_\_\_\_\_

Plan No(s): \_\_\_\_\_

City File No.: \_\_\_\_\_

## **STORMWATER MANAGEMENT FACILITIES MAINTENANCE, DISCHARGE CONTROL, AND LIEN AGREEMENT, ASSOCIATED COVENANTS, AND GRANT OF ACCESS**

This Stormwater Management Facilities Maintenance, Discharge Control, and Lien Agreement, Associated Covenants, and Grant of Access ("Agreement") dated as of the date of recordation of this Agreement with the Office of the County Recorder of San Diego County ("Effective Date"), is made by and between \_\_\_\_\_ ("Property Owner"), and the City of San Marcos, a chartered municipal corporation ("City"), collectively referenced as "Parties," and individually as "Party," with respect to the following:

**WHEREAS**, Property Owner is the fee owner of that certain real property located at \_\_\_\_\_, more particularly described in Exhibit "A" attached hereto and made a part hereof, and located within the City of San Marcos, County of San Diego, State of California ("Real Property"); and

**WHEREAS**, Property Owner intends to develop the project known as \_\_\_\_\_ on the Real Property with a Priority Development Project ("Project"); and

**WHEREAS**, to facilitate compliance with the National Pollutant Discharge Elimination System ("NPDES") permit ("Permit") issued to City, City has adopted and enforces regulations requiring permanent storm water quantity and/or quality protection measures (Best Management Practices or "BMPs"), which regulations include, but are not limited to, Chapter 14.15 of San Marcos Municipal Code ("SMMC"), and City's Best Management Practices ("BMP") Design Manual; and

**WHEREAS**, routine inspection and maintenance of BMPs will preserve the design and Permit objective to remove pollutants in storm water to the maximum extent practicable; and.

**WHEREAS**, in accordance with the NPDES permit, the SMMC and the BMP Design Manual, Property Owner is required to install, inspect, maintain, repair, and replace all permanent stormwater best management practice facilities, stormwater management facilities, BMP facilities, and associated improvements (collectively, "Permanent Stormwater Controls") on the Real Property in perpetuity as described and depicted in Exhibits B and C, attached hereto and

incorporated herein by this reference, and also as described in the Project Storm Water Quality Management Plan ("SWQMP") and the approved Plan File/Drawing \_\_\_\_\_ on file with City.

**WHEREAS**, in accordance with the NPDES permit, City requires this Agreement to document the terms and conditions relating to ongoing long-term maintenance of all structural BMPs by the Property Owner; and

**WHEREAS**, Property Owner enters into this Agreement on its own behalf and on behalf of its successors and assigns, and makes the covenants contained herein to fulfill the obligations described above.

**NOW, THEREFORE**, the Parties agree as follows:

1. **Operation & Maintenance Plan**. Property Owner has caused to be prepared a Permanent Stormwater Control Operation and Maintenance Plan ("OMP"), approved by City to ensure implementation and maintenance consistent with San Diego Regional Water Quality Control Board NPDES permit requirements. The OMP describes employee training programs and duties, routine inspection, service and operating schedules, maintenance frequency, and specific maintenance activities. Property Owner shall include a copy of the OMP in the Project SWQMP; the final approved OMP is attached to this Agreement as Exhibit D and incorporated herein by this reference.

2. **Amendment**. Property Owner must obtain City's prior written consent for any material change to the Permanent Stormwater Controls or the OMP. For purposes of this Agreement, "material change" means anything other than correction of a typographical error, or a change to a non-substantive provision of the Permanent Stormwater Controls or the OMP, which change does not affect a NPDES permit requirement. If required at City's sole discretion, Property Owner shall amend the OMP and implement the same. Property Owner may seek to amend the OMP, subject to City's review and approval in City's sole discretion.

3. **Maintenance Activities**. Property Owner must install, inspect, maintain, and repair or replace as needed, all Permanent Stormwater Controls, as described and depicted in Exhibits B and C, to ensure they are functioning as originally designed and approved, in accordance with the OMP and the schedule contained therein. If necessary to ensure the Permanent Stormwater Pollution Controls continue to operate effectively to remove pollutants in storm water to the maximum extent practicable, Property Owner must perform additional maintenance or repair outside of the schedule contained in the OMP. Property Owner must not demolish, remove, modify, and/or lessen the effectiveness of the Permanent Stormwater Controls.

4. **Maintenance Records**. Property Owner must prepare and maintain annual records documenting all maintenance activities under the OMP. Property Owner must maintain the Records in compliance with all applicable local, state, and federal law, and with all applicable permits and must make them available to City for inspection upon its request at any time.

