

<b>REQUEST FOR COUNCIL ACTION</b> CITY OF SAN DIEGO	CERTIFICATE NUMBER (FOR COMPTROLLER'S USE ONLY) N/A
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TO: CITY COUNCIL	FROM (ORIGINATING DEPARTMENT): Real Estate Assets	DATE: 06/26/2013
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SUBJECT: Deer Canyon Open Space Acquisition

PRIMARY CONTACT (NAME, PHONE): Lane MacKenzie, 619-236-6050, 51A	SECONDARY CONTACT (NAME, PHONE): Christina Marin, 619-533-6509, 51A
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**COMPLETE FOR ACCOUNTING PURPOSES**

FUND					
DEPT / FUNCTIONAL AREA					
ORG / COST CENTER					
OBJECT / GENERAL LEDGER ACCT					
JOB / WBS OR INTERNAL ORDER					
C.I.P./CAPITAL PROJECT No.					
AMOUNT	0.00	0.00	0.00	0.00	0.00

FUND					
DEPT / FUNCTIONAL AREA					
ORG / COST CENTER					
OBJECT / GENERAL LEDGER ACCT					
JOB / WBS OR INTERNAL ORDER					
C.I.P./CAPITAL PROJECT No.					
AMOUNT	0.00	0.00	0.00	0.00	0.00

COST SUMMARY (IF APPLICABLE): Cost: N/A  
Thomas Guide Page: 1189 A-6

**ROUTING AND APPROVALS**

CONTRIBUTORS/REVIEWERS:	APPROVING AUTHORITY	APPROVAL SIGNATURE	DATE SIGNED
Environmental Analysis	ORIG DEPT.	Barwick, James	6/27/2013
Financial Management	CFO		
Park and Recreation	DEPUTY CHIEF		
Comptroller	COO		
	CITY ATTORNEY		
	COUNCIL PRESIDENTS OFFICE		

PREPARATION OF:     RESOLUTIONS     ORDINANCE(S)     AGREEMENT(S)     DEED(S)

1) Authorize the Mayor or his designee to accept a grant deed for 60 acres of land identified as "The Deer Canyon Environmental Mitigation Preserve", and further identified as the N ½ of NW ¼ of SE ¼ and the NE ¼ of SW ¼ of Sec. 14, T14S, R3W, San Bernardino Meridian.

2) Authorize the Chief Financial Officer to accept \$1,072.47 from the San Diego Foundation on behalf of the Deer Canyon Conservation Endowment Fund as a grant towards the maintenance of the preserve, and deposit the funds into the General Fund 100000.

3) Determine that the activity is exempt from CEQA pursuant to Section 15325: Transfer of Ownership of Interest in Land to Preserve Existing Natural Conditions and Historical Resources.

STAFF RECOMMENDATIONS:  
Approve the acquisition/actions

SPECIAL CONDITIONS (REFER TO A.R. 3.20 FOR INFORMATION ON COMPLETING THIS SECTION)

COUNCIL DISTRICT(S): 1

COMMUNITY AREA(S): TORREY HIGHLANDS

ENVIRONMENTAL IMPACT: This activity is not a project therefore is categorically exempt from CEQA in accordance with CEQA Guidelines Section 15325: Transfer of Ownership of Interest in Land to Preserve Existing Natural Conditions and Historical Resources.

CITY CLERK INSTRUCTIONS: DO NOT RECORD. Return documents to Real Estate Assets Department, Attention: B. Lane MacKenzie, M.S. 51A, for further handling.

**COUNCIL ACTION  
EXECUTIVE SUMMARY SHEET  
CITY OF SAN DIEGO**

DATE: 06/26/2013

ORIGINATING DEPARTMENT: Real Estate Assets

SUBJECT: Deer Canyon Open Space Acquisition

COUNCIL DISTRICT(S): 1

CONTACT/PHONE NUMBER: Lane MacKenzie/619-236-6050, 51A

**DESCRIPTIVE SUMMARY OF ITEM:**

Acquisition of the Deer Canyon Environmental Mitigation Preserve, totaling 60 acres, in the Del Mar Mesa area and the acceptance of a grant for \$1,072.47 from the San Diego Foundation to be used for maintenance of the Preserve.

**STAFF RECOMMENDATION:**

Approve the acquisition/actions

**EXECUTIVE SUMMARY OF ITEM BACKGROUND:** In September of 2005 the City of San Diego and the Deer Canyon Environmental Mitigation Preserve (Preserve) entered in the Deer Canyon Conservation Bank Agreement (“Agreement”). The “Agreement” provided for the establishment of a 60 acre mitigation credit bank in the Del Mar Mesa area identified as Deer Canyon. There are a total of 60 credits available for mitigation credit sales. Upon completion of the sale or transfer of all conservation credits, the Conservation Bank Land (60 acres) would be transferred to the City of San Diego.

