



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Kim Welsh  
Julie Edmonds-Mares  
Jennifer A. Maguire

**SUBJECT:** SEE BELOW

**DATE:** 09-06-11

Approved

Date

9/14/11

**COUNCIL DISTRICT: 6**

**SUBJECT: NEGOTIATE AND EXECUTE A \$6,000,000 PURCHASE AND SALE AGREEMENT WITH UNION PACIFIC RAILROAD FOR THE THREE CREEKS TRAIL DEVELOPMENT, AUTHORIZE THE CITY MANAGER OR DESIGNEE TO EXECUTE ALL SALES DOCUMENTS TO COMPLETE THE TRANSACTION, ADOPTION OF APPROPRIATION ORDINANCE AND FUNDING SOURCES RESOLUTION AMENDMENTS IN VARIOUS FUNDS TO REBUDGET FUNDS TO 2011-2012 FOR THE THREE CREEKS TRAIL LAND ACQUISITION, AUTHORIZE THE CITY MANAGER TO NEGOTIATE AND EXECUTE A \$3,000,000 AMENDED AND RESTATED FUNDING AGREEMENT WITH THE COUNTY OF SANTA CLARA, AND AUTHORIZE THE CITY MANAGER TO EXECUTE AND RECORD A CONSERVATION EASEMENT IN FAVOR OF SANTA CLARA COUNTY AND OPEN SPACE AUTHORITY**

## RECOMMENDATION

1. Adopt a resolution authorizing the City Manager or designee to i) negotiate and execute the purchase agreement with Union Pacific Railroad Company, in the amount of \$6,000,000 for the purchase of land located from Lonus Street to Minnesota Avenue in San José, CA, (APN No. 264-11-100, 264-11-101, 264-54-067, 264-56-108, 434-01-059) for the future Three Creeks Trail, ii) negotiate and execute all other documents and take such further actions as are necessary to complete the transaction; and iii) settle any claims related to the removal of the existing billboard from this property up to a maximum of \$120,000.
2. Adopt the following Appropriation Ordinance and Funding Sources Resolution Amendments in the Construction and Conveyance Tax Fund: City-Wide Parks Purposes (Fund 391):
  - a. Increase the Beginning Fund Balance by \$1,165,000;
  - b. Increase the TRAIL: Three Creeks Land Acquisition appropriation to the Parks, Recreation and Neighborhood Services Department by \$992,000; and
  - c. Establish the Reserve: TRAIL: Three Creeks appropriation to the Parks, Recreation and Neighborhood Services Department for \$173,000.

3. Adoption of the following Appropriation Ordinance and Funding Sources Resolution Amendments in the Construction Tax and Property Conveyance Tax Fund: Parks Purposes Council District #6 (Fund 384):
  - d. Increase the Beginning Fund Balance by \$1,260,000; and
  - e. Increase the TRAIL: Three Creeks Land Acquisition appropriation to the Parks, Recreation and Neighborhood Services Department by \$1,260,000.
4. Adoption of the following Appropriation Ordinance and Funding Sources Resolution Amendments in the Subdivision Park Trust Fund (Fund 375):
  - f. Increase the Beginning Fund Balance by \$621,000; and
  - g. Establish the Reserve: TRAIL: Three Creeks appropriation to the Parks, Recreation and Neighborhood Services Department for \$621,000.
5. Adopt a resolution authorizing the City Manager or designee to i) negotiate and execute an amended and restated funding agreement with Santa Clara County in the amount of \$3,000,000 for use in the acquisition of real property for the Three Creeks Trail, and ii) execute and record a conservation easement on any land owned by City for the Three Creeks Trail as required by Santa Clara County and the Open Space Authority.

## **OUTCOME**

Acquisition of the subject properties will allow for partial future development of the western alignment of the Three Creeks Trail from Lonus Street to Minnesota Avenue, with a direct link to the Los Gatos Creek Trail. An already completed portion of the trail system from Minnesota Avenue to the Guadalupe River allows for interconnection with the core trail system at a future date.

Acquisition of the western alignment is an important milestone for the City of San José. The City Council has taken many actions over the past five years to secure funding and advance development of the project.