5. **Annual Report**. Property Owner must submit to City by October 1 of each year its certified Annual Report documenting compliance with this Agreement and applicable regulations and laws. Said Annual Report must contain, at a minimum, the following:

5.1 The name, address, and telephone number of the person completing the Annual Report.

5.2 The name, address, and telephone number of any business and/or person responsible for implementation of any portion the OMP.

5.3 Time period covered by the report.

5.4 A chronological summary of the activities conducted under the OMP; a photocopy of the applicable sections of the logbook with a clarifying explanation will generally suffice. City may request additional information. For any activities conducted by parties which are not an affiliate of Property Owner, include a copy of the invoice for services rendered during that reporting period.

5.5 An outline of planned activities for the following reporting period/year. And current photographs of all BMPs installed on the Real Property.

6 Storm Water Quality Management Plan. Additional information as contained in the SWQMP for the Project will be on file at City Hall for the duration of the applicable Public Records Act retention period for such records. .

7 Notice, Time to Cure. City will provide Property Owner with a written notice of any failure to satisfactorily perform obligations under this Agreement and/or the OMP. Property Owner will have a reasonable period of time, as defined in the notice, to cure any failure to perform all maintenance obligations for which a deficiency has been noticed and/or the OMP schedule calls for the same. If Property Owner cannot cure the deficiency within the time period specified in the Notice, Property Owner may submit a written request for additional time specifying why the cure cannot be completed within the specified time, how Property Owner intends to address the deficiency, and how much additional time is required to perform the work.

8 City Remedies in Event of Failure to Maintain, Costs as Lien Against Real Property. In the event of failure to satisfactorily perform obligations under this Agreement and/or the OMP, City shall give the Owner notice of the specific maintenance and/or repair required ("the Work"), and a reasonable time period within which such Work is to be completed. If the required maintenance and/or repair Work is not completed within the time period set by City, City has the right, but not the obligation, to provide notice that it will perform such Work and invoice Property Owner for any and all costs associated with the same. If City elects to perform the Work or to cause it to be performed, invoices for the actual, reasonable cost of such work and associated expenditures, such as City staff time associated with Property Owner's failure to timely perform the Work, shall be paid within 30 days of Property Owner's receipt of the invoice for such Work. City's invoiced costs and expenses pursuant to this Section 9 will constitute a lien against the Real Property, together with interest at the rate of ten percent (10%) per annum on unpaid invoices. Payments will be first applied to accrued interest and then to the outstanding principal amount, which amounts can be added to the amounts due and owing under the Real Property tax bill and collected as ordinary taxes by City in its discretion. The actions described in this Section 8 are in addition to and not in lieu of any and all legal remedies available to City. The remedies delineated in this Agreement are cumulative and not exclusive of any rights or remedies that may otherwise be available unless this Agreement provides expressly to the contrary. Property Owner may contest City's costs to the extent such costs are in excess of the amounts permitted under this Section by submitting a protest within five (5) calendar days of its receipt of City's invoice. If legal action ensues, any costs or fees incurred by City will be added to the amount of the lien. In the event of an emergency or imminent threat to public health or welfare, City may take immediate measures to remedy or address said threat, and no notice to Property Owner shall be required under such circumstances.

9        **City Right of Entry and Access.** Property Owner hereby grants permission to City to enter onto the Real Property without prior notice at any time to inspect, assess, observe, and ensure adequate performance of the Permanent Stormwater Controls in accordance with this Agreement and all applicable regulations and laws.

10      **Effective Date, Agreement and Covenants Run with the Real Property.** This Agreement shall become effective upon execution of this document by all parties ("Effective Date"). This Agreement is intended to protect the value and desirability of the Project and the Real Property, and to benefit all the citizens of City and the watershed. This Agreement and the terms, covenants, and conditions contained herein constitute covenants running with the Real Property and are binding on all parties having or acquiring from Property Owner or their successors any right, title, or interest in or to the Project, the Real Property, and/or any part thereof, as well as their title, or interest in the Project, the Real Property, and/or any part thereof, as well as their respective heirs, successors, and assigns, in perpetuity. This Agreement shall inure to the benefit of each present or future successor in interest to the Project, the Real Property, and/or any part thereof, or interest therein, and to the benefit of all citizens of City.

