

RESOLUTION NUMBER R- 303490

DATE OF FINAL PASSAGE MAR 12 2008

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN DIEGO AUTHORIZING THE SETTLEMENT OF THE LITIGATION ENTITLED LA JOLLA ALTA MASTER COUNCIL V CITY OF SAN DIEGO

WHEREAS, the homeowners association of La Jolla Alta Master Council has brought litigation against the City of San Diego in the lawsuit entitled *La Jolla Alta Master Council v City of San Diego, et al.*, San Diego Superior Court Case No. GIC 822281 for damage to its canyon property as an alleged result of the City's storm drain systems; and

WHEREAS, San Diego Superior Court Judge Linda Quinn, after a court trial on the issue of liability, found that the City of San Diego was liable to plaintiff in inverse condemnation for damage to Plaintiff's property caused by the City's failure to maintain its storm drain system at that location; and

WHEREAS, a jury trial was due to commence on the damages phase of trial, which included Plaintiff's claim for the cost of a temporary "Phase I" fix to the lower canyon and a permanent "Phase II" fix thereafter, and claim for attorney's fees; and

WHEREAS, the City of San Diego entered into an agreement with the City of San Diego's excess liability insurer, CSAC-EIA, wherein the City agreed to pay the excess carrier the remaining retained self-insured limit in exchange for the carriers' agreement to defend the City without a reservation of rights and pay any judgment and attorney's fees that resulted in the lawsuit, and that agreement was approved in Resolution R-303299 on January 18, 2008; and

WHEREAS, in the Closed Session Meeting of January 15, 2008, the Council voted 6 to 0, on motion by Councilmember Atkins with a second by President Pro Tem Madaffer, to

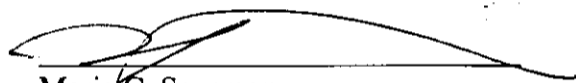
(R-2008-667)

authorize the City Attorney's Office to enter into a settlement agreement with Plaintiff La Jolla Alta Master Council wherein the City would pay Plaintiff \$4.5 million from its excess liability carrier for Phase I repairs, and attorney's fees, assume the permanent "Phase II" repair obligation to the lower canyon, and accept drainage easements in the lower and upper canyons that were the subject of the litigation so the City could maintain those easements on a going-forward basis; and Plaintiff would dismiss its lawsuit against the City.

NOW, THEREFORE, BE IT RESOLVED, by the Council of the City of San Diego, that the agreement attached hereto as Exhibit 1 in furtherance of the closed session vote be formally approved by the City Council.

APPROVED: MICHAEL J. AGUIRRE, City Attorney

By




Maria C. Severson  
Deputy City Attorney

MCS:gb  
02/11/08  
Or.Dept: City Attorney's Office

(R-2008-667)

I hereby certify that the foregoing Resolution was passed by the Council of the City of San Diego, at this meeting of MAR 11 2008.

ELIZABETH S. MALAND  
City Clerk

By   
Deputy City Clerk

Approved: 3-12-08  
(date)

  
JERRY SANDERS, Mayor

Vetoed: \_\_\_\_\_  
(date)

\_\_\_\_\_  
JERRY SANDERS, Mayor

## SETTLEMENT AGREEMENT AND LIMITED RELEASE

This Settlement Agreement and Limited Release is entered into by and between the La Jolla Alta Master Council and the City of San Diego.

### 1. DEFINITIONS

The following terms used in this Settlement Agreement and Limited Release shall have the meanings set forth below:

1.1 "Action": The term "Action" means the civil action filed by the La Jolla Alta Master Council on December 8, 2003, in the Superior Court of the State of California, County of San Diego, Central Division, entitled La Jolla Alta Master Council v. The City of San Diego; and Does 1 through 20, inclusive, Case Number GIC 822281;

1.2 "Agreement": The term "Agreement" means this "Settlement Agreement and Limited Release;"

1.3 "Canyon": The term "Canyon" means both the "Lower Canyon" or "Lot 1" defined as that portion of the La Jolla Alta Canyon that is bounded at the north by Alta La Jolla Drive and at the south by the cul-de-sac at Vickie Drive in La Jolla, California, also known as Pueblo Lot 1780, Lot 1 of P.R.D. Unit 15, depicted on Map No. 12751, and which is owned by the Council (defined below in section 1.8); and the "Upper Canyon" defined as that portion of the La Jolla Alta Canyon which lies north of Alta La Jolla Drive, which the Council owns, also known as Lot 15 of La Jolla Alta P.R.D. Unit No. 6, depicted on Map No. 85281; as Lot 16 of La Jolla Alta P.R.D. Unit 6, depicted on Map No. 8528; and as Lot 25 of La Jolla Alta P.R.D. Unit Nos. 9 and 10, depicted on Map 8948. Throughout this document terms "Lower Canyon" and "Lot 1" may be used interchangeably;