## **BACKGROUND**

The Three Creeks Trail is identified as a core trail system from Lonus Street to Coyote Creek. It was identified in the City's *Greenprint for Parks and Community Facilities and Programs (Greenprint)* in September 2000 and continues to be a priority project in the Greenprint's 2009 update. Once developed, the trail system will provide an opportunity for trail inter-connection, as it would link the Los Gatos Creek Trail, the Guadalupe River Trail (future) and the Coyote Creek Trail (future), and a potential connection to the Highway 87 Bikeway (existing).

Over the past several years, Council has taken actions to support the acquisition and development. Some recent Council actions include:

- August 24, 2010 (item 5.1), executed \$3,000,000 in funding agreements with the Santa Clara County Open Space Authority for acquisition and development of the Three Creeks Trail system from Lonus Street (near Los Gatos Creek) to Highway 87.
- February 14, 2011, authorized the City Manager to seek \$450,000 in grant funding from the Santa Clara Valley Water District for improving the trestle that spans Los Gatos

Creek, and signage and fencing necessary for interim public use of the acquired parcels from Lonus Street to Minnesota Avenue. On June 14, 2011, the City received notification from the Santa Clara Valley Water District that the grant was awarded.

Environmental Status of Property: Over the past several years, the State of California, Department of Toxic Substance Control (DTSC) has worked with Union Pacific Railroad to prepare and implement a Remedial Action Work Plan for the clean up of the former railway and leave it in a “clean” state suitable for future public trail purposes. Clean up work is on-going and scheduled for completion in October 2011.

### **ANALYSIS**

Execution of the purchase agreement will result in the City owning a set of contiguous parcels. As a group, they form an alignment suitable for east-west travel. This direction of travel is limited within the City’s Trail Network because most trails follow north-south waterways. The City’s Bike Master Plan identifies a number of enhanced east-west corridors including Three Creeks Trail because they support better interconnectivity of trails and facilitate bicycle travel for recreational and commute purposes. The subject properties are approximately one linear mile in length and 344,867 square feet in area.

Staff will continue to seek Council authorization to pursue funds through grants and other sources for further acquisition along the eastern alignment and for development of paved trail and landscaping along the entire trail system.

The parcels to be acquired are as noted in the table below, and represented by Exhibit A.

<b>Assessor’s Parcel Number (APN)</b>	<b>Property Limits</b>	
264-11-101 & northern portion of 264-11-100	Lonus St	Los Gatos Creek
264-11-100 southern portion	Los Gatos Creek	Coe Avenue
264-54-067	Coe Avenue	Broadway Avenue
264-56-108	Broadway Avenue	Willow St.
434-01-059	Bird Ave	400' N. of Minnesota

The properties proposed for purchase link to a stretch of paved trail between Minnesota Avenue and the Guadalupe River which was developed as a condition for a previous residential development. Securing the parcel from the Guadalupe River to Highway 87 will likely occur as a condition of a future development. Gaining access beneath Highway 87 will likely occur through coordination with Caltrans and potentially the Joint Powers Board and the High Speed Rail Authority.

### **Proposed Business Terms**

Negotiations regarding the proposed form of agreement have been largely based upon a standard form of agreement prepared by UPRR; through extensive negotiations, UPRR has agreed to very few material concessions. The following principal terms and conditions will be included in the Purchase and Sale Agreement between UPRR and the City for purchase of the properties described above:

- **Price:** \$6,000,000. The purchase price includes all land between Lonus Street and Minnesota Avenue, as well as the trestle bridge structure. The purchase price results

from careful analysis and lengthy negotiations. In September 2008, the City and UPRR mutually agreed to contract with a land development consultant (Tran Systems) to determine the highest and best use of the parcels considered for sale. The report found that some parcels were highly developable and others had little or no developmental potential. UPRR was prepared to sell developable parcels to developers. If the City had to acquire similar rights from private property owners the purchase price of right of way over developed property averages \$150 per square foot. Using this methodology, the acquisition price for the subject property would be approximately \$9,000,000. Instead, the City negotiated a purchase price through the use of existing data such as recently sold parcels and reported purchase offers, attempting to factor into the negotiated price a lesser value for those portions of the property having little or no developmental potential. In conveying the property, UPRR will reserve rights to minerals lying below a depth of 500 feet. Upon execution of the purchase agreement, City will make a good faith deposit of \$120,000 which will be forfeited by City in the event City breaches its obligation to purchase.