The City in conjunction with the US Fish and Wildlife Service and the State Fish and Game Department has the authority to enter into Conservation Bank Agreements with private parties for the purposes of natural conservation consistent with the City’s Multiple Species Conservation Program. This allows the City to add additional acreage to it’s conservation holdings, at no cost to the City.

The “Preserve” has notified the City that the sale of all credits from the bank has occurred and has provided a Grant Deed for the referenced land for the City’s acceptance. This action will provide for acceptance of that Grant Deed.

**FISCAL CONSIDERATIONS:** The City will not be expending any funds in conjunction with this property acquisition.

**PREVIOUS COUNCIL and/or COMMITTEE ACTION** (describe any changes made to the item from what was presented at committee): N/A

**COMMUNITY PARTICIPATION AND PUBLIC OUTREACH EFFORTS:** N/A

**KEY STAKEHOLDERS AND PROJECTED IMPACTS:** Acceptance of the 60 acres will increase the City’s Multiple Species Conservation Program’s foot print in the Del Mar Mesa area.

Barwick, James  
Originating Department

\_\_\_\_\_  
Deputy Chief/Chief Operating Officer

Recording Requested by:

City Real Estate Assets Dept.

After recording mail to:

Office of the City Clerk  
City of San Diego  
Mail Station 2A

SPACE ABOVE THIS LINE FOR RECORDER'S USE

APN : 306-050-20

NO DOCUMENTARY TAX DUE - R & T 11922 (amended)  
Presented for record by the CITY OF SAN DIEGO

### GRANT DEED

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged,  
the Deer Canyon Environmental Mitigation Preserve, LLC

HEREBY GRANT(S) To The City of San Diego, a municipal corporation, in the County of San Diego, State of California, all right, title and interest in and to that real property situated in the City of San Diego, County of San Diego, State of California, described as follows:

See Exhibit "A" attached hereto and made a part hereof

The GRANTEE specifically understands and agrees that the property herein granted is subject to a covenant wherein the grantee agrees to protect and manage the property as open space preserve which is made part of the City of San Diego **Multiple Species Conservation Program (MSCP)**. The property is subject to all covenants and restrictions place upon lands within the MSCP area and only those development activities consistent with the management, protection, study and preservation of the property's natural native biotic community are permitted.



This is to certify that the interest in the real property conveyed by this instrument to the City of San Diego, a municipal corporation, is hereby accepted the undersigned officer on behalf of the City of San Diego pursuant to authority conferred by Resolution No. 250320, adopted by the Council of the City of San Diego on October 1, 1979, and the grantee consents to recordation thereof by its duly authorized officer.

**SEE ATTACHED  
FOR OFFICIAL  
ACKNOWLEDGEMENT**

Dated \_\_\_\_\_ By \_\_\_\_\_

State of California )  
County of San Diego )

# CALIFORNIA ALL-PURPOSE CERTIFICATE OF ACKNOWLEDGMENT

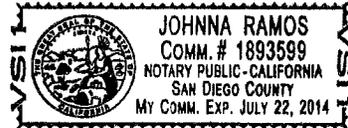
On September 1<sup>st</sup>, 2010 before me, Johnna Ramos, notary public  
(here insert name and title of the officer)

personally appeared James B. Carter

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

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

WITNESS my hand and official seal.



Signature Johnna Ramos

(Seal)

## OPTIONAL INFORMATION

Although the information in this section is not required by law, it could prevent fraudulent removal and reattachment of this acknowledgment to an unauthorized document and may prove useful to persons relying on the attached document.

### Description of Attached Document

The preceding Certificate of Acknowledgment is attached to a document titled/for the purpose of grant deed

containing 1 pages, and dated 9/1/10

The signer(s) capacity or authority is/are as:

- Individual(s)
- Attorney-in-fact
- Corporate Officer(s) \_\_\_\_\_ Title(s)

- Guardian/Conservator
- Partner - Limited/General
- Trustee(s)
- Other: \_\_\_\_\_

representing: \_\_\_\_\_  
Name(s) of Person(s) or Entity(ies) Signer is Representing

Additional Information	
<b>Method of Signer Identification</b>	
Proved to me on the basis of satisfactory evidence: <input type="radio"/> form(s) of identification <input type="radio"/> credible witness(es)	
Notarial event is detailed in notary journal on: Page # _____ Entry # _____	
Notary contact: _____	
Other	
<input type="checkbox"/> Additional Signer(s)	<input type="checkbox"/> Signer(s) Thumbprint(s)
<input type="checkbox"/>	_____

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**LEGAL DESCRIPTION**

Real property in the City of San Diego, County of San Diego, State of California, described as follows:

The North half of the Northwest Quarter of the Southeast Quarter and the Northeast Quarter of the Southwest Quarter of Section 14, Township 14 South, Range 3 West, San Bernardino Meridian, in the City of San Diego, County of San Diego, State of California, according to Official Plat thereof.