1.4 "City": The term "City" means the City of San Diego;

1.5 "Complaint": The term "Complaint" means the Second Amended Complaint for Inverse Condemnation, Declaratory Relief and Injunctive Relief dated April 11, 2005;

1.6 "Completion of the Phase I Work": The term "Completion of the Phase I Work" means the date of approval by the City of the as-built plans and the date the City is provided with the as-graded soils report for the Phase I work (defined below in section 1.15) or thirty (30) days from the submission of said plans and report, whichever occurs first. The thirty (30) day period will be tolled while the Resident Engineer satisfactorily responds to any questions or completes any requirements initiated by the City during its review process.

1.7 "Completion of the Phase II Work": The term "Completion of the Phase II Work" means the date on which the Phase II Work (defined below in section 1.16) is completed by the City and determined to be in compliance with the requirements of any county, state or federal agency or department with jurisdiction over the work;

1.8 "Council": The term "Council" means the La Jolla Alta Master Council, a mutual benefit non-profit corporation;

1.9 "Court": The term "Court" means the Superior Court of the State of California, County of San Diego;

1.10 "Easement": The term "Easement" means an exclusive permanent or temporary right of way to reasonably use real property and/or the restriction of such use in the Canyon granted by the Council and accepted by the City, and thereafter recorded, for the purposes of safely operating and reasonably maintaining a Storm Drain System (defined below in section 1.13) in the Canyon. The easements described in this section are in addition to the already existing recorded permanent drainage easements owned by the City in the Canyon. The temporary easement described below will remain in effect until replaced by a permanent easement subject to the covenants described below and at Sections 3.3, *et seq.*;

1.10.1 Temporary Exclusive Drainage Easement in Lot 1: Upon completion of the Phase I Work, the Council shall grant and the City shall accept and thereafter record, the temporary exclusive drainage easement in Lot 1 (in the form attached hereto as Exhibit A), which is incorporated herein;

1.10.2 Temporary Exclusive Open Channel Drainage Easement in Upper Canyon: Upon execution of this Agreement, the Council shall grant and the City shall accept and promptly record, the temporary exclusive open channel drainage easement in the form and to the dimensions set forth in Exhibit B, which is incorporated herein, consisting of an unimproved open storm drain channel plus 20 feet in width on either side. The purpose of this easement, in addition to the general purpose described above in section 1.10 is to identify the boundaries of the existing open unimproved drainage channel (defined below in section 1.20) in the Upper Canyon which is used and expanded by the operation of the Storm Drain System (defined below in section 1.13). The City may improve this channel as part of a permanent repair in the future at its sole discretion;

1.10.3 Permanent Exclusive Drainage Easement in Lot 1: Not later than ninety (90) days after the earlier of the first business day in January, 2011 or completion of the Phase II Work, the City shall provide the Council with a proposed Permanent Exclusive Drainage Easement over Lot 1 in the form set forth in Exhibit C which is incorporated herein. The easement will include an accurate legal description of the proposed permanent easement area and will comply with the conditions of section 3.3.1 and 3.3.2. If applicable, the dimensions of the permanent exclusive drainage easement in

Lot 1 shall be based, in part, on the completed Phase II Work, a drainage study and water surface evaluation calculation performed by the City (or by an engineer of its selection) at the City's expense, and which conforms to the then-current City Design Drainage Manual. The intended purpose of this provision is that the permanent drainage easement acquired by the City for the Lower Canyon shall not be larger than that which is reasonably necessary to maintain the Storm Drain System in the Lower Canyon. If the City does not prepare and submit the permanent drainage easement to the Council in the time period set forth in this paragraph, then the Temporary Exclusive Drainage Easement in Lot 1 shall become the Permanent Exclusive Drainage Easement in Lot 1 of the same size and specifications;