- Hazardous Materials: The site is known to have contamination associated with railroad operations; site characterization was undertaken by UPRR in the areas of likely exposure, excluding, however, the trestle bridge structure which will require additional characterization, remediation and other improvement. The remediation process (exclusive of the trestle area) is anticipated to be completed in mid-October, 2011; the completion of this process with the Department of Toxic Substance Control (DTSC) sign-off satisfactory to City would be a condition to City's obligation to purchase. Once the City enters into a due diligence period staff will do additional hazmat testing as well as title survey the site; the City's satisfaction with the results of its due diligence review is a condition for the City's obligation to purchase.
- Encroachments and other off-record rights: City's purchase will be "as-is" regarding all matters including condition of title to the property. UPRR acknowledges that the property may be subject to Licenses and other off-record third party rights, and visual site inspections reveal at least 10-12 fenced encroachments. During the due diligence period, UPRR shall, without making representations or warranties with respect to the accuracy or completeness thereof, provide a list of off-record agreements and the City will undertake other inquiries to discover such off-record rights.

City's ability to obtain satisfactory title coverage will be a condition to City's obligation to purchase the property; provided the title survey (prepared by City's surveyor) identifies discoverable off record rights, the City's title insurance would normally adequately protect the City from claims by the holders of any such rights which are not otherwise disclosed to the City during its due diligence. However, UPRR is proposing that if off record rights should be discovered after the closing, the City nonetheless agree to assume obligations arising under those rights as well. This provision is unusually broad in that it would undermine the City's title insurance coverage, because the City would be obliged to recognize such rights in spite of the fact that title insurance would have protected the City from the exercise of such rights had the City not agreed with UPRR to assume. Such rights could include such matters as undisclosed underground pipelines, other unknown surface and subsurface use rights, or other agreements concerning the property. Staff attempts to soften this assumption provision were largely fruitless.

In order to complete the transaction, the City will decide post-closing if we need to eliminate or leave the Licenses and other rights in place, depending upon such factors as how such rights affect trail operation; it should be noted that the degree of difficulty or expense in eliminating such rights is presently unknown and likely will not be fully known prior to the closing.

- **Billboards:** There is a billboard located on the subject property. Keeping the billboard on city-owned property violates existing City Policy. UPRR has a national agreement with the billboard company that allows them to cause individual signs to be removed at a fixed cost of \$11,525 per sign. As a condition to City's obligation to purchase, UPRR will cause the billboard to be removed. The City has agreed to bear the fixed cost noted above associated with the removal of the billboard and pay UPRR in advance; once paid, this cost would be forfeited by City if the purchase agreement were terminated for any reason. However, being a government agency, the City may still be responsible to pay certain costs to the billboard company associated with the removal. The City has allocated \$120,000 which, based on industry standards, should be sufficient to cover any possible payment obligations.
- **Release and Indemnity:** As noted above, the purchase will be "as-is" to the City, without representation or warranty of any kind from UPRR. The terms of sale, as proposed by UPRR, include a release by the City of all claims and liabilities associated with the "condition of the property", which is broadly defined to include all matters concerning the property including, physical, environmental, title, etc. This means that, the City will be relying solely upon the strength of its due diligence and title insurance to identify/satisfy costs or expenses of any nature relating to the condition of the property, and that UPRR would have no responsibility to make the City whole for those costs or expenses. Such reliance is not unusual, although it is not without risk (for example, undetected contamination or suits for pre-closing third party personal injuries).

As proposed by UPRR the terms of sale will also require the City to indemnify UPRR from any claims or liabilities associated with the condition of the property. This means that if UPRR were later faced with costs or expenses of any nature relating to the condition of the property, the City would be required to make UPRR whole. While some relatively minor concessions were made by UPRR, this provision taken together with the provision (discussed above) requiring post-closing assumption of unknown rights creates a risk to the City that it might otherwise not face as a "bonafide" purchaser without knowledge, as well as claims relating to prior violations of law by UPRR concerning the property. The later could include such matters as claims arising as a result of UPRR's failure to have complied with requirements related to abandonment and cessation of rail operations or disposition of railroad right of way property, possibly raising ownership and other title issues that might not be covered by the City's title insurance.

