

**MATCHING GRANT AGREEMENT
BETWEEN
THE CITY OF SAN JOSE
AND
OUR CITY FOREST
(FY 2009-2010)**

This Matching Grant Agreement ("Agreement") is made and entered into this _____ day of _____, 2009, by and between the CITY OF SAN JOSE, a municipal corporation of the State of California ("City") and OUR CITY FOREST, a California nonprofit corporation ("Grantee").

RECITALS

WHEREAS, Grantee, as a nonprofit corporation, is involved in Community Forest programs in the City of San José; and

WHEREAS, City desires for Grantee to actively solicit and obtain Community Forestry grants from other agencies, specifically, the State of California administered Federal AmeriCorps grant; and

WHEREAS, in an effort to assist Grantee in securing the Federal AmeriCorps grant, City wishes to award a grant to Grantee for Grantee to apply to the local match requirement for the third year of the Federal AmeriCorps grant; and

WHEREAS, City's Director of Transportation (the "Director") is charged with the responsibility of administering this Agreement on City's behalf;

NOW, THEREFORE, the parties agree as follows:

SECTION 1. AUTHORITY AND STATUS OF GRANTEE.

Grantee represents and warrants that the information contained in this Agreement is true and accurate to the best of its knowledge; and that it is a duly organized validly

existing nonprofit corporation in good standing under the laws of its place of incorporation; that its signatory to this Agreement is authorized by resolution, by laws, or constitution of the nonprofit corporation, currently, in full force and effect, to execute this Agreement on Grantee's behalf.

SECTION 2. TERM OF AGREEMENT.

This Agreement shall be for a term commencing on October 16, 2009 and expiring on October 15, 2010, unless otherwise terminated earlier as provided for in this Agreement. Regardless of the date of execution of this Agreement, this Agreement is effective as of October 16, 2009.

SECTION 3. RELATIONSHIP OF PARTIES.

Under no circumstances will this Agreement be construed as one of agency, partnership, joint venture or employment between Grantee and City. Each party acknowledges and agrees that it neither has, nor will give the appearance or impression of having, any legal authority to bind or commit the other party in any way.

SECTION 4. PAYMENT AND EXPENDITURE OF GRANT AWARD.

A. City agrees to pay Grantee a total grant in an amount not to exceed One-Hundred Twenty Thousand Dollars (\$120,000) ("Grant Award"), for Grantee to apply towards its third year matching fund requirement for the AmeriCorps Grant. City will pay the Grant Award to Grantee in two (2) installments; the first, in the amount of Eighty Thousand (\$80,000) dollars, the second, in the amount of Forty Thousand, (\$40,000) dollars.

1. As a condition precedent to the City's payment of the first installment of the Grant Award, immediately upon execution of this Agreement, Grantee shall submit to the City evidence of the insurance coverage required by Section 16 of this Agreement.
2. As a condition precedent to the City's payment of the second installment of the Grant Award, on or before February 1, 2010, Grantee shall submit to the City, for review and approval: a status report, consisting of a

summary of progress in accomplishing the AmeriCorps grant goals and performance measures as outlined in "Exhibit A" (Matching Grant Program), attached hereto and incorporated herewith and, monthly Financial Reports and a Mid-Year Performance Report, as specified below in Sections 6, 7, and 9.

B. Grantee shall expend the Grant Award on the program set forth in the attached Exhibit A.

C. If any of the Grant Award remains unexpended at the expiration of this Agreement, the Director may, at the Director's sole option, extend the term of this Agreement, or alternatively, require Grantee to repay any amounts remaining unexpended.

SECTION 5. WITHHOLDING OR CANCELLATION OF PAYMENTS.

City may elect to suspend or to cancel payment to Grantee, in whole or in part, in the event of any of the following occurrences:

1. If the Grantee is in default under any provisions of this Agreement.
2. If the Grantee makes ineffective or improper use of any City funds in the provision of programs and services.
3. If Grantee fails to comply with any of the terms and conditions of this Agreement.
4. If Grantee submits to City any report that in any material respect is incorrect, incomplete or misrepresents information.
5. If Grantee loses its nonprofit status.