1.10.4 Permanent Exclusive Drainage Easement in Upper Canyon: Not later than ninety (90) days after the first business day in January, 2011, the City shall provide the Council with the permanent exclusive drainage easement (in the form attached hereto as Exhibit D) which is incorporated herein. The easement will include an accurate legal description of the proposed permanent easement area and will comply with the conditions of sections 3.3.1 and 3.3.2. If applicable, the dimensions of the permanent drainage easement in the Upper Canyon shall be based, in part, upon the improvements made or to be made, if any, to the existing open channel, a drainage study and water surface evaluation calculation performed by the City (or by an engineer of its selection) at the City's expense, which conforms to the then-current City Design Drainage Manual. The intended purpose of this provision is that the permanent drainage easement acquired by the City for the Upper Canyon shall not be larger than that which is reasonably necessary to maintain the Storm Drain System in the Upper Canyon. If the City does not prepare and submit the permanent exclusive drainage easement to the Council as required by this paragraph, then the Temporary Exclusive Open Channel Drainage Easement in the Upper Canyon shall become the Permanent Exclusive Open Channel Drainage Easement in the Upper Canyon of the same size and specifications;

1.11 "Execution of this Agreement": The term "Execution of this Agreement" means the date on which this Agreement is signed by the President and Treasurer of the Board of Directors of the Council and the City identified person in the Notices Section of this Agreement;

1.12 "Interim Maintenance Period": The term "Interim Maintenance Period" means the period commencing upon the Completion of the Phase I Work and ending upon the Completion of the Phase II work;

1.13 "Storm Drain System": The term "Storm Drain System" or "System" means the drainage system operated by the City that discharges storm waters into the Canyon at various locations by way of various received drainage easements and discharges waters out of the Canyon at Vickie Drive. The City created and operates the Storm Drainage System, which incorporates the Canyon and the easement areas described in section 1.10 et. seq. as an integral part. The System includes public streets,

sidewalks, culverts, pipes, and improved and unimproved open channels that collect and direct storm water to the Canyon at several locations within the Upper and Lower Canyon. The System funnels storm waters under and around Alta La Jolla Drive and into Lot 1. The City owns permanent drainage easements in the Canyon which end at the discharge points of its pipes, which include City approved energy dissipaters. Those easements join the new easements described in Section 1.10 above;

1.14 "Maintenance": The term "Maintenance" or "maintain" or "maintaining" (whether capitalized or not) means the provision of all services, labor and materials reasonably necessary to maintain, restore, and repair the structural and operational integrity of the Phase I Work during the Interim Maintenance Period, the Phase II Work following Completion of the Phase II Work and also includes the provision of all services, labor and materials reasonably necessary to repair, restore, and maintain the Storm Drain System. The term "Maintenance" or "maintain" also includes the maintenance of any vegetation required to be planted in Lot 1 as a condition of the SDP (defined below in section 1.18) or as required by any county, state or federal department or agency with jurisdiction over the work for the Vegetation Maintenance Period (as defined in section 1.19) but only for the period set forth in section 1.19;

1.15 "Phase I Work": The term "Phase I Work" means the emergency repairs to the damage in Lot 1 of the Canyon performed pursuant to the City-approved Grading Plans for Phase I (Emergency) Alta La Jolla Restoration, Lot 1, Map No. 12751, Sheets 34452-1-D through 7-D, dated August 22, 2007 (attached hereto as Exhibit E) and pursuant to Municipal Code section 143.0126 (attached hereto as Exhibit F) prepared by Land Design Consultants and approved by the City on August 30, 2007, as well as any Change Orders and other amendments thereto, and which is being performed by Nautilus General Contractors, Inc., pursuant to a written contract between the Council, as owner, and Nautilus General Contractors, Inc., as general contractor, dated September 2007, a copy of which is attached as Exhibit G to this Agreement;

1.16 "Phase II Work": The term "Phase II Work" means the permanent repairs or restoration in Lot 1 of the Canyon that will be the subject of an SDP application filed by the City and will be performed following completion of the Phase I Work. The Phase II Work includes obtaining all necessary permits, investigations, design and construction of all aspects of the permanent repairs, as well as any mitigation measures required by the City or any county, state or federal department or agency including, but not limited to, the California Department of Fish & Game, California Regional Water Quality Control Board, and United States Army Corps of Engineers;

1.17 "Mitigation Measures": The term "mitigation measures" includes, for example, (a) planting and maintenance of vegetation, (b) construction of improvements, (c) maintenance of such improvements, and/or (d) the purchase of real property and any other acts that may be required by the City or any county, state or federal department or agency including, but not limited to, the California Department of Fish & Game,