The release and indemnity provisions also apply to possible future soil remediation; because once the City has accepted the DTSC sign-off the City will be responsible for any future remediation of the site if required. However, given the intended trail use which will cap the property, staff considers there is minimal risk.

Many of the risks which the proposed purchase agreement allocates to the City would not be so allocated in the event the City would obtain the property through condemnation.

Upon execution of a purchase agreement, City and UPRR will initiate a due diligence period for purchase of the property which will end on November 30, 2011.

Funding: As part of this memorandum, it is recommended that the City re-budget un-expended funds totaling \$3,046,000 that were allocated in 2010-2011. A rebudget of funds did not occur as part of the Recommended Amendments to the 2011-2012 Proposed Operating and Capital Budgets memorandum because staff had expected that the transaction was feasible prior to June 30, 2011. A portion of these funds (\$2,252,000) will be expended on the purchase of the Three Creeks Trail property, as outlined in this document. This funding will be augmented with an additional \$4.0 million that will be deposited in an escrow account from the County of Santa Clara (\$2.0 million) and the Open Space Authority (\$2.0 million) for the purchase of the western alignment of the Three Creeks Trail property. The County of Santa Clara is making park funds available to acquire lands for a regional trail system. The Santa Clara County Open Space Authority is providing funds to acquire lands that offer open space to residents and visitors of an urban neighborhood. As part of this memorandum, an additional \$794,000 is being placed in reserves (\$621,000 in the Park trust Fund and \$173,000 in the Parks City-Wide Construction and Conveyance Tax Fund) for the future acquisition and development of the Three Creeks Trail.

The State of California is providing funds through a Roberti-Z'berg Grant (2002 Program) in the amount \$1,260,000 for the project. Staff is coordinating with State Grant Managers to permit use of the funds for acquisition. Should staff be unsuccessful, the grant scope will be reprogrammed for development activities so there is no loss in funding for the project's delivery. The funding package defined by this Council memorandum allocates sufficient funding through the other funding sources to address any potential shortfalls from the State grant at this time, if staff is unsuccessful in negotiating the grant scope.

Funding and Conservation Easement Agreements with the County of Santa Clara: Staff is also requesting as part of this memorandum authority to negotiate and execute an amended and restated funding agreement with the Santa Clara County in the amount of \$3,000,000. The initial funding agreement was executed on September 28, 2004. The proposed amended and restated agreement would provide \$2,000,000 for the current acquisition of the Western Alignment and another \$1,000,000 for a future acquisition along the Eastern Alignment. As stated previously, the \$2,000,000 in funding from the County of Santa Clara for the acquisition of the western alignment of the Three Creeks Trail property will be deposited directly into an escrow account. The agreement would expire on September 14, 2015 and may be extended for another five years at the County's discretion. The proposed agreement with Santa Clara County and the previously approved agreement with Santa Clara County Open Space Authority (OSA) also require the City to execute and record a joint conservation easement on the entire trail alignment owned by the City. A conservation easement is a legally enforceable land preservation agreement recorded against real property for the purposes of retaining land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition. A copy of the Conservation Easement that is required to be recorded is attached to this memorandum as Exhibit B. The table on the following page sets forth a summary of the provisions in the Conservation Easement and capacity for City to comply:

Provision	Compliance
Land must be used in perpetuity as open space and recreation.	Per the Council adopted Greenprint, it is the City's vision to develop the land as a trail and City would be required under the Funding Agreement and Conservation Easement to continue its use as a trail in perpetuity after development or the land would revert back to the County and/or OSA.
No structures may be erected without prior written authorization of the County's Parks Department Director and OSA.	Future trail development does not contemplate structures. Trail development would be consistent with other City trails and include a paved trail surface, with associated striping, signage and landscaping. City will need to get County and OSA permission to construct any structures.
No mitigation may occur on the land without prior written authorization of the County's Parks Department Director and OSA.	The majority of the site does not appear to be suitable for mitigation. In its current state, there appears to be no habitat present that would require mitigation as part of future trail development work.
Property may not be used as security for debt.	City will need to comply with this provision.
Property may not be transferred without prior written authorization of County and OSA.	An assessment has been performed as part of the due diligence for the possible purchase of certain real property and much of the land has very little development potential. In the event City would like to transfer or sale the property in the future, City will need to get authorization from SCC and OSA.
Interest and title in the property will vest to the SCC or OSA if City violates the terms and conditions of the Conservation Easement.	City intends to develop the trail and comply with all terms and conditions of the Conservation Easement. In the event that City does not comply with the terms and conditions of the easement, interest and title will vest with SCC or OSA.
City must use best efforts to complete design within three years and open the trail to the public within five years.	City will try to seek grant funding and other funding sources to complete design and construction of the trail.