SECTION 6. ACCOUNTING AND FINANCIAL RECORDS.

Grantee shall establish and maintain at all times, on a current basis in connection with the provision of the Matching Grant Program, an adequate accounting system in accordance with generally accepted accounting principles and standards and

acceptable to Director covering all revenues, costs, and expenditures with respect to Grantee's performance under this Agreement.

SECTION 7. FINANCIAL REPORTS.

A. Grantee shall submit reports of all financial transactions related to Grantee's performance under this Agreement ("Financial Reports") in accordance with the schedule specified in this Section: February 1, 2010 and October 15, 2010. The Financial Reports shall be submitted in duplicate to the Director. The format of the Financial Reports shall be as directed by the Director. In lieu of generating a consolidated quarterly report, the Grantee may instead submit, in strict accordance with the above schedule, a report covering each of the months in the reporting period, which includes a Standard Balance Sheet and Standard Income and Expense Statement for each of the months in the reporting period. The Financial Reports must be prepared in accordance with generally accepted accounting principles.

B. Grantee shall also submit a final report of all financial transactions related to this Agreement no later than October 15, 2010 ("Final Report"). The Final Report must be prepared and certified by a certified public accountant in accordance with generally accepted auditing principles.

C. Grantee shall submit a copy of their Federal Internal Revenue tax return for the fiscal year 2009 verifying the Grantee's 501c (3) status no later than October 15, 2010.

SECTION 8. CONTRACTOR'S FINANCIALS.

A. City Council requires that each non-profit organization receiving \$200,000 or more in funds from the CITY or Redevelopment Agency (in the aggregate) during any fiscal year which is either (i) grant funding other than construction funding and/or (ii) operating subsidy funding for operation of CITY facilities, must prepare and make available for public view on the internet, annual audited financial statements. The audited financial statements must be made available for view within six (6) months from

the end of the non-profit's fiscal year (which period may be extended by the City Manager based upon a showing of hardship or other good cause) and must be viewable by the public at no cost. All audits must be performed by a certified public accountant currently licensed to practice in the State of California, must conform to generally accepted auditing standards and otherwise be in a form acceptable to the City Manager.

B. Non-profits shall be required to comply with this requirement at the time that the non-profit has entered into one or more grant agreements or subsidy agreements with the CITY and/or Redevelopment Agency, which provide for the payment of an aggregate amount that equals or exceeds \$200,000 in grant and/or subsidy funds in any one fiscal year. Non-profits covered by this requirement must exert due diligence in determining when they have reached the aggregate funding threshold of \$200,000. The provisions of the financial posting requirements shall be interpreted broadly to effectuate the purpose of making available to the public information on recipients of substantial CITY and/or Redevelopment Agency funds. These provisions shall apply not only to grant agreements or operating agreements but shall also apply, without limitation, if any amendments to such agreements brings the total annual funding to equal or exceed \$200,000, and also to any other agreements with the CITY and/or Redevelopment Agency that are equivalent in purpose to a grant agreement or an operating subsidy agreement, regardless of the title of the agreement.

C. This posting requirement shall remain in effect until an entire fiscal year passes in which the non-profit does not have contracts with the CITY and/or Redevelopment Agency which provide for grants and/or subsidies from the CITY and/or Redevelopment Agency in an aggregate amount equaling or exceeding \$200,000. Without limitation of any other remedy, Grantee's failure to comply with this requirement may be taken into consideration when evaluating Grantee's request for future grant funds or subsidies.

SECTION 9. PERFORMANCE REPORTS.

In addition to the Financial Reports required by Section 7, Grantee shall also submit to

the Director reports that documents Grantee's performance ("Performance Reports"), as measured by the performance measures set forth in Exhibit A. The dates for submission of Performance Reports shall be the same as those established for Financial Reports specified in Section 7.

SECTION 10. RIGHT OF EXAMINATION AND AUDIT.

