

EXEMPT FROM FEES pursuant to
Gov't Code §§ 6103, 27383, and 27388.1
(filing requested/executed by municipality)

RECORDING REQUESTED BY, AND
WHEN RECORDED RETURN TO:

City Engineer
City of Escondido
201 North Broadway
Escondido, CA 92025-2798

This Space for Recorder's Use Only

STORM WATER CONTROL FACILITY MAINTENANCE AGREEMENT
APN NO. _____

This STORM WATER CONTROL FACILITY MAINTENANCE AGREEMENT (“Agreement”) is entered into between the City of Escondido, a California municipal corporation (“City”) and [Entity Name, Entity Type] (“Owner”), and in accordance with City of Escondido Grading Plan No. [GP Number] (“Grading Plan”). (The City and Owner may each be referred to herein as a “Party” and collectively as the “Parties.”)

WHEREAS, installation and maintenance of Storm Water Control Facilities (“SWCF”) is required pursuant to the Escondido Municipal Code, by the California Regional Water Quality Control Board (“RWQCB”), and by the City as a condition of approval of property development; and

WHEREAS, Owner is the owner of certain real property identified as Assessor’s Parcel Number (APN) [APN]; located at [Street Address], Escondido, CA [zip code]; and more particularly described in Exhibit A, attached hereto and incorporated herein by this reference (“Property”); and

WHEREAS, Owner has proposed development of the Property that provides benefit to the general public and the City and meets the requirements of RWQCB Order R9-2013-0001, as amended by Order Nos. R9-2015-0001 and R9-2015-0100 (National Pollution Discharge Elimination System No. CAS0109266); and

WHEREAS, the current and future subdivision Owner shall use the SWCF as installed per the Grading Plan and the provisions of the Storm Water Quality Management Plan prepared by the Owner and approved by the CITY on [Approval Date] (“Storm Water Plan”); and

WHEREAS, it is the mutual desire of the Parties to establish a method for the maintenance and repair of the SWCF, and that the SWCF be maintained in a safe and usable condition by the Owner; and

WHEREAS, the City shall have the right but not the obligation to enforce full compliance with the terms and conditions of this Agreement; and

WHEREAS, it is the mutual intention of the Parties that this Agreement constitute a covenant running with the land, binding upon each successive person having or acquiring any right, title, or interest in all or any portion of the Property.

NOW, THEREFORE, in consideration of the above premises, the mutual covenants and promises below, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. The Property is benefited by this Agreement, and the Owner is expressly bound hereby for the benefit of the land. In the event any of the herein described parcels of land are subdivided further, the Owner, or its heirs, assigns, and successors in interest of each such newly created parcel, shall be liable under this Agreement for its then pro rata share of expenses and such pro rata shares of expenses shall be computed to reflect such newly created parcels.

2. The cost and expense of maintaining the SWCF shall be the responsibility of, and paid by, the Owner. The SWCF shall be constructed and maintained by the Owner in accordance with the Grading Plan and Storm Water Plan.

3. Repair and maintenance responsibilities for all structural SWCF and required Best Management Practices (“BMPs”) are set forth in the Storm Water Plan. Owner shall, as changes occur, provide the City with the name, title, and phone number of the persons or entities responsible for maintenance and reporting activities; funding, schedules, and procedures for inspection and maintenance of the SWCF; implementation of worker training requirements; and any other activities necessary to ensure compliance with BMPs. The Storm Water Plan shall provide for the servicing of all SWCF as needed, and at least once during August or September of each year, and for the retention of inspection and maintenance records for at least three years. Owner shall submit annual certification to the City’s Department of Engineering Services between September 1 and October 1 of each year. The certification shall document all maintenance performed and compliance with applicable permits.

4. The City shall have the right to inspect the SWCF and related records as needed to ensure the SWCF is being properly maintained.

5. If any individual Owner fails to pay its share of costs and expenses as required to use, maintain, or repair the SWCF, then the City shall be entitled without further notice to institute legal action for the collection of funds advanced on behalf of the individual Owner that did not pay its share of costs and expenses and shall be entitled to recover in such action, in addition to the funds advanced, interest thereon at the current prime rate of interest, until paid; all costs and disbursements of such action, including such sum or sums as the court may fix; and reasonable attorney’s fees.

6. Any liability of the Owner to any worker employed to make repairs or provide maintenance under this Agreement, or to third persons, as well as any liability of the Owner for damage to the property of any such worker, or any third persons, as a result of or arising out of repairs and maintenance under this Agreement, shall be borne solely by the Owner (and if jointly owned,

then in the same percentage as each individual Owner bears the costs and expenses of such repairs and maintenance). In the case of more than one Owner, each individual Owner shall be responsible for and maintain its own insurance. By this Agreement, the Parties do not intend to provide for the sharing of liability with respect to personal injury or property damage other than that attributable to the repairs and maintenance undertaken under this Agreement. Each Owner agrees to indemnify any other Owner from any and all liability for injury to an individual Owner or damage to its property when such injury or damage results from, arises out of, or is attributable to any maintenance or repairs undertaken pursuant to this Agreement.

7. Indemnification, Duty to Defend, Hold Harmless.

7.1 To the fullest extent permitted by law, Owner shall jointly and severally indemnify, defend with legal counsel reasonably satisfactory to the City, and hold harmless the City and the City's officers, officials, directors, employees, agents, volunteers, and Councilmembers (collectively, "Indemnitees") from and against any and all claims, demands, actions, causes of action, proceedings (including but not limited to legal and administrative proceedings of any kind), suits, fines, penalties, sanctions, judgments, levies, liens, orders (including without limitation any RWQCB Orders), assessments, costs, expenses, liabilities, losses, damages, or injuries, in law or equity, including without limitation the payment of all consequential damages and attorney's fees and other related litigation costs and expenses, of every nature caused by, arising out of, or in connection with Owner's obligations under this Agreement or Owner's obligations for implementation of storm water management in accordance with RWQCB Order R9-2013-0001 and subsequent amendments (collectively, "Claims"), including any reasonable attorney's fees, costs, and expenses incurred by the Indemnitees in responding to or defending any Claims, except where caused by the active negligence, sole negligence, or willful misconduct of the Indemnitees.