**EVALUATION AND FOLLOW-UP**

Staff will seek Council approval at a later date for the appropriation of funds for the design and construction of the trail system.

**POLICY ALTERNATIVES**

***Alternative #1: Do Nothing***

**Pros:** This approach does not require an investment of staff time for administration of funding agreements, acquisition or future project development.

**Cons:** Sufficient City financial resources are not available for the organization to solely pursue acquisition of lands necessary for the Three Creeks Trail.

**Reason for not recommending:**

This approach is inconsistent with current City Council policy to promote development of the trail network. Execution of the funding agreements must occur in order to have access to funds necessary for acquisition.

**PUBLIC OUTREACH**

X **Criterion 1:** Requires Council action on the use of public funds equal to \$1 million or greater. **(Required: Website Posting)**

**Criterion 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**

**Criterion 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

On February 4, 2008, staff conducted a community meeting to provide information about development of the trail system. The presentation also discussed the current status of real property acquisition negotiations for the western alignment and an overview of challenges with pursuing a trail project along the eastern alignment. Several community members strongly advocated for acquisition and development of the entire proposed Three Creeks Trail, including the eastern alignment.

On March 14, 2011, staff provided a Trail Network Overview presentation to the Save Our Trails Organization, with specific focus on development of the Three Creeks Trail system.

This memorandum meets Criterion 1 and therefore will be posted on the City's website for the September 27, 2011, City Council Agenda.

**COORDINATION**

This project has been coordinated with the City Attorney's Office and the Planning, Building and Code Enforcement Department.

**COST SUMMARY/IMPLICATIONS**

1. AMOUNT RECOMMENDED FOR THE ACQUISITION:

Property Purchase	\$6,000,000
Billboard Removal Fees	\$11,525
Settlement of possible Billboard Claims	\$120,000
Closing Costs (2% of purchase price of \$6.0m)	<u>\$120,000</u>
TOTAL	\$6,251,525

2. SOURCE OF FUNDING:

391 – Construction and Conveyance Tax Fund: City-Wide Parks Purposes	\$992,000
384 – Construction Tax and Property Conveyance Tax Fund: Parks Purposes Council District #6	\$1,260,000
OSA - Open Space Authority (deposited directly into an escrow account)	\$2,000,000
County – Santa Clara County grant (deposited directly into an escrow account)	\$2,000,000
<b>TOTAL SOURCE OF FUNDING</b>	<b>\$6,252,000</b>

Please note that an additional \$794,000 is being placed in reserves (\$621,000 in the Park trust Fund and \$173,000 in the Parks City-Wide Construction and Conveyance Tax Fund) for the future acquisition and development of the Three Creeks Trail.

3. OPERATING COST: This memorandum provides funding for the purchase of land, which will have a minimal operating and maintenance impact on the General Fund (\$6,000 annually). Once the design and construction of the trail has been completed, the operating and maintenance impact will be approximately \$47,000 annually. This funding was included in the 2012-2016 General Fund Forecast, released on February 28, 2011.

**BUDGET REFERENCE**

Fund #	Appn. #	Appn. Name	RC #	Total Appn. Amount	2011-2012 Proposed Capital Budget Page*	Last Budget Action (Date, Ord. No.)
<b>Total Project Cost</b>				<b>\$6,251,525</b>		
<b><u>Recommended Funding Sources**</u></b>						
391	5283	TRAIL: Three Creeks Land Acquisition		\$1,165,000	V - 424	6/21/11 Ord. No. 28928
384	5950	TRAIL: Three Creeks Land Acquisition		\$1,260,000	V - 363	6/21/11 Ord. No. 28928
375	6054	TRAIL: Three Creeks Land Acquisition		\$621,000	V - 476	6/21/11 Ord. No. 28928
<b>Total Current Funding Available</b>				<b>\$3,046,000</b>		

\* The 2011-2012 Adopted Capital Budget and 2012-2016 Adopted Capital Improvement Program was approved by the City Council on June 21, 2011.