California Regional Water Quality Control Board, and United States Army Corps of Engineers as a result of the Phase I Work or Phase II Work;

1.18 "SDP": The term "SDP" means a Site Development Permit issued by the City to perform the Phase II Work in Lot 1; and

1.19 "Vegetation Maintenance Period": The term "Vegetation Maintenance Period" means the period commencing upon planting any vegetation in the Canyon pursuant to any mitigation or maintenance requirements of the City or any county, state or federal agency or department and shall continue for a period of one (1) year thereafter or for such other period as may be required by any city, county, state or federal agency or department;

1.20 "Unimproved Open Drainage Channel": The City is operating the System in the Upper Canyon using an unimproved open drainage channel to transport storm waters from the outfall of pipes upstream to culvert inlets downstream. The channel changes dimensions following storm events.

## 2 RECITALS

2.1 WHEREAS, the Council is the owner of the Canyon;

2.2 WHEREAS, the Council commenced the Action against the City alleging claims against the City as a result of the failure of the City to reasonably operate the Storm Drain System resulting in damage in Lot 1 of the Canyon;

2.3 WHEREAS, the Complaint alleges claims against the City for damage in Lot 1 of the Canyon for inverse condemnation, and for declaratory relief regarding the City's duty to maintain and repair damages caused by the City's operation of the Storm Drain System in Lot 1;

2.4 WHEREAS, the Complaint also alleges claims against the City for declaratory relief regarding the City's duty to maintain and repair damages caused by the City's operation of the Storm Drain System in the Upper Canyon;

2.5 WHEREAS, the City denied, and continues to deny, liability to the Council for the damage in the Canyon;

2.6 WHEREAS, trial of the Council's claims against the City was bifurcated into separate phases for determining liability and damages;

2.7 WHEREAS, trial of liability issues commenced on or about November 14, 2006, and concluded on or about December 4, 2006, with post-trial briefs accepted by the Court up to December 29, 2006;



- 2.8 WHEREAS, the Council dismissed from the Action its claims sounding in injunctive relief without prejudice;
- 2.9 WHEREAS, the Court, in a written Statement of Decision filed on April 27, 2007, found the City liable to the Council under theories of inverse condemnation and declaratory relief for damage in the Canyon. A true and correct copy of the Statement of Decision is attached as Exhibit G to this Agreement;
- 2.10 WHEREAS, trial of the damages phase commenced on October 15, 2007, with a mistrial declared on October 29, 2007, because of wildfires in San Diego County that resulted in closure of the courthouse from October 22 through 26, 2007; and
- 2.11 WHEREAS, the Council and the City participated in a judicial settlement conference before the Honorable Linda B. Quinn on October 18, 2007 and a mediation before Steven Kruis on November 14, 2007;
- 2.12 NOW THEREFORE, the Council and the City desire to resolve the Action without further litigation proceedings and do hereby agree to resolve the Action as follows:

### 3 AGREEMENTS AND COVENANTS

- 3.1 Dismissal, Payments and Basic Obligations: Upon execution of this Agreement, and its approval by the City Council, the Council shall dismiss the Action with prejudice. In consideration for a dismissal of the Action, with prejudice, and the other agreements and covenants set forth herein, the City shall pay to the Council the sum of Four Million Five Hundred Thousand Dollars (\$4,500,000.00) in two installments as follows: (a) the sum of One Million Dollars (\$1,000,000.00) shall be paid on or before February 7, 2008; and (b) the sum of Three Million Five Hundred Thousand Dollars (\$3,500,000.00) shall be paid on or before March 15, 2008; and the City hereby waives any right to appeal and shall perform the Interim Maintenance, the Phase II Work, and the Maintenance as described herein and comply with the other agreements and covenants set forth herein;
- 3.2 Phase I Work: The Council shall remain solely responsible for the Phase I Work, and assumes all liabilities therefor and resulting therefrom, until Completion of the Phase I Work. Upon completion of the Phase I Work, per section 1.6, the City Engineer, or his designated Deputy City Engineer shall be substituted as the "Resident Engineer" or engineer of work for the Phase I Work. Upon completion of the Phase I Work and delivery to the City of the Temporary Exclusive Drainage Easements, the City shall maintain the Phase I Work during