11      **Indemnification and Hold Harmless.** Property Owner shall indemnify, reimburse, hold harmless, and defend City and its authorized agents, officers, officials, and employees ("City Indemnitees") from and against any and all claims, demands, suits, damages, liabilities, losses, accidents, casualties, occurrences, claims, and payments, and/or legal proceedings of any kind or nature, including, but not limited to, administrative proceedings, including reasonable attorneys' and expert fees and costs (collectively, "Losses"), claimed or that might arise or be asserted against City that are alleged or proven to result or arise from Property Owner's failure to comply with the terms of this Agreement, except to the extent that such Losses are caused, contributed to, or exacerbated by, the active negligence or willful misconduct of a City Indemnitee. Property Owner's indemnification, reimbursement, hold harmless, and defense obligation shall also apply to any facility located on the Real Property that were not removed and/or replaced in connection with the Project, irrespective of whether such facility was constructed as part of the Project or pre-existed the same. In the event any such claim is asserted against City Indemnitees, City shall promptly notify Property Owner, and Property Owner shall defend City at its own expense any suit or action of whatever nature based on such claim. At its sole discretion, City shall have the right to participate in the event of any suit based on such claims. If City elects, at its sole discretion, to conduct its own defense, participate in its own defense, or obtain independent legal counsel in defense on any claim related to the installation, inspection, maintenance, repair or replacement of the Permanent Stormwater Controls, Property Owner agrees to pay the reasonable value of attorney's fees and all of City's reasonable costs. Property Owner's obligation to indemnity is not restricted to insurance proceeds, if any, received by City Indemnitees. Property Owner agrees to pay any and all costs City Indemnitees incur enforcing the indemnity and defense provisions of this Section 11.

12      **Security.** If within any five-year period City inspectors determine on two occasions that Property Owner has failed to effectively operate, maintain, and/or repair the Permanent Stormwater Controls, City may require Property Owner to provide City with security to ensure the faithful performance of the obligations of this Agreement and the OMP for at least two years, as determined by City ("Security Amount"). Security may be in the form of a performance bond in the Security Amount City's standard requirements for such security including, but not limited to, admission, licensing, and rating of such surety. In the event of any insolvency, bankruptcy, or termination by the state of the right to do business, of any surety furnished by Property Owner, Property owner shall submit a substitute bond or surety acceptable to City within seven days. Security may also be in the form of an irrevocable letter of credit in the Security Amount in form acceptable to City's manager and attorney, issued in favor of City by a reputable state or national

financial institution with at least one branch located within the City of San Marcos, or in the form of a cash deposit in the Security Amount. Such security shall be maintained for the balance of the term of this Agreement, in City's sole discretion. City may use all or any portion of the security to fund the costs associated with City's performance of any of the maintenance, repair, and/or replacement for the Permanent Stormwater Controls as delineated herein, or to reimburse itself for such costs incurred by reason of Property Owner's failure to do so and/or breach of this Agreement. In the event the funds fall below the Security Amount required by this Agreement, Property Owner must deposit funds or additional sureties to bring the Security Amount equal to the amount required by this Section 12.

13     No Additional Liability. It is the parties' intent by entering into this Agreement to ensure the proper maintenance of the Permanent Stormwater Controls by Property Owner; provided, however, that this Agreement shall not be deemed to create or effect any additional liability not otherwise provided by law to any party for damage alleged to result from or caused by storm water runoff.

14     Transfer of Property. Property Owner agrees whenever the Real Property is sold, conveyed or otherwise transferred to a person or entity (each referred to herein as a "Transferee"), it shall notify the Transferee of this Agreement, and provide to the Transferee, not later than ten (10) business days before the date of transfer, a copy of this Agreement complete with all exhibits, all available maintenance records, and annual reports pertaining to the obligations set forth in this Agreement, and any material correspondence between City and Property Owner relating to the Permanent Stormwater Controls including but not limited to any notice of default (collectively, "Stormwater Documents"), provided failure of Property Owner to deliver the Stormwater Documents as set forth above shall not be a defense in any action by City for enforcement of the terms of this Agreement as against any Transferee. Property Owner's obligations shall not be limited by any prior or subsequent declaration by Property Owner and/or their successor(s) in interest.

15 Release of Agreement. If requested by Property Owner, City will consider whether all or any portion of the Permanent Stormwater Controls are no longer required. If the City Manager or designee makes such determination, City shall enter into an amendment or release of this Agreement, as applicable, in recordable form acceptable to City's attorney.