7.2 Owner's duty to defend the Indemnitees is separate, independent, and free-standing from Owner's duty to indemnify and hold harmless the Indemnitees. Owner's defense obligation shall arise immediately upon receipt by the City or Owner of any written notice of any alleged Claims, or a written Notice of Violation or equivalent notice of intent from the RWQCB or other enforcement agency to levy any fines, penalties, or sanctions against Indemnitees, and shall continue until the entry of any final and non-appealable judgment or order, including without limitation any final and non-appealable RWQCB Order or other agency enforcement order.

7.3 The indemnity protections provided by this Agreement are not intended to exceed the indemnity available under applicable law. If the indemnity protections are found by a court to be unlawful in any way, the protection shall be curtailed or adjusted, but only to the minimum extent required to conform to applicable law.

7.4 All terms and provisions within this Section 7 shall survive termination of this Agreement.

8. If, in the City's sole judgment, the SWCF is not being maintained to the standards required by this Agreement, the City may thereupon provide written notice to the Owner to initiate repairs or construction within 90 days. Upon the Owner's failure to demonstrate good faith to make repairs or construction within 90 days, the City may make all necessary repairs to the SWCF or construct the SWCF in a manner to meet the standards set forth in this Agreement and to then assess

costs to the Owner.

9. If the City elects to make necessary maintenance or repairs in accordance with this Agreement, such maintenance and repairs shall be accepted “as is” by the Owner without any warranty of workmanship and be guaranteed and indemnified by Owner in accordance with this Agreement.

10. The obligations and benefits provided for in this Agreement shall run with the land obligated and benefited, respectively, and shall be binding on all persons having or acquiring any right, title, or interest in the Property or any part thereof. As such, it is the intent of the Parties that this Agreement and the promises, covenants, rights, and obligations set forth herein (i) shall be and are covenants running with the Property, encumbering the Property for the term of this Agreement, and binding upon Owner’s successors in title and all subsequent owners and operators of the Property; (ii) are not merely personal covenants of the Owner; and (iii) shall bind Owner and its respective heirs, executors, administrators, successors, and assigns.

11. Amendments. This Agreement may not be amended, modified, waived, or supplemented except by an agreement in writing signed by all of the Parties, and then only in the specific instance and for the specific purpose given.

12. Governing Law. This Agreement shall be governed by the laws of the State of California. In the event any provision of this Agreement is held to be unenforceable or invalid by any court of competent jurisdiction, the validity and enforceability of the remaining provisions shall not be affected thereby.

13. Entire Agreement. This Agreement, together with its attachments or other documents, if any, described or incorporated herein, contains the entire agreement and understanding concerning the subject of this Agreement and supersedes and replaces all prior negotiations, understandings, or proposed agreements, written or oral, except as otherwise provided herein. Each of the Parties hereto acknowledges that no other Party, nor the agents nor the attorneys for any Party, has made any promise, representation, or warranty whatsoever, express or implied, not contained herein, to induce the execution of this Agreement and acknowledges that this Agreement has not been executed in reliance upon any promise, representation, or warranty not contained herein.

14. Severability. This Agreement shall be performed and shall be enforceable to the full extent allowed by applicable law, and the illegality, invalidity, waiver, or unenforceability of any provision of this Agreement shall not affect the legality, validity, applicability, or enforceability of the remaining provisions of this Agreement.

15. Capacity. Each individual signing this Agreement represents and warrants that he or she has been authorized to do so by proper action of the Party on whose behalf he or she has signed.

16. Advice of Counsel. The Parties hereby acknowledge that they have executed this Agreement after having the opportunity to consult with, and receive the advice of, their own counsel.

17. Attorney’s Fees. In any action to enforce the terms of this Agreement, the Parties agree that the prevailing party shall be entitled to its actual attorney’s fees and all costs, fees, and expenses, including the fees of expert witnesses and consultants, whether or not such costs, fees, and

expenses are recoverable or allowed as costs under section 1033.5 of the California Code of Civil Procedure. Such fees and costs shall be proven and awarded by the court after the conclusion of the trial on all other issues by way of a cost bill and motion. In addition to the foregoing award of attorney's fees and costs, the prevailing party shall be entitled to its attorney's fees and costs incurred in any post-judgment proceeding to collect or enforce any judgment. This provision is separate and shall survive the merger of this provision into any judgment on this Agreement.

18. Counterparts. This Agreement may be executed on separate counterparts that, upon completion, may be assembled into and shall be construed as one document.

19. Recitals. The Recitals set forth in this Agreement are included herein by reference as part of this Agreement and the Parties agree that said Recitals are essential facts to this Agreement.

20. Effective Date. Unless a different date is provided in this Agreement, the effective date of this Agreement shall be the latest date of execution set forth by the names of the signators below.

IN WITNESS WHEREOF, this Agreement is executed by the Parties or their duly authorized representatives as of the Effective Date:

CITY OF ESCONDIDO

Date: _____

Julie Procopio, Director of Engineering Services

[OWNER]

Date: _____

Signature

Name/Title (please print)

(ALL ABOVE SIGNATURES MUST BE NOTARIZED)

Approved as to Form:

OFFICE OF THE CITY ATTORNEY
Michael R. McGuinness, City Attorney

BY: _____

EXHIBIT A

Legal Description of Property