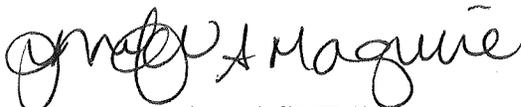
\*\* Included in this memorandum are recommendations to allocate funding totaling \$3,046,000 from three allocations for the purchase of land and future development for the Three Creeks Trail Land Acquisition project. A portion of these funds (\$2,252,000) will be expended on the purchase of the Three Creeks Trail property, as outlined in this document. As part of this memorandum, the remaining \$794,000 (\$3,046,000 allocated minus \$2,252,000 required for the purchase of land) is being placed in reserves for the future acquisition and development of the Three Creeks Trail.

**CEQA**

Resolution No. 65459, PP03-05-175

/s/  
KIM WALES  
Director of Economic Development  
Chief Strategist

/s/  
JULIE EDMONDS-MARES  
Acting Director of Parks, Recreation and  
Neighborhood Services

  
JENNIFER A. MAGUIRE  
Budget Director

I hereby certify that there will be available for appropriation in the designated fund and in the amounts listed below in Fiscal Year 2011-2012 moneys in excess of those heretofore appropriated there from:

Parks City-Wide Construction and Conveyance Tax Fund	\$1,165,000
Subdivision Park Trust Fund	\$621,000
Council District #6 Construction and Conveyance Tax Fund	\$1,260,000

  
JENNIFER A. MAGUIRE  
Budget Director

For questions please contact NANJI KLEIN, DEPUTY DIRECTOR, OFFICE OF ECONOMIC DEVELOPMENT, at 535-8184.

Exhibit A – Three Creeks Trail alignment map (western alignment)

Exhibit B- Joint Conservation Easement



**EXHIBIT B**

RECORDING WITHOUT FEE UNDER  
SECTION 6103 CALIFORNIA  
GOVERNMENT CODE

Recording Requested By and  
When Recorded Return to:

County of Santa Clara  
Parks and Recreation Dept.  
Attn: Real Estate Div.  
298 Garden Hill Drive  
Los Gatos, CA 95032

And to:

Santa Clara Open Space Authority  
Attn: Real Estate Div.  
6980 Santa Teresa Blvd., Ste. 100  
San Jose, CA 95119

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**CONSERVATION EASEMENT**

In reference to the property or properties conveyed by the Grant Deed between the City of San José, a municipal corporation of the State of California (“Grantor”), and the [INSERT], its successors and assigns dated [INSERT], Grantor hereby grants this Conservation Easement, in perpetuity, jointly to the Santa Clara County Open Space Authority (“Authority”), a Special District, and the County of Santa Clara (“County”), a political subdivision of the State of California, collectively referred to as “Grantees”:

**A. RECITALS**

**WHEREAS**, the Authority entered into a Funding Agreement (“Funding Agreement”) dated March 31, 2011, to assist funding Grantor’s acquisition of the real property described in Attachment A to this Conservation Easement attached hereto and hereby incorporated by reference (“Property”); and

**WHEREAS**, the County and Grantor entered into an Amended and Restated Agreement for the Possible Acquisition of Property for the Three Creeks Trail dated [INSERT], to assist funding Grantor’s acquisition of the Property for the establishment of the Three Creeks Trail, anticipated to extend approximately 2.5 miles from the vicinity of Highway 280 at Los Gatos Creek, traverse the future Guadalupe River Trail, link to the existing Highway 87 Bikeway (Western Alignment), and connect to the future Coyote

Creek Trail within Kelley Park (Eastern Alignment) in San José, California ("Three Creeks Trail"); and

**WHEREAS**, the Authority and County have assisted with Grantor's acquisition of the Property for the purposes of preserving, protecting and managing, for the use and enjoyment of all people, a well-balanced system of urban and non-urban areas of outstanding scenic, recreational and agricultural importance, and for the establishment of a network of trails that will facilitate public access to outstanding scenic, recreational areas; and