16 Notices. Except as otherwise expressly provided herein, any notices given under this Agreement shall be effective only if in writing and given by delivering the notice in person, by sending it first class mail or certified mail with a return receipt requested or overnight courier, return receipt requested, with postage prepaid, addressed as follows:

City: Stormwater Program  
City of San Marcos  
1 Civic Center Drive  
San Marcos, CA 92069

With a copy to: **City Engineer  
City of San Marcos  
1 Civic Center Drive  
San Marcos, CA 92069**

Property Owner: \_\_\_\_\_  
\_\_\_\_\_

(Note: the address set forth in City's tax rolls for the Real Property must be one of the addresses for Property Owner)

The foregoing addresses may be changed by written notice. Notices herein shall be deemed given two (2) days after the date when they shall have been mailed if sent by first class, certified or overnight courier, or upon the date personal delivery is made. No notice to or demand on the Parties for notice of an event not herein legally required to be given shall in itself create the right in the Parties to any other or further notice or demand in the same, similar, or other circumstances.

17 Miscellaneous.

17.1 Amendment or Modification. This Agreement may be amended or modified only in writing signed by City and Property Owner.

17.2 No Waiver Except in Writing. No waiver by any party of any of the provisions of this Agreement shall be effective unless in writing and signed by an officer or other authorized representative, and only to the extent expressly provided in such written waiver. No waiver of any breach shall affect or alter this Agreement, and each and every covenant, condition, and term hereof shall continue in full force and effect to any existing or subsequent breach.

17.3 City Authorized Representative. All approvals and determinations of City requested, required, or permitted hereunder may be made by the City Engineer or designee.

17.4 Independent Contractors. Property Owner, and its contractors, subcontractors, and/or any other individuals or entities employed by Property Owner shall be independent contractors and not agents of City. Any provisions of this Agreement giving City the right to secure compliance with the OMP, NPDES permit, and/or any other applicable stormwater regulation or statute, relate to only achievement of required compliance.

17.5 Merger, Venue. This instrument (including the attached Exhibits and the documents referenced herein) contains the entire agreement between the parties and all prior written or oral negotiations, discussions, understandings, and agreements are merged herein. This Agreement shall be governed by and construed in accordance with California law and, to the extent applicable, federal law. Any action arising under or relating to this Agreement shall be brought only in the Superior Court of San Diego County, North County Division, or the U.S. District Court, Southern District of California, as applicable.

17.6 Joint and Several Liability. If Property Owner consists of more than one person or entity, then the obligations of each person or entity shall be joint and several.

17.7 Severability. If any provision of this Agreement or the application thereof to any person, entity or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Agreement, or the application of such provision to persons, entities, or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby, and each other provision of this Agreement shall be valid and be enforceable to the fullest extent permitted by law.

17.8 Counterparts. This Agreement may be executed in more than one counterpart, each of which shall be deemed to be an original but all of which, when taken together shall constitute but one instrument.

17.9 Signing Authority. Each signatory and Party hereto hereby warrants and represents to the other Party that it has legal authority and capacity and direction to enter into this Agreement; that all necessary authorizations for entry into this Agreement have been secured and agrees to hold the other Party hereto harmless if it is later determined that such authority does not exist.

17.10 Conflicts Between Terms. If a conflict or inconsistency exists between the main body of this Agreement and the Exhibits, the main body of this Agreement controls. If a conflict exists between an applicable federal, state, or local law, rule, regulation, order, or code, and this Agreement, the law, rule, regulation, order, or code controls. Varying degrees of stringency among the main body of this Agreement, the Exhibits, and laws, rules, regulations, orders, or codes are not deemed conflicts, and the most stringent requirement will control. Each Party shall notify the other immediately upon identifying any apparent conflict or inconsistency concerning this Agreement.

17.11 Interpretation. Where the context requires in this Agreement, the singular will be construed as the plural, and neuter pronouns will be construed as masculine and feminine pronouns, and vice versa. Unless otherwise specified, whenever in this Agreement, including its Exhibits, reference is made to any Recital, Article, Section, Exhibit, or any defined term, the reference will be deemed to refer to the Recital, Article, Section, Exhibit, or defined term of this Agreement. Any reference to a Recital, an Article or a Section includes all subsections and subparagraphs of that Recital, Article or Section. Section and other headings are for the purpose of convenience of reference only and are not intended to, nor will they, modify or be used to interpret the provisions of this Agreement. References in this Agreement to days will be to calendar days, unless otherwise specified. If the last day of any period to give or reply to a notice, meet a deadline, or undertake any other action occurs on a day that is not a Business Day, then the last day for giving or replying to such notice, meeting such deadline or undertaking any such other action will be the next succeeding Business Day. As used in this Agreement, "Day" will mean any day of the week other than a Saturday or Sunday on which offices of City are open to the public for business for carrying on substantially all City functions. The use in this Agreement of the words "including", "such as" or words of similar import when used with reference to any general term, statement or matter will not be construed to limit such statement, term or matter to the specific statements, terms or matters, unless language of limitation, such as "and limited to" or words of similar import are used with reference thereto. In the event of a conflict between the Recitals and the remaining provisions of this Agreement, the remaining provisions will prevail. Any reference to this Agreement includes any modification made in accordance with the terms hereof. Obligations and requirements to be performed by Property Owner will be construed as mandatory, rather than directory, in nature.