the Interim Maintenance Period. The Council has provided herewith written evidence that the City is named as an additional insured on all insurance policies pertaining to the Phase I Work for Nautilus General Contractors, and is attached hereto as Exhibit I. In addition, the Council hereby assigns to the City the indemnity, hold harmless, and defense provisions of each of the Council's contracts with Nautilus General Contractors and Land Design Consultants, and hereby assigns paragraphs 13 through 16 of the Standard Work Agreement between the Council and GEI. The Council also hereby assigns to the City all rights, if any, that the Council has as against the hydro seed subcontractor for the Phase I Work. The Council shall obtain written consents, if necessary, to such assignment from Nautilus General Contractors, GEI and Land Design Consultants. As between the Council and the City, the City shall be responsible for the Phase I improvements but shall stand in the Council's shoes by acquiring all rights the Council has against Nautilus General Contractors, GEI, and Land Design Consultants as concerns the investigation, design and construction of the Phase I Work. True and correct copies of the contracts entered into between the Council and Nautilus General Contractors, Land Design Consultants, and GEI, respectively, are attached hereto as Exhibits G, J, and K.

3.3 Maintenance of the Storm Drainage Easements: The City shall be responsible for the Maintenance of all areas within all the storm drainage easements it holds in the Canyon. Nothing in this Agreement shall be construed to alter the Parties' rights and obligations pursuant to the Negative Open Space Easement in Lot 1 (attached hereto as Exhibit L) and which is incorporated herein;

3.3.1 Reduction in Size of Temporary Exclusive Drainage Easements in the Canyon: The temporary exclusive drainage easement in Lot 1 (Exhibit A) and the temporary exclusive open channel drainage easement in the Upper Canyon (exhibit B) may be reduced in size at the sole expense of the City and only by use of the easement forms attached as Exhibit C and D, respectively. The acceptable dimensions of these easements however will depend upon the nature and extent of the permanent repairs made by the City in the Canyon and the reasonable maintenance requirements of the City's adopted design. The size of the permanent exclusive drainage easement in Lot 1 (Exhibit C) may be smaller than the temporary exclusive drainage easement in Lot 1 (Exhibit A) provided the permanent easement area reserved is sufficient to allow for on-going maintenance by the City of the System in Lot 1 without damage to the fee. Similarly, the size of the permanent exclusive drainage easement in the Upper Canyon (Exhibit D) may be smaller than the temporary exclusive open channel drainage easement in the Upper Canyon (Exhibit B) provided the permanent easement area reserved is sufficient to allow for on-going

maintenance by the City of the System in the Upper Canyon without damage to the fee. If these conditions and the conditions in section 3.3.2 are met, the Council will promptly grant and the City will accept and record the permanent easements (Exhibits C and D) that will include a legal description provided at the City's expense and which is plotted based on the same maps and datum points used to plot the respective temporary easements. These permanent easements will include a quitclaim of the temporary exclusive drainage easements in the Canyon thereby dissolving them. The City's right to propose a reduced permanent easement in Lot 1 is not dependent upon improvements to the Upper Canyon;

3.3.2 Repairs to the Canyon Area Formerly Included Within Temporary Easement Upon Conversion to Permanent Easement: Prior to conversion of the Temporary Easements to Permanent Easements, the City, at its sole expense, will repair any damage to the fee and remove any dangerous condition, within the Temporary Easement boundaries that will be excluded from the boundaries of the Permanent Easements caused by the Phase II Work in Lot 1 or the operation of the Storm Drain System in the Canyon.

3.4 Substitution of Responsible Party: Upon execution of this Agreement and upon receipt by the City of payment of all charges due and owing as of January 15, 2008 on Job Order Account number 42-7767, the City will substitute in as applicant of the Council's SDP by filing a "Change in Responsible Party" form signed and notarized by both parties (attached hereto as Exhibit M). The Council represents that it will supply to the City all consents, and authorizations reasonably necessary to enable the City to file the SDP application for the Phase II Work and to obtain the issuance of an SDP for the Phase II Work;

3.5 Delivery of Investigative Materials: The Council has authorized and the Council's consultants referenced below have agreed to deliver, or cause to be delivered, to the City's representative designated in the Notices section of this Agreement, at the City's expense and upon its payment, legible copies of all geotechnical, geology, vegetation, biological, environmental, hydraulic and hydrology work performed by GEI, Rivertec Engineering, and Land Design Consultants, and any subcontractor or independent contractor thereof in connection with the SDP application by the Council, the Phase I Work, and the Phase II Work based on the design by Land Design Consultants, as well as all calculations (including, but not limited to, slope stability and hydrology) bearing on conditions existing prior to commencement of the Phase I Work, during construction of the Phase I Work, prepared in connection with the design of the