Grantee agrees that the City's Manager, Auditor, Attorney or the Director, or any of their duly authorized representatives, shall have access to and the right to examine all facilities and activities of Grantee related to Grantee's performance of this Agreement, including the right to audit, examine and make excerpts or transcripts of all contracts, subcontracts, invoices, payroll records, personnel records, and all other data or financial records relating to matters covered by this Agreement at any time. Grantee further agrees that such right of City to examine or audit shall continue for three (3) years after the expiration or termination of this Agreement, or for such longer period, if any, as is required by applicable law.

SECTION 11. PRESERVATION OF RECORDS.

Grantee shall preserve and make available its records related to its performance of this Agreement (a) until the expiration of three (3) years from the date of final payment to Grantee under this Agreement, or (b) for such longer period, if any, as is required by applicable law.

SECTION 12. REIMBURSEMENT TO CITY.

Grantee agrees to pay to City, within fifteen (15) days after City's written notice to Grantee, any portion of the Grant Award paid by the City to Grantee which the Director has determined is a Disallowed Cost.

SECTION 13. INDEPENDENT CONTRACTOR.

A. The parties agree that Grantee and Grantee's employees shall be at all times independent contractors and not agents or employees of the City, and that Grantee and Grantee's employees shall not be entitled to any salary, fringe benefits,

pension, Workers' Compensation, sick leave, insurance or any other benefit or right connected with employment by the City of San José, or any compensation other than as prescribed herein, and Grantee and Grantee's employees expressly waive any claim it/they may have to any such rights.

B. Under no circumstances shall this Agreement be construed as one of partnership, joint venture or employment between Grantee and City. Each party acknowledges and agrees that it neither has, nor will give the appearance or impression of having, any legal authority to bind or commit the other party in any way.

SECTION 14. ASSIGNMENT BY GRANTEE.

Any assignment or attempt to assign this Agreement by Grantee without Director's written authorization shall constitute a material breach for which City may automatically terminate this Agreement without prior notice.

SECTION 15. INDEMNIFICATION AND HOLD HARMLESS.

Grantee shall protect, defend, indemnify and hold harmless City, its officers, employees and agents against any loss, liability, damage, suits, actions or claims arising out of or relating in any way to Grantee's performance under this Agreement due to the willful or negligent acts (active or passive) or omissions by Grantee's officers, employees, volunteers or agents. The acceptance of Grantee's performance under this Agreement by City shall not operate as a waiver of such right of indemnification. This Section shall survive expiration or sooner termination of this Agreement.

SECTION 16. INSURANCE REQUIREMENTS.

At Grantee's sole cost and expense, and for the entire term of this Agreement, Grantee shall obtain and maintain in full force all of the insurance requirements set forth in Exhibit B, attached hereto and incorporated herewith. All policies, endorsements, certificates and/or binders will be subject to approval by the Director of Finance or the Director's authorized designee ("Risk Manager") as to form or content. These requirements are subject to amendment or waiver if so approved in writing by the Risk

Manager. Grantee agrees to provide City with a copy of said policies, certificates and/or endorsements upon execution of this Agreement as a condition of the City's first installment of the grant award.

SECTION 17. NONDISCRIMINATION BY GRANTEE.

In the performance of this Agreement, Grantee shall not discriminate, in any way, against any employee or applicant for employment because of race, sex, color, age, religion, sexual orientation, disability, actual or perceived gender identity, ethnicity or national origin, nor shall Grantee, in the providing of service hereunder, discriminate against any person on the basis of race, sex, color, age, religion, sexual orientation, disability, actual or perceived gender identity, ethnicity or national origin.

SECTION 18. COMPLIANCE WITH ALL LAWS.

A. Grantee shall comply with all applicable City, state and federal laws, regulations and rules related to the operation of Program, including but not limited to laws, regulations and rules applicable to health, safety and equal opportunity employment.

B. Grantee recognizes and understands that this Agreement may create a possessory interest subject to property taxation and that Grantee may be subject to payment of property taxes levied on such interest and any such tax shall be the liability of and be paid by Grantee.