17.12 Compliance with Controlling Law. Property Owner must comply with all applicable federal, state, or local law, rule, regulation, order, or code(s) applicable to this Agreement. In addition, Property Owner must comply immediately with all directives issued by City or its authorized representatives under authority of any laws, rules, regulations, ordinances, or order.

17.13 Prompt Performance. Time is of the essence with respect to each covenant and condition set forth in this Agreement.

17.14 Drafting Ambiguities. The Parties and their representatives each acknowledge that they are aware they have the right to be advised by counsel with respect to the negotiation, terms, and conditions of this Agreement, and the decision whether or not to seek advice of counsel with respect to his Agreement is a decision that is the sole responsibility of each

Party. This Agreement shall not be construed in favor of or against either Party by reason of the extent to which each Party participated in the drafting of this Agreement.

18 Enforcement. Failure to comply with the terms of this Agreement constitutes a violation of San Marcos Municipal Code Chapter 14.15 (Stormwater Management and Discharge Control), and may result in enforcement action pursuant to City's stormwater regulations and administrative procedures. These remedies are not exclusive, and are in addition to any legal or equitable remedies provided in this Agreement and/or otherwise available to City.

IN WITNESS WHEREOF, City and Property Owner have each caused this Agreement to be executed by their respective duly authorized representatives as of the Effective Date.

Property Owner: By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

For: \_\_\_\_\_

[NOTE: NOTARY ACKNOWLEDGMENTS FOR ALL SIGNATURES MUST BE ATTACHED, AND DOCUMENTATION OF SIGNATURE AUTHORITY PROVIDED; ANY AGREEMENTS SIGNED BY CORPORATE ENTITIES MUST INCLUDE THE SIGNATURES OF TWO PERSONS HOLDING SEPARATE OFFICES; SIGNATURES ON BEHALF OF PARTNERSHIPS AND LLCs MUST BE SIGNED BY MANAGING PARTNER]

City of San Marcos: Approved By:

\_\_\_\_\_  
Isaac Etchamendy, City Engineer  
City of San Marcos

**THIS IS TO CERTIFY** that the interest in real property conveyed by the Stormwater Management Facilities Maintenance, Discharge Control, And Lien Agreement, Associated Covenants, And Grant Of Access to the City of San Marcos, a chartered municipal corporation, is hereby accepted, and the grantee consents to recordation thereof by its duly authorized officer.

Dated: \_\_\_\_\_  
\_\_\_\_\_  
Phillip Scollick, City Clerk  
City of San Marcos

Approved as to Form:

\_\_\_\_\_  
Helen Holmes Peak, City Attorney

## **EXHIBIT A**

### Legal Description of Real Property

Document # \_\_\_\_\_

**Exhibit A**

## **EXHIBIT B**

### Description of Permanent Stormwater Pollution Controls

## **EXHIBIT C**

### Plat of Permanent Stormwater Pollution Controls

## **EXHIBIT D**

Approved Operation and Maintenance Plan for the Real Property/Project

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA )  
 ) ss.  
COUNTY OF SAN DIEGO )

On \_\_\_\_\_, before me, \_\_\_\_\_, Notary Public,  
personally appeared \_\_\_\_\_, who proved to me on the  
basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and  
acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by  
his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted,  
executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

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## Notary Public

[seal]

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA )  
 ) ss.  
COUNTY OF SAN DIEGO )

On \_\_\_\_\_, before me, \_\_\_\_\_, Notary Public, personally appeared \_\_\_\_\_, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

## Notary Public

[seal]

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

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his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted,  
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## Notary Public

[seal]

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basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and  
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his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted,  
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WITNESS my hand and official seal.

## Notary Public

[seal]