Phase I Work (including upon completion of the Phase I Work), and prepared in connection with the design for the Phase II Work by Land Design Consultants;

3.6 Delivery of Applications: The Council has authorized and the Council's consultants referenced below have agreed to deliver, or cause to be delivered, to the City's representative designated in the Notices section of this Agreement, at the City's expense and upon its payment, a copy of all permit and other applications to any City, county, state or federal department or agency, as well as legible and complete copies of all correspondence, email and deliverables to or from any such department or agency, including but not limited to the California Department of Fish & Game, California Regional Water Quality Control Board, and United States Army Corps of Engineers, that pertain to the Phase I Work, the SDP or the design of the Phase II work by Land Design Consultants. This includes all correspondence, email and other deliverables exchanged between any City, county, state or federal agency or department and any of the Council's agents, including, but not limited to, Land Design Consultants, Rivertec Engineers, and GEI;

3.7 Phase II Work: The City will design and construct the Phase II Work, shall substitute for the Council as the permittee on the permit granted by the Army Corps of Engineers, and, shall be responsible for accomplishing all acts necessary to obtain approval of the SDP, including any approvals required by any City, county, state or federal agency and department, including but not limited to the California Department of Fish & Game, the California Regional Water Quality Control Board, and the United States Army Corps of Engineers. The City shall have the right, at its sole discretion, to select the appropriate design for the Phase II Work, to select the design professionals to design the Phase II Work and perform any services reasonably necessary to obtain the SDP, and to select the general contractor to perform the Phase II Work and will be solely responsible for its action or failures to act in that regard. The Council expressly acknowledges and agrees that the City shall not be required to accept or construct the Phase II design prepared by Land Design Consultants and further represents that it has no expectation that the City will construct the Phase II design prepared by Land Design Consultants. The Council has not obligated either itself or the City, in communications with any county, state or federal department or agency, to construct the Phase II design prepared by Land Design Consultants;

However, the City acknowledges and agrees that upon completion of the Phase I Work the City will notify the regulatory agencies described above that it has substituted in place of the Council as responsible party for the completion of the Phase II Work and as permittee on permits granted by those agencies prior to the completion of the Phase I Work and will provide the

Council with a copy of all such notices at the Council's expense;

In addition, the City acknowledges and agrees that it will be solely responsible for all fines or penalties, levied by any of the above regulatory agencies, arising out of the Phase II Work or failure to complete that work, and will defend, indemnify and hold the Council, as owner, harmless from any liability to the above agencies arising out of the Phase II Work or the City's elections in making permanent repairs in Lot 1;

**3.8 Indemnity:** The City shall make available for review and copying at the Council's expense, to the Council's representative designated in the Notices section of this Agreement, a copy of each contract between the City and any outside design professional and general contractor who is participating in the Phase II Work or SDP and further represents and warrants that each such contract will contain an indemnity, hold harmless and defense provision that complies with the City's requirements, including minimum insurance requirements, and that said provisions will run in favor equally of the City and of the Council. In addition, the City represents and warrants that each outside design professional and general contractor with which the City contracts to perform services in connection with the Phase II Work or SDP shall name the Council as an additional insured on its general liability policy to the same extent that the City is named an additional insured. The City shall promptly provide copies of all additional insured endorsements to the Council's representative designated in the Notices section of this Agreement;

**3.9 Maintenance of the Phase II Work:** The City shall be required to maintain the Phase II work in accordance with section 1.14, above. The Council represents and agrees that it will provide any authorization, consent, access or other documentation that is reasonably necessary for the City to perform any Maintenance required by this subsection that have not already been provided by pre-existing easements or the easements accepted as part of this Agreement

**3.9.1 Maintenance of the Open Channel in the Upper Canyon:** The City shall be required to maintain the unimproved open drainage channel described within the boundaries of Exhibit B as described in section 1.14;

**3.10 Maintenance of Vegetation:** The City shall be required to plant and maintain any vegetation required pursuant to any mitigation measure imposed by any City, county, state or federal agency or department in connection with the Phase II Work or the SDP during any required Vegetation Maintenance Period as defined in Section 1.19 above;