SECTION 19. EFFECT OF WAIVER.

The waiver by City of any breach of any term, covenant or condition of this Agreement shall not be deemed a waiver of such term, covenant or condition or a waiver of any subsequent breach of such term, covenant or condition. The consent or approval by City to any act by Grantee requiring City's approval or consent shall not be deemed to waive provisions for City's approval or consent or any subsequent acts by Grantee.

SECTION 20. BREACH.

A. Grantee's performance of each and every provision of this Agreement is an integral part of the consideration for City to enter into this Agreement. Grantee's failure to perform any of the provisions of this Agreement shall constitute a material breach for which City, in addition to any other rights or remedies available to City, may immediately terminate this Agreement upon written notice to Grantee.

B. City, at City's sole option, may elect to provide written notice of the breach of this Agreement and a time period in which Grantee may cure the specified breach. In the event that Grantee fails to cure the specified breach within the time period specified, City may terminate this Agreement.

SECTION 21. TERMINATION WITHOUT CAUSE.

A. This Agreement may be terminated by either party upon giving to the other party seven (7) days written notice of termination. In the event such notice of termination is given, this Agreement shall be deemed terminated and at end seven (7) days after written notice is given.

B. The Director is authorized to decide on the part of City, that this Agreement is to be terminated and to furnish written notice thereof, either under this Section or Section 20.

C. No later than thirty (30) days of Grantee's receipt of City's termination notice under this Section or Section 20, Grantee shall refund the unused portion of the Grant Award to City; except that Grantee shall have no obligation to refund to City any portion of the grant award that the City determines was spent in accordance with the terms of the Agreement. Additionally, Grantee shall provide City with an accounting of its expenditure of the Grant Award as set forth in Section 7.

SECTION 22. NOTICES.

A. Any and all notices which either party desires or is required by this

Agreement to give or furnish to the other party shall be personally delivered or deposited in the United States mail, postage prepaid, addressed as follows:

CITY: City of San José—Department of Transportation
Attention: Our City Forest – Project Manager
200 East Santa Clara Street, 8th Floor Tower
San José, CA 95113-1905

GRANTEE: Our City Forest
151 West Mission Street
San José, CA 95110

B. The parties may change their respective addresses for purposes of delivering notices by sending notice of such change pursuant to this section.

C. Notice shall be deemed effective on the date personally delivered or, if mailed, three (3) days after deposit in the United States mail.

D. Grantee's primary contact with City shall be the project manager appointed by the Director. Grantee shall submit all correspondence and communication regarding this Agreement to City through the project manager.

SECTION 23. ENVIRONMENTALLY PREFERABLE PROCUREMENT POLICY.

A. Grantee agrees that, in the performance of this Agreement, Grantee shall perform its obligations under the Agreement in conformance with City Council Policy 4-6, Environmentally Preferable Procurement Policy. A description for environmentally preferable procurement and the Policy can be found on the City's website at the following link: <http://www.sanjoseca.gov/esd/natural-energy-resources/epp.htm>.

- B. Environmental procurement policies and activities related to the completion of work will include wherever practicable, but are not limited to:
1. Use of recycled and/or recyclable products in daily operations (i.e. 30, 50, 100% PCW paper, chlorine process free; triclosan free hand cleaner, etc.)
 2. Use of Energy Star Compliant equipment.
 3. Vehicles and vehicle operations (i.e. Alternative Fuel, Hybrid, etc.)
 4. Internal waste reduction and reuse protocol(s).
 5. Water and resource conservation activities within facilities, including bans on individual serving bottled water and the use of compostable food service products, etc.

SECTION 24. NO RELIGIOUS OR POLITICAL ADVOCACY.

- A. Grantee shall not expend any portion of the compensation hereunder to inhibit or promote religion and the services funded by this Agreement must not be used to convey a religious message. Any portion of the compensation used in contradiction to the provisions of this section, shall be deemed a disallowed cost.
- B. Grantee shall not expend any portion of the compensation hereunder for political advocacy efforts, whether for or against a political candidate, ballot measure or bill.