APN: 306-050-20-00

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**DEER CANYON  
CONSERVATION BANK AGREEMENT**

THIS CONSERVATION AGREEMENT [Agreement] made and entered into this 21<sup>st</sup> day of September, 2005 between Deer Canyon Environmental Mitigation Preserve, LLC [Property Owner], and the City of San Diego [City]. The Deer Canyon Environmental Mitigation Preserve, LLC and the City are referred to herein individually as "Party" and jointly as the "Parties". The purpose of this Agreement is to establish the terms and conditions for a conservation bank for certain real property to be known as the Deer Canyon Conservation Bank.

**RECITALS**

- A. The Property Owner is the owner of 60 acres of real property located in the County of San Diego, California, and more completely described in Exhibit A [General Location Map and Legal Description] and illustrated in Exhibit B [Legal Parcel Map] attached hereto [Conservation Bank Lands]. The entire 60 acres of land will be managed as a single unit known as the Deer Canyon Conservation Bank [Conservation Bank]. There are a total of 60 credits available for mitigation credit sales. The 60 mitigation credits will be used for calculation of the endowment funds necessary to provide management of the lands.
- B. Under the City of San Diego Implementing Agreement (Section 9.14) between the United States Fish and Wildlife Service [USFWS] and the California Department of Fish and Game [CDFG] [together "Wildlife Agencies"], the City has the authority to enter into a Conservation Bank Agreement with private parties for the purposes of natural conservation consistent with the adopted Multiple Species Conservation Program Subarea Plan, which has been prepared consistent with the State of California Official Policy on Conservation Banks issued by the California Resources Agency (April 1995) and the Supplemental Policy regarding Conservation Banks within the NCCP area of Southern California issued by the United States Fish and Wildlife Service and the California Department of Fish and Game (January 24, 1996).
- C. Under the California Endangered Species Act, California Fish and Game Code § 2050 et seq. [CESA], California Fish and Game Code § 1802, and other State laws, CDFG has jurisdiction over the conservation, protection, restoration, enhancement and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species. CDFG is also the manager and trustee of fish and wildlife resources and their habitat pursuant to California Fish and Game Code Section 1802.
- D. USFWS has jurisdiction over the conservation, protection, restoration, enhancement and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species pursuant to the provisions of various federal laws including the Endangered Species Act, 16 USC § 1531 et seq. ("ESA"), the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666c, and the Fish and Wildlife Act of 1956, 16 U.S.C. § 742(f) et seq.
- E. The Deer Canyon Environmental Mitigation Preserve, LLC, a California limited liability corporation, was formed on May 8, 2003 for the sole and exclusive purpose of holding title to the Conservation Bank Lands during the period in which the sale of the environmental credits would take place.
- F. Establishment of the Deer Canyon Conservation Bank Agreement represents an opportunity to implement the ongoing regional biological resource planning efforts in San Diego County by conserving highly valuable resources within an area that is recognized as an essential part of a regional biological preserve system. More specifically, the Conservation Bank Lands are strategically located within the City of San Diego's Multi-Habitat Planning Area [MHPA]. The City's Subarea Plan and MHPA have been accepted as a habitat conservation plan by the Wildlife Agencies. The primary goals of the Multiple Species Conservation Program [MSCP] are to conserve biodiversity in the MSCP Plan Area and to provide for the permanent protection of plant and wildlife species (and the habitats on which they depend) which are currently listed, or may in the future become listed, as threatened or endangered under the federal or state endangered species acts through the establishment of a permanent preserve. The City's MHPA is depicted on Exhibit C and the site's Habitat Value on Exhibit D.