**WHEREAS**, California Civil Code Section 815.1 defines "conservation easement" as any limitation in a deed, will or other instrument in the form of an easement, restriction, covenant, or condition, which is or has been executed by or on behalf of the owner of land subject to such easement and is binding upon successive owners of such land, and the purpose of which is to retain land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition; and

**WHEREAS**, the purpose of this Easement is to ensure that the Property is dedicated and preserved as open space and parkland, and open to the public, in perpetuity, and that Grantor's responsibilities for continued maintenance and operation of the Property and its improvements as open space and parkland remain in effect in perpetuity; and

**WHEREAS**, it is Grantor's intention that the limitations set forth below, shall run with the land and be binding on Grantor, its successors and assigns in perpetuity;

**NOW, THEREFORE**, for good and valuable consideration, and in consideration of the mutual covenants, terms, conditions, and restrictions contained herein, and pursuant to the laws of the State of California including Sections 815-816 of the California Civil Code, Grantors do hereby grant to Grantees a conservation easement in perpetuity over the Property of the nature and character and to the extent set forth herein, and the grant is made subject to the following limitations:

**B. LIMITATIONS**

1. Restrictions. Pursuant to Civil Code Section 815 et seq., the following restrictions shall apply in perpetuity to the Property described in Attachment A:

a. *Permissible Uses*. The Property shall be used and maintained for open space and recreation, specifically, for development of a trail, and be open to the public, in perpetuity.

b. *Structures*. No new structures or improvements shall be erected on the Property without written approval of the Grantees, as provided through the Authority's General Manager and County Executive, in which case the facility shall only be a public facility related to a designated open space or recreational trail use, or appurtenant thereto.

c. *Natural Resources.* No native plant, tree or wildlife species shall be disturbed now or in the future on the Property except to abate disease, eliminate an imminent hazard to the health, safety, or welfare of the general public, or as approved by Grantor as part of a plan for public access, resource management, and restoration.

d. *Grantee Review.* Grantor will provide Grantees with the opportunity to review and comment on any plan for significant improvements to the Property at appropriate stages of the planning process. At a minimum, Grantor shall provide Grantees with a site plan showing the location of the proposed improvements or restoration before Grantor approval of final plans and specifications. Grantees' comments shall be advisory only. Grantor shall make the final decision as to any plans or improvements for the Property as long as the decision is consistent with the terms and conditions of this Conservation Easement.

e. *Trail and Master Plan Development.* Grantor will work diligently and in good faith, and use its best efforts to bring forward for consideration by the City Council proposals to fully fund the environmental review (CEQA), planning, and design, of the Three Creeks Trail within three (3) years from the date Grantor takes title to all of the property required for the Western Alignment of the Three Creeks Trail, and to open the respective Trail alignment to public use within five (5) years from this date. Grantor shall be responsible for assuring that the Property is in an environmental condition suitable for public use as a trail. If Grantor prepares a Master Plan that includes the Property, Grantor shall consult with Grantees during the development of the Master Plan. If a committee or task force is formed to assist with preparation of the Master Plan, Grantor shall offer to include a representative from each Grantee in such a committee or task force.

f. *Mitigation.* The Grantor shall not use or allow the use of any portion of the Property for mitigation without the written permission of the Authority's General Manager and County Executive. Absent such permission, the Property shall not be available to count toward satisfying any open space or preserved land requirements as stipulated under applicable land use laws, ordinances, or codes. Furthermore, Grantor may not transfer for use outside the Property (whether or not for compensation) any development rights allocated to the Property under applicable law. The terms of this restriction shall be perpetual and it shall be a covenant running with the land. In providing permission under this subsection, the General Manager or County Executive may require that all funds generated in connection with any authorized or allowable mitigation on the real property shall be remitted promptly to the Authority and County, respectively, based on the Grantee's respective proportionate contribution toward the purchase price of the Property until the Authority and County have been fully

compensated for all of its past, present and future costs with respect to the Property, including, but not limited to, staff monitoring costs and acquisition costs at fair market value as of the time the mitigation is to begin.

g. *Mortgage only with approval.* The Property (including any portion of it or interest in it) may not be used as security for any debt without written approval of the Authority's General Manager and County Executive.

h. *Transfer only with approval.* The Property (including any portion of it or interest in it) may not be transferred without written approval of the Authority's General Manager and County Executive.