SECTION 25. ACKNOWLEDGEMENT OF CITY.

Grantee will acknowledge the support of City, where appropriate, in written documents and informational material regarding the grant project.

SECTION 26. MISCELLANEOUS PROVISIONS.

A. The parties agree that this Agreement shall be governed and construed in accordance with the laws of the State of California. In the event that suit is brought by either party to this Agreement, the parties agree that venue will be exclusively vested in

the state courts of the County of Santa Clara, or if federal jurisdiction is appropriate, exclusively in the United States District Court, Northern District of California, San José, California.

B. The headings of the sections and subsections of this Agreement are inserted for convenience only. They do not constitute a part of this Agreement and shall not be used in its construction.

C. The waiver by any party to this Agreement of a breach of any provision of this Agreement will not be deemed a continuing waiver or a waiver of any subsequent breach of that or any other provision of this Agreement.

D. Any and all exhibits that are referred to in this Agreement are incorporated herein by reference and are deemed a part of this Agreement. This Agreement may only be amended by formal written agreement executed by both parties.

E. If a court of competent jurisdiction adjudges any provision of this Agreement as void or unenforceable, the remaining provisions shall not be affected hereby and shall remain in full force and effect.

F. Where performance is specified to be performed on or before a date certain, time shall be of the essence.

G. Where this Agreement refers to City and no officer of the City is named, the Director of the City's Department of Transportation will have the authority to act on City's behalf.

WITNESS THE EXECUTION HEREOF, the day and year first herein above written.

APPROVED AS TO FORM:



JOHNNY V. PHAN
Deputy City Attorney

CITY OF SAN JOSE, a municipal corporation

By: _____
DEANNA J. SANTANA
Deputy City Manager

OUR CITY FOREST, a California non-profit corporation

By:  _____
RHONDA BERRY
Executive Director
Fed. I.D. 77-0371911

EXHIBIT A

MATCHING GRANT PROGRAM

A. FEDERAL AMERICORPS GRANT PROGRAM DESCRIPTION.

1. Grantee applied for and obtained a One Million Dollars (\$1 million), three-year grant for its Green San José initiative from the State-administered Federal AmeriCorps program. The grant provides partial funding for 22 full-time community forestry trainees and 1.5 additional staff positions. These positions will provide tree planting, tree care, volunteer support and community education services to the neighborhoods of San José. This grant program requires an annual Grantee match of approximately \$607,000 for such items as trees, stakes, stipends, trucks, insurance, computers and related expenses. This Matching Grant Agreement for \$120,000 is to provide a portion of the matching funds required for the third year of the grant.

2. Grantee's business and services model is a perfect fit for the three strategic goals of this federal program:

a. Grantee meets a critical need in the community by providing tree related services.

b. The City is strengthened through the Grantee's engagement of citizens in developing and maintaining the community forest.

c. Grantee provides an opportunity for Americans to be involved in a lifetime of meaningful volunteer service.

B. SERVICES.

1. As part of this Agreement, Grantee shall provide the following services:

a. **Funding Outreach** - For Fiscal Year 2009-2010, Grantee shall secure funding from sources other than the City of San José to complete the \$607,000 local match required for the third year of the grant to secure the AmeriCorps grant for the third year.

b. **Staff** - Grantee shall hire and train 22 AmeriCorps trainees that will assist in accomplishing the following tasks:

1. Develop community-based programs to enhance and protect the San José area's community forest.

2. Develop related volunteer opportunities for residents of all ages throughout the City.
3. Respond to citizen requests for information and assistance.
4. Conduct educational outreach to both English and non-English speaking populations and distribute educational materials in various languages.
5. Assist with project implementation for state and federal grants.
6. Coordinate with City Arborist, City Parks Managers and other City staff, as appropriate, on projects concerning City trees and property and related matters.
7. Provide citizen volunteers with ongoing support and technical assistance.
8. Provide educational displays and information materials.