- 3.11 Each Party to Bear Own Fees, Costs and Expenses: The Council and the City hereby represent and agree that, except for the payments referenced in section 3.1 above, each party shall bear its own attorneys' fees, costs and expenses in connection with this Agreement and the Action, that neither party shall be deemed a "prevailing party" for purposes of attorney's fees, costs or expenses in connection with the Action, and that the payments set forth above in section 3.1 constitute a full accord and satisfaction of any claim or right to payment, damages or reimbursement for the Phase I Work and any claim the Council, or any of its attorneys, has or may have against the City for attorneys' fees, costs and/or expenses arising out of or in connection with the Action or pursuant to any contract or statute that applies to the Action;
- 3.12 Disputes Arising Out of Agreement: The Superior Court of the City and County of San Diego, by and through the Hon. Linda B. Quinn shall retain jurisdiction to address and resolve any and all disputes arising out of this Agreement or the City's operation of the System or any part thereof before completion of the Phase I Work. The Parties retain all rights they may have arising out of any disputes regarding the performance of this Agreement or otherwise;
- 3.13 Attorneys' Fees in the Event of Dispute: In the event of a dispute arising out of, or in connection with, this Agreement, the prevailing party in a civil proceeding shall be entitled to recover its reasonable attorneys' fees as an item of costs;
- 3.14 Governing Law: This Agreement shall be governed by, interpreted, construed and enforced according to the laws of the State of California;
- 3.15 Entire Agreement: This Agreement and Exhibits hereto constitutes the entire agreement between the Council and the City pertaining to the Action and the Canyon, as well as any other subject contained herein, and fully supersedes and supplants any and all prior negotiations, understandings, agreements, statements, representations, warranties, and promises, whether written or oral;
- 3.16 No Amendment Except in Writing: The Council and the City represent and agree that this Agreement cannot be amended or modified except in a writing that is signed by the party to be charged. This means, for example, that this Agreement cannot be amended or modified orally or by conduct. The Council and the City each hereby represent and agree that neither of them will make any claim or assertion, at any time or place, that this Agreement has been modified or amended orally or by a party's conduct;

- 3.17 No Assignment: The Parties represent and warrant that they have not made, and will not make in the future, an assignment of any of their respective rights or obligations under this Agreement;
- 3.18 Neutral Construction: The Council and the City, as well as their respective attorneys, each contributed to and participated in the drafting of this Agreement. The Council and the City represent and agree that Civil Code section 1654 shall not apply concerning any dispute over the terms of this Agreement or their construction or interpretation;
- 3.19 Severability: If for any reason any provision of this Agreement is declared to be invalid or unenforceable, the Council and the City hereby agree that the remaining provisions of this Agreement shall continue in full force and effect, and that this Agreement shall be construed as if the invalidated or unenforceable provision(s) had never been a part of this Agreement;
- 3.20 Further Assurances: The Council and the City each agree to promptly execute, provide or supply any information, authorizations or consents that may be reasonably required to achieve the purposes set forth in this Agreement;
- 3.21 Advice of Counsel: The Council and the City each represents and warrants that it and its duly qualified and authorized representatives have read this Agreement, has had it reviewed by counsel of its choice and that counsel has fully explained the provisions of this Agreement to them, that they understand the provisions of this Agreement, and that the Council and the City are signing this Agreement freely and voluntarily;
- 3.22 No Reliance on Other Party: The Council and the City, in entering into this Agreement, each expressly represents and agrees that it is not relying upon any representation, statement, covenant, agreement, promise or warranty, except as expressly contained in this Agreement, and that it has not relied upon any statement, comment, or representation by the other in deciding to enter into this Agreement or concerning the terms of this Agreement;
- 3.23 Signatories Duly Authorized: The Council represents that the Director signatories to this Agreement on its behalf has been duly authorized by the board of directors of the Council to sign this Agreement on its behalf and shall provide a copy of the minutes or resolution verifying the same to the City and which shall be appended as Exhibit 'N' to this Agreement. Likewise, the City represents that the signatory to this Agreement on its behalf has been duly authorized by the City Council to sign this Agreement on its behalf and shall provide a copy of the minutes or resolution verifying the same to the Council and which shall be appended as Exhibit 'O' to this Agreement;

3.24 City Council Approval: The City represents, warrants and agrees that the City Attorney's Office will execute this Agreement as to form on behalf of the City and promptly submit it to the San Diego City Council with the recommendation that the Agreement be promptly approved by the City Council. This Agreement will not be binding on any Party unless and until it is approved by the City Council;