2. Covenants and Conditions. Pursuant to Civil Code Section 815 et seq., the following covenants and conditions shall apply in perpetuity to the Property described in Exhibit A:

a. *Run with the Land.* The restrictions, covenants and conditions set forth herein shall run with the land and bind the Property in perpetuity.

b. *Binding on Successors.* The restrictions, covenants and conditions set forth herein shall, pursuant to its terms, inure to the benefit of the Authority, and bind the Property, the Grantor and its successors and assigns.

c. *Recordation.* The Grantor shall record this instrument in the Office of the Recorder of County of Santa Clara, California immediately following recording of the Grant Deed under which the City took title to the Property.

d. *Access/Right to Inspect.* The Grantees, their representatives and assigns shall have reasonable access to the Property to monitor compliance with the restrictions, covenants and conditions set forth herein.

e. *Dissolution of Grantees.* If the existence of the Grantor ceases for any reason or if any of the restrictions, covenants or conditions stated herein are violated, all of the Grantor's rights, title and interest in the Property shall automatically vest in the Grantees for the benefit of the Grantees, or their successors, upon acceptance by the Grantees, as may be agreed upon between Grantees.

f. *Eminent Domain.* The Grantor shall promptly notice the Grantees of any eminent domain proceeding affecting the Property, or any portion of it, and shall continuously provide the Grantees with copies of all relevant documents. If the Grantor receives any compensation for the Property taking, whether by agreement, settlement or court order, then the Grantor

shall promptly pay to the Grantees a share of the proceeds proportionate to the Grantee's respective contribution toward the purchase price of the Property.

## C. ENFORCEMENT

1. General. The Grantees shall have the right and power to enforce the restrictions, covenants and conditions set forth herein, by any proceedings at law or in equity, against the Grantor or any person or persons violating or attempting to violate any restriction, covenants and/or condition set forth herein; to restrain violations; to require specific performance and/or to recover damages.

2. Procedure. If either one or both of the Grantees determines that Grantor is in violation of the restrictions, covenants and conditions set forth herein or that a violation is threatened, the Grantee shall give written notice to Grantor of such violation and demand corrective actions sufficient to cure the violation, and, where the violation involves injury to the Property resulting from any use or activity inconsistent with the permitted uses of the restrictions, covenants and conditions set forth herein, to restore that portion of the Property so injured. If Grantor fails to cure the violation within thirty (30) days after receipt of notice thereof from Grantee, or under circumstances where the violation cannot reasonably be cured within a thirty (30) day period, fails to begin curing such violation within the thirty (30) day period, or fails to continue diligently to cure such violation until finally cured, either one or both of the Grantees may bring an action at law or equity in a Court of competent jurisdiction to enforce the limitations, restrictions, covenants and conditions set forth herein, to enjoin the violation, *ex parte* as necessary, by temporary or permanent injunction to recover any damages to which it may be entitled for violation of the restrictions, covenants and conditions set forth herein, or injury to any public interest protected by the restrictions, covenants and conditions set forth herein, and to require the restoration of the Property to the condition that existed prior to such injury.

3. Relief. Grantor agrees that the Grantees' remedies at law for any violation of the restrictions, covenants and/or conditions set forth herein are inadequate, and that the Grantees shall be entitled to the injunctive relief described in the immediately preceding paragraph 2, above, both prohibitive and mandatory, in addition to such other relief to which the Grantees may be entitled, including specific performance of the restrictions, covenants and conditions set forth herein, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. The Grantees' remedies shall be cumulative and shall be in addition to all remedies now or hereafter existing at law or in equity.

4. Cost(s) of enforcement. Any costs incurred by the Grantees in enforcing the restrictions, covenants and conditions set forth herein against Grantor, its successors and/or assigns including, without limitation, costs of suit and attorneys' fees, and any costs of restoration necessitated by Grantor's violation of the

restrictions, covenants and conditions set forth herein shall be borne, joint and severally, by Grantor, its successors and/or assigns.

5. No Waiver. The failure by the Grantees to enforce any restriction, covenant or condition herein contained shall in no event be deemed a waiver of the right to do so thereafter.

**City of San José**  
a Municipal Corporation

\_\_\_\_\_  
Date: \_\_\_\_\_

APPROVED AS TO FORM:

\_\_\_\_\_  
Deputy City Attorney