- G. It is anticipated that construction and development activity within the Natural Community Conservation Planning area (NCCP) in San Diego County [Credit Area], will necessitate the mitigation of impacts to endangered, threatened and sensitive species and biologically sensitive habitats through the preservation of off-site lands which possess comparable habitat values. The biological resources report and credit area can be found in Exhibit E.
- H. The Conservation Bank Lands support 35.97 acres of Tier I habitat, including California Adolphia; 0.2 acre of Tier II habitat; and 23.83 acres of Tier III habitat. The various Tiers provide habitat that is suitable for a variety of endangered, threatened and sensitive species as depicted on Exhibit E [Biological Resources Report]. The biological values on site, along with the Conservation Bank Lands' proximity to adjacent large areas of natural habitat and its connectivity to the protected open space lands occupied by listed and sensitive species, led to the inclusion of the Conservation Bank Lands within the City's MHPA.
- I. The City has determined that the Conservation Bank Lands are generally suitable to mitigate for impacts to certain sensitive and declining vegetation types, habitat for certain species designated endangered or threatened under CESA or ESA, certain rare or sensitive species, and multi-species habitat values within the Credit Area. Certain rare endemic and/or listed species may not have similar or comparable habitat requirements and use of the Conservation Bank may not be appropriate to mitigate for impacts to those species. Use of the Conservation Bank to mitigate for impacts to wildlife and plants and the vegetation communities on which they depend shall be governed by Section Article IV of this Agreement.
- J. The Parties desire to enter into this Agreement to set forth the terms and conditions pursuant to which the Deer Canyon Conservation Bank will be established and implemented, including the method and requirements for the sale of Conservation Bank credits by the Property Owner to third party purchasers [Credit Purchasers] in need of mitigation.
- K. The parties acknowledge that various Natural Community Conservation Planning Act (Fish & Game Code Section 2800, et seq.) plans [NCCP] and Endangered Species Act Section 10(a)(1)(B) Habitat Conservation Plans [HCP] covering all or a part of the Credit Area may be adopted or approved by the applicable Wildlife Agencies. As used herein, the term "NCCP/HCP" specifically includes the MSCP, the Subarea Plans approved or proposed in the MSCP, the MHCP for the northern portion of San Diego County, subarea plans contemplated in the MSCP and MHCP and other subarea plans now or hereafter proposed (each such subarea is referred to hereinafter as a "Subarea Plan"). Once an NCCP/HCP is approved by the Wildlife Agencies, and for so long as it is in effect, the NCCP/HCP shall, for projects within its ambit that are within the Credit Area, establish the offsite mitigation requirements of all habitats and species covered by the plan.

NOW, THEREFORE, in consideration of the foregoing recitals and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

#### **ARTICLE I. DEFINITIONS**

- 1.1 Agreement. This Deer Canyon Conservation Bank Agreement.
- 1.2 CDFG. The California Department of Fish and Game, a subdivision of the California Resources Agency.
- 1.3 CEQA. The California Environmental Quality Act (California Public Resources Code Sections 21000 et seq.); guidelines for implementation at California Public Resources Code Sections 15000 et seq., including all regulations promulgated pursuant to that Act.
- 1.4 CESA. The California Endangered Species Act (California Fish and Game Code sections 2050 et seq.), including all regulations promulgated pursuant to that Act.
- 1.5 Conservation Credit. A mitigation credit, one acre of habitat equals one conservation credit.

- 1.6 Covered Species. Those species within a designated MSCP regional planning area which the Wildlife Agencies have determined will be adequately conserved by that regional plan when the Plan(s) is implemented through the Subarea Plans.
- 1.7 Credit Area. The geographic area within which impacts that occur may be mitigated through use of conservation credits on the Deer Canyon Conservation Bank consistent with the Agreement.
- 1.8 Conservation Easement. A recorded conservation easement established to conserve biological resources, and which imposes certain habitat management obligations for the Conservation Bank Lands.
- 1.9 ESA. The federal Endangered Species Act (U.S.C. §§ 1531 et seq.), including all regulations promulgated pursuant to that Act.
- 1.10 Habitat Conservation Plan also HCP. Conservation plans prepared pursuant to Section 10(a)(2)(A) of the ESA (16 U.S.C. section 539(a)(2)(A)) and each Subarea Plan approved by the Wildlife Agencies.
- 1.11 Management Deposit. The sum of money deposited into the Management Fund to be used for the management and maintenance of the of the Conservation Bank Lands for the benefit of biological resources.
- 1.12 Management Fund. A segregated, interest bearing fund maintained by the Fund Manager to be used exclusively for the management and maintenance of the Conservation Bank Lands in accordance with the Management Plan and the Conservation Easement.
- 1.13 Management Plan. The plan, attached as Exhibit F, intended to describe the activities required for the management and maintenance of the Conservation Bank Lands and to be carried out by the Managing Agency during the term of this Agreement.
- 1.14 MHCP. The Multiple Habitat Conservation Program, a comprehensive habitat conservation planning program which addresses multiple species habitat needs and the preservation of native vegetation in northwestern San Diego County, California.
- 1.15 MSCP. The Multiple Species Conservation Program, a comprehensive habitat conservation planning program which addresses multiple species habitat needs and the preservation of native vegetation in southwestern San Diego County, California.
- 1.16 NCCP Act. The California Natural Community Conservation Planning Act of 1991, enacted by Chapter 765 of the California statutes of 1991 (A.B. 2172) codified in part at California Fish and Game Code section 2800, et seq.) including all regulations promulgated pursuant to that Act.
- 1.17 NCCP Authorization. Any authorization issued by CDFG under the NCCP Act (including but not limited to, California Fish and Game Code sections 2825(c) or 2835), or by the California Fish and Game Commission under the NCCP Act (including but not limited to California Fish and Game Code § 2830) to authorize the Take of a species listed under CESA as threatened or endangered, or of a species which is a candidate for such a listing, or of a species identified pursuant to Section 2835. These legal authorities are wholly independent of each other.
- 1.18 NCCP Plan. A plan developed in accordance with the NCCP Act which provides comprehensive management and conservation of multiple wildlife species, and which identifies and provides for the regional or area-wide protection and perpetuation of natural wildlife diversity while allowing compatible and appropriate development and growth.
- 1.19 Subarea Plan. The plan prepared by the jurisdictions and reviewed and approved by the USFWS and CDFG, to implement the MSCP or MHCP within its jurisdictional boundaries.
- 1.20 USFWS. The United States Fish and Wildlife Service, an agency of the United States Department of the Interior.

## ARTICLE II. TERM OF THE AGREEMENT

- 2.1 **Term.** The Term of this Agreement shall commence on Execution of this Agreement and shall extend for a period of five (5) years following the sale of the first (1<sup>st</sup>) Conservation Credit.
- 2.1.1 *Extension of Term.* The Property Owner and the City of San Diego may extend the Term of this Agreement by written agreement for an additional two years in order to effectuate the sale of Conservation Credits and/or the continued management and maintenance of Conservation Bank Lands. In order to extend the Term, the Property Owner will make additional deposits into the Management Fund as required by the Managing Agency to pay the costs and expenses associated with the management and monitoring for the additional term.

## ARTICLE III. ESTABLISHMENT OF THE CONSERVATION BANK

- 3.1 **Requirements for the Establishment of the Conservation Bank.** The Conservation Bank shall be deemed established when all of the following requirements are met:
- 3.1.1 *Evaluation of Conservation Bank Lands.* For the purpose of determining the extent of biological resources, including wildlife, whether sensitive, endangered or threatened species, and their habitats, attributable to the land proposed to be used as Conservation Bank Lands, all necessary inspection and/or studies of the land shall be conducted to establish values and existence of such biological resources.
- 3.1.2 *Approval of Conservation Bank Lands.* The City shall review all reports provided and determine whether and to what extent the biological values are supported.
- 3.1.2.1 *Approval Prior to this Agreement.* With respect to this Agreement, representatives of the City have already reviewed the Biological Resources Report [Report] for purposes of determining its biological values in connection with the sale of Conservation Credits. The City Representatives concur with the findings in the Report. As a result of benefits accruing to wildlife resources, including sensitive, endangered and threatened species and their habitats, and upon the establishment of the Conservation Bank for conservation purposes, the City acknowledges and agrees that as described in Recitals F,G,H,and I and subject to the limitations provided in this Agreement, the Property possesses biological values which support the Conservation Credits acknowledged in section 4 below.
- 3.1.3 *Execution of the Agreement.* Execution of this Agreement shall occur on the date this Agreement is approved by the City in the manner required by the City Charter and signed by the appropriate City Representative.
- 3.1.4 *Conveyance and Recording of the Conservation Easement.* Concurrent with the execution of this Agreement, the Property Owner shall deliver to the City of San Diego, with a copy to USFWS, and CDFG the following:
- 3.1.4.1 A duly executed and acknowledged Conservation Easement in the form attached hereto as Exhibit G-1 [Conservation Easement].
- 3.1.4.2 A detailed map of the lands covered by the Conservation Easement.
- 3.1.4.3 A duly executed and acknowledged Grant Deed, attached hereto as Exhibit G-2, conveying title of the Property to the City of San Diego and containing provisions requiring that the property be held and managed in perpetuity as open space lands [Grant Deed]. The Grant Deed, however, shall not be recorded until transfer of Conservation Bank Lands pursuant to section 7.1

3.1.4.4 A current title report in the form attached hereto as Exhibit H.

#### ARTICLE IV. CONSERVATION CREDITS - PURPOSE, VALUE, USE, AND SALE.

- 4.1 **Purpose.** Deer Canyon Conservation Bank Conservation Credits are intended to serve as mitigation for adverse biological impacts to land within the Credit Area possessing similar or comparable habitat values with the following exceptions:
- 4.1.1 *Inconsistent Impacts.* Impacts which are inconsistent with a Subarea Plan or compromise the biological integrity outside the Subarea Plan in which the Property is located.
  - 4.1.2 *Habitat Linkage Area.* The area for which the credit holder is seeking mitigation is a designated as an important habitat linkage area.
  - 4.1.3 *Non-represented Habitat or Species.* The habitat or species impacted requires like-kind mitigation and that habitat or species is not represented within the Deer Canyon Conservation Bank.
    - 4.1.3.1 *Tiers.* With respect to certain projects under City control, mitigation may be allowed with similar or comparable habitat values if within the same Tier and City Regulations permit the use of such similar or comparable habitat values as mitigation.
- 4.2 **Value.** One (1) acre of Conservation Bank Land shall have the value of one (1) Conservation Credit. The total number of credits available shall be based on 60 acres of Conservation Bank Land; thus, a total of sixty (60) Conservation Credits will be created, acknowledged, and accepted by the City in accordance with the terms and conditions of this Agreement. The Parties acknowledge that the level of Conservation Credits provided to Property Owner hereunder have been negotiated with the express understanding that no enhancement of the Conservation Bank lands to increase Conservation Credits is contemplated.
- 4.2.1 *Reduction in Value.* Notwithstanding anything to the contrary contained in this Agreement, in the event that the City reasonably determine that portions of the Property have been damaged subsequent to the date of this Agreement, and prior to the official date of transfer of conservation easement and: (i) the effect has been to materially impair the habitat values on such damaged property; and (ii) the Property Owner has not reasonably restored habitat value to such damaged area or provided the City with reasonable evidence that habitat value will be restored, then the City may, at its discretion, either reduce the number of Conservation Credits allocated to the Property in question in proportion to such damaged area or, if it determines that the habitat values of the property have been so impaired as to render it unsuitable as a Conservation Bank, terminate this Agreement.
  - 4.2.2 *Number and Type.* For development projects located within the ambit of a Wildlife Agency approved NCCP/HCP within San Diego County, subject to section 4.1, the Implementing Agreement [IA] of the jurisdiction issuing the development approval will control the appropriate number and type of mitigation acres required to mitigate biological impacts to covered endangered, threatened or sensitive species and habitats.
- 4.3 **Sale or Conveyance of Conservation Credits.**
- 4.3.1 *No Further Assessment.* Once the Conservation Bank has been established in accordance with the procedures set forth in section 4, no further evaluation or assessment by the City shall be required as a prerequisite to the sale of the Conservation Credits, or the City acknowledgment and acceptance thereof, except as provided in sections 5.3 and 6.1 et seq..
  - 4.3.2 *Entitlement.* The Property Owner shall be entitled to sell Conservation Credits to Credit Purchasers, or apply such Conservation Credits against any mitigation applicable to other properties owned by the Property Owner in the Credit Area, during the Term of the Agreement and in a manner consistent with Recital I and sections 4.1 and 4.2 above. Subject to the Management Fund obligations under

section 5.3 below, the Property Owner shall have the exclusive right to determine the price for any and all Conservation Credits offered for sale or conveyance.

- 4.3.3 *Number.* Under this Agreement, no more than sixty (60) Conservation Credits may be sold or transferred. Once all Conservation Credits have been conveyed, no further Conservation Credits shall be acknowledged by the City.
- 4.3.4 *Accounting for Sale or Conveyance.* The sale or conveyance of Conservation Credits shall be accounted for in accordance with section 6.1 below.

## ARTICLE V. MANAGEMENT OF CONSERVATION LANDS

5.1 **Managing Agency.** During the Term of this Agreement, HDR, its successors, or assigns, shall oversee, manage, and maintain the Conservation Bank Lands in order to preserve its habitat and conservation values in accordance with the terms of this Agreement, the Conservation Easement, and the Management Monitoring Plan. The rights and obligations of the Managing Agency shall include:

5.1.1 *Management and Monitoring Plan.* The Managing Agency shall create a Managing and Monitoring Plan, which address all of the Minimum Management and Monitoring Requirements referred to in section 5.2 [Management Plan].

5.1.2.1 The Management Plan shall provide for the implementation of the specific management measures and tasks identified in Exhibit F and shall prioritize the importance of the various measures and tasks. The Management Plan shall be subject to the approval of the City, which approval shall not be withheld unreasonably. Once the Management Plan has been approved by the City, the Managing Agency shall implement the Management Plan in accordance with the terms of the Conservation Easement and this Agreement. The Managing Agency and the City shall meet and confer from time to time, upon the request of any one of them, to revise the Management Plan to better preserve the habitat and conservation values of the Property.

5.1.2.1.1 Prior to development of the Management Plan, the Property Owner shall manage the property consistent with the purposes of this Agreement and the Conservation Easement to preserve the habitat and conservation values of the Property.

5.1.2 *Reasonable Efforts.* The Managing Agency shall use reasonable efforts to prevent third party use of the Property in a manner not permitted under this Agreement or the Conservation Easement.

5.1.3 *Right to Restrict Access.* The Managing Agency shall share with the Property Owner the right to restrict public access to the Property. Representatives of the City shall have a right to enter the Property at any time and guests of the City may enter with twenty-four (24) hour notice to the Property Owner and the Managing Agency.

5.1.4 *Cash Flow.* The Managing Agency shall establish a Cash Flow Worksheet, which includes all anticipated expenditures, in order to provide the Fund Manager with a basis for anticipating Management Fund balances. The worksheet shall be updated monthly during the Management Term and the anticipated Cash Flow shall be compared to the actual monthly expenditures.

5.2 **Minimum Management and Monitoring Requirements.** The Parties have agreed to Management and Monitoring Requirements, attached as Exhibit F, which detail the minimum level and type of activities required for the Management and Monitoring of the Conservation Bank Lands. These requirements shall be used by the Managing Agency to create an appropriate Management Plan. Any reduction in level or type of activities shall be considered a material breach of this Agreement for which the City may avail itself of the remedies in Article IX of this Agreement, including termination.

5.3 **Funding.** The Property Owner shall be obligated to fund the Management and Monitoring of the Conservation Bank Lands to provide all of the activities required by the Management Plan. Funding shall be provided in the following manner:

5.3.1 *Establish Management Fund.* Concurrent with the execution of this Agreement, the Property Owner shall establish a dedicated, interest bearing account, to be known as the Deer Canyon Conservation Bank Lands Management and Maintenance Fund [Management Fund], for the exclusive purpose of managing the Deer Canyon Conservation Bank Lands in accordance with the Management and Monitoring Plan.

5.3.2 *Management Deposit.* Prior to or concurrent with the sale, transfer, or use of the first (1<sup>st</sup>) Conservation Credit, the Property Owner shall deposit \$41,567.00 into the Management Fund. The Deposit is intended to defray the costs of managing the Conservation Bank in accordance with the requirements of the Management and Monitoring Plan.

5.3.2.1 The Management Deposit shall be a non-refundable deposit with no right of reimbursement to the Property Owner.

5.3.3 *Minimum Balance.* Property Owner shall maintain a Minimum Balance in the amount determined by the Fund Manager, pursuant to section 5.4.2, in the Management Fund at all times. If, at any time, the Management Fund balance falls below the minimum, Property Owner shall deposit, within thirty (30) Calendar Days of such time, the difference between the Minimum Balance and the actual balance into the Management Fund.

5.3.4 *Interest.* The accrued interest and earnings from the Management Fund shall be used exclusively to fund the management of the Conservation Bank Lands in accordance with the Management and Monitoring Plan.

5.4 **Fund Manager.** The Fund Manager shall hold and manage the Management Fund described in section 5.3.1 in trust for the purposes specified in this Agreement. The Fund Manager may invest Management Funds in a low risk money market accounts or similar low risk market vehicles and shall expend the funds to pay costs and expenses reasonably incurred in the execution of the management and monitoring activities for the Conservation Bank Lands under the Management Plan, including, without limitation, property taxes, contracts, equipment, and reasonable administrative costs of the Managing Agency, not to exceed five percent (5%) of the cost of the tasks performed, pursuant to this Agreement.

5.4.1 *Non-Profit.* The Fund Manager shall be a duly organized and authorized 501(c)(3) non-profit organization. Prior to contracting with the Fund Manager for its services under this Agreement, the Property Owner shall seek and obtain City approval.

5.4.2 *Duty to Determine Minimum Fund Balance.* The Fund Manager, in cooperation with the City and the Managing Agency, shall use daily, monthly/quarterly, and annual reporting information identified in Article VI to determine the actual costs of managing, monitoring, and maintaining the Conservation Bank Lands. The actual costs of managing, monitoring, and maintaining shall be used in combination with the cash flow worksheets provided by the Managing Agency, and any other relevant information to determine the cash balance necessary in the Management Fund to meet the daily financial obligations of the Fund Manager. This dollar amount shall be the Minimum Balance necessary to effectively and efficiently manage the Conservation Bank Lands and required under section 5.3.3.

## ARTICLE VI. REPORTING AND MAINTENANCE OF RECORDS

6.1 **Reporting Requirements.** In addition to any reporting requirements imposed by law, the Property Owner, the Managing Agency, and the Fund Manager shall have the following reporting requirements during the Term of this Agreement:

6.1.1 *Reporting Per Occurrence.*

6.1.1.1 Sales or Transfers. Every sale or transfer of a Conservation Credit shall be reported by the Property Owner to the City within thirty (30) Calendar Days of the sale or transfer. The first sale, transfer, application or use of a Conservation Credit shall be accompanied by a Deposit Receipt for such sale or transfer in the amount of the Management Deposit identified in section 5.3.2 of this Agreement.

6.1.1.1.1 Deposit Receipt. The Deposit Receipt shall identify the amount of the Management Deposit, the date of the deposit, and the account into which the Deposit was made.

6.1.1.2 Damage to Conservation Bank Lands. In the event that major damage occurs to the Conservation Bank Lands, the Managing Agency shall notify the City and the Property Owner immediately.

6.1.1.2.1 Managing Agency and Property Owner shall consult with the City to identify remedial measures and tasks which shall be performed to the biological resources. A time line to complete the tasks shall be established. If the Managing Agency or the Property Owner fail to perform the tasks within the agreed upon time line, the remaining unsold credits will be held in abeyance by the City until such time that the agreed upon tasks are completed.

6.1.1.3 Managing and Monitoring Activities. If, at any time during the term of this Agreement, the Managing Agency anticipates that the actual expenditures will deviate from the Cash Flow Worksheet, whether increasing or decreasing expenditures, the Managing Agency shall immediately report the expected change in the Cash Flow to the Fund Manager.

6.1.1.4 Fund Balance Falls Below Minimum. If, at any time, the Management Fund balance falls below the Minimum Balance, the Fund Manager shall immediately notify the Property Owner and the City.

6.1.2 *Monthly/Quarterly Accounting.*

6.1.2.1 Management Fund. At the end of each quarter, during the Term of this Agreement, the Fund Manager, shall provide to the City, the Property Owner, and the Managing Agency, a quarterly accounting of all expenditures from and deposits to the Management Fund. This accounting shall be accompanied by the quarterly statement from the Bank or institution in which the Funds reside.

6.1.2.2 Cash Flow. At the end of each quarter, during the Term of this Agreement, the Managing Agency shall provide the Cash Flow Worksheet to the City, the Property Owner, and the Fund Manager.

6.1.2.3 Proof of Expenditures. At the end of each month, the Managing Agency shall provide proof of all expenses incurred during that month to the Fund Manager.

6.1.2 *Annual Reporting, Accounting and Audit.*

6.1.2.1 Management Fund. The Fund Manager shall provide an accounting of all funds received and expended for the management of the Conservation Bank Lands using Generally Accepted Accounting Principals [GAAP]. The accounting and the activities of the Managing Agency shall be audited annually, and the accounting and the results of the audits shall be provided to the City of San Diego as part of the Annual Accounting and Property Management Report due on or before January 15th of each year in accordance

with section 6.1.2.2. The annual accounting and results of the audit shall also be made available to the public.

6.1.2.2 Annual Accounting and Property Management Report. The Managing Agency shall provide to the City an Annual Accounting and Property Management Report on or before January 15<sup>th</sup> of each year. The Accounting and Property Management Report shall include the following:

6.1.2.2.1 The annual accounting and results of the audit described in section 6.1.2.1.

6.1.2.2.2 A general description of the status of the biological resources on the Property.

6.1.2.2.3 The results of any biological monitoring or studies conducted on the Property.

6.1.2.2.4 A description of all management actions taken on the property and the costs thereof.

6.1.2.2.5 A description of any problems encountered in managing the property.

6.1.2.2.6 A description of management actions and the anticipated costs thereof that the Managing Agency will undertake, in accordance with the Management Plan, in the coming year.

6.2 **Maintenance of Records.** Property Owner, Managing Agency, and Fund Manager shall maintain any and all records related to the Conservation Bank, including sales or transfer of credits, deposits and expenditures or funds, and other records in support of the reporting requirements in section 6.1 for a period of five (5) years following the completion of the maintenance and reporting term or the termination of this Agreement pursuant to Article IX, whichever occurs first.

## ARTICLE VII. TRANSFER OF CONSERVATION BANK LANDS.

7.1 **Transfer of Title.** Upon the conclusion of the Term of this Agreement including any extension to the Term pursuant to section 2.1.1, or upon termination of this Agreement, whichever occurs first, the Property Owner, at the option of the City, shall transfer the Conservation Bank Lands by a Grant Deed to either (i) the City of San Diego or (ii) a Trust established for the purpose of maintaining Conservation Bank Lands and approved by the City [Trust].

7.1.1 *Earlier Transfer.* If all conservation credits from the Deer Canyon Conservation Bank have been sold or transferred in accordance with this Agreement, the Conservation Bank Lands may be transferred to the City or Trust at that time, provided the following requirements are met:

7.1.1.1 The Managing Agency provides to the City and the Property Owner an estimate of the Management and Monitoring expenses for the balance of the 5 year Management and Monitoring Term.

7.1.1.2 The Property Owner makes a deposit into the Management Fund in the amount of the estimate.

7.1.1.3 The City agrees in writing to accept the Conservation Bank Lands or to allow the transfer to the Trust.

7.1.2 *Charges Associated with Transfer.* The Property Owner shall pay all transfer taxes and recording charges associated with the conveyance of the Property