C. PERFORMANCE MEASURES.

1. The following performance categories will be used to measure the productivity and output of Grantee's Program:
 - a. Grantee shall enroll at least twenty-two (22) AmeriCorps trainees in the program by November 1, 2009.
 - b. Grantee shall graduate at least fifteen (15) AmeriCorps trainees by August 31, 2010.
 - c. Grantee shall develop Green San José federal grant training curriculum, handbooks and timelines.

EXHIBIT B

INSURANCE REQUIREMENTS

Grantee shall procure and maintain for the duration of the contract insurance against claims for injuries to persons or damages to Grantee property that may arise from or in connection with the operation and use of City owned premises. The cost of such insurance shall be Grantee's responsibility.

Minimum Limits of Insurance

Coverage shall be at least as broad as:

1. The coverage provided by Insurance Services Office Commercial General Liability coverage ("occurrence" form CG 0001); and
2. The coverage provided by Insurance Services Office form number CA 0001 covering Automobile Liability. Coverage shall be included for all owned. Non-owned and hired automobiles; and
3. Workers' Compensation insurance as required by the State of California and Employer's Liability insurance; and
4. Property insurance against all risks of loss to any tenant improvements or betterments, or Grantee owned property.

There shall be no endorsement reducing the scope of coverage required above unless approved by the City's Risk Manager.

Minimum Limit of Insurance

Grantee shall maintain limits no less than:

1. General Liability: \$1,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit. \$100,000 Fire Legal Liability limit.
2. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage.
3. Workers' Compensation and Employer's Liability: Workers' Compensation limits as required by the California Labor and Employer's Liability limits of \$1,000,000 per accident for bodily injury or disease; and

4. Property Insurance: Full replacement cost with no coinsurance penalty provision.

Deductibles and Self-Insured Retentions

Any deductibles or self-insured retentions must be declared to and approved by the City. At the option of the City, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the City, its officers, officials, employees and volunteers; or Grantee shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses.

Other Insurance Provisions

- 1) The general liability policy is to contain, or be endorsed to contain, the following provisions.
 - a.. The City of San José, its officers, officials, employees and volunteers are to be covered as additional insured as respects: liability arising out of activities performed by, or on behalf of, Grantee, Grantee products or completed operations, premises owned, occupied or used by Grantee. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officers, officials, employees or volunteers.
 - b. Grantee's insurance coverage shall be primary insurance as respects the City, its officers, officials, employees and volunteers. Any insurance or self-insurance maintained by the City, its officers, officials, employees or volunteers shall be excess of Grantee's insurance and shall not contribute with it.
 - c. Any failure to comply with reporting or other provisions of the policies including breaches of warranties shall not affect coverage provided to the City, its officers, officials, employees or volunteers.
 - d.. Coverage shall state that Grantee's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits or the insurer's liability.
 - e.. Coverage shall contain a waiver of subrogation in favor of the City, it's officials, employees, agents and contractors.
- 2) Workers' Compensation and Employers' Liability
Coverage shall contain a waiver of subrogation in favor of the City, it's officials, employees, agents and contractors.
- 3) All coverages
Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, canceled, reduced in coverage or in limits except after thirty (30) day's prior written notice by certified mail, return

receipt requested, has been given to the City, except that ten (10) days' prior written notice shall apply in the event of cancellation for non-payment of premium.

Acceptability of Insurers

Insurance is to be placed with insurers acceptable to the City's Risk Manager.

Verification of Coverage

Grantee shall furnish the City with certificates of insurance and with original endorsements affecting coverage required by this clause. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

Proof of insurance shall be either emailed in pdf format to: Riskmgmt@sanjoseca.gov, or mailed to the following postal address (or any subsequent email or postal address as may be directed in writing by the Risk Manager):

City of San José – Human Resources
Risk Management
200 E. Santa Clara Street – 2nd Floor Wing
San Jose, CA 95113-1905

Subcontractors

Grantee shall include all contractors and sub-contractors as insureds under its policies or shall obtain separate certificates and endorsements for each.