3.25 Notices: The Council and the City, respectively, designate the following persons to execute and receive notices in connection with this Agreement:

For the Council:

John F. McGuire, Esq. (or his designee)  
Thorsnes Bartolotta McGuire  
2550 Fifth Avenue, 11<sup>th</sup> Floor  
San Diego, CA 92103  
Ph. (619) 236-9363  
Fax. (619) 236-9653  
[mcguire@tbmlawyers.com](mailto:mcguire@tbmlawyers.com)

For the City:

Michael Aguirre, Esq. (or his designee)  
Mia Severson, Esq. (or her designee)  
Office of the City Attorney  
1200 Third Avenue, Suite 1100  
San Diego, CA 92101-4100  
Ph. (619) 533-5800  
Fax 619-533-5856  
[mseverson@sandiego.gov](mailto:mseverson@sandiego.gov)

The individuals named above may be changed or supplemented by unilateral amendment to this Section upon reasonable notice.

3.26 Counterparts: This Agreement may be executed in counterparts. However, this Agreement shall not be binding upon any party until it has been executed by both by the President of the Board of Directors of the Council and City, by the person in the Notices Section of this Agreement, and promptly thereafter approved by the City Council;

3.27 Duplicate Originals: There shall be two originals of this Agreement, with one received by the Council and the other received by the City.

3.28 Waiver: Voluntary written waiver of any condition precedent or condition subsequent contained herein shall be limited to that condition and shall not constitute a waiver of any other condition.

Signatures on the following page....



IN WITNESS WHEREOF, the undersigned have executed this Agreement on the date indicated.

LA JOLLA ALTA  
MASTER COUNCIL

THE CITY OF SAN DIEGO

By: [Signature]  
Its: President  
Dated: February 6, 2008

By: [Signature]  
Its: Chief Operating Officer  
Dated: February 7, 2008

By: Maria Santacosta  
Its: Treasurer  
Dated: February 6, 2008

APPROVED AS TO FORM:

For the Council:

For the City:

John F. McGuire, Esq.  
Attorney for the La Jolla Alta Master Council

[Signature]  
Mia Severson, Esq.  
Chief Deputy City Attorney

For CSAC Excess Insurance Authority

For AIG Domestic Claims, Inc.

Doug Taylor

Tim Owens

IN WITNESS WHEREOF, the undersigned have executed this Agreement on the date indicated.

LA JOLLA ALTA  
MASTER COUNCIL

THE CITY OF SAN DIEGO

By: \_\_\_\_\_  
Its: \_\_\_\_\_  
Dated: February \_\_, 2008

By: \_\_\_\_\_  
Its: \_\_\_\_\_  
Dated: February \_\_, 2008

By: \_\_\_\_\_  
Its: \_\_\_\_\_  
Dated: February \_\_, 2008

APPROVED AS TO FORM:

For the Council:

For the City:

\_\_\_\_\_  
John F. McGuire, Esq.  
Attorney for the La Jolla Alta Master Council

\_\_\_\_\_  
Mia Severson, Esq.  
Chief Deputy City Attorney

For CSAC Excess Insurance Authority

For AIG Domestic Claims, Inc.

*Douglas J. Taylor*  
\_\_\_\_\_  
Doug Taylor

\_\_\_\_\_  
Tim Owens

IN WITNESS WHEREOF, the undersigned have executed this Agreement on the date indicated.

LA JOLLA ALTA  
MASTER COUNCIL

THE CITY OF SAN DIEGO

By: \_\_\_\_\_  
Its: \_\_\_\_\_  
Dated: February \_\_, 2008

By: \_\_\_\_\_  
Its: \_\_\_\_\_  
Dated: February \_\_, 2008

By: \_\_\_\_\_  
Its: \_\_\_\_\_  
Dated: February \_\_, 2008

APPROVED AS TO FORM:

For the Council:

For the City:

\_\_\_\_\_  
John F. McGuire, Esq.  
Attorney for the La Jolla Alta Master Council

\_\_\_\_\_  
Mia Severson, Esq.  
Chief Deputy City Attorney

For CSAC Excess Insurance Authority

For AIG Domestic Claims, Inc.

\_\_\_\_\_  
Doug Taylor

*Tim Owens*  
\_\_\_\_\_  
Tim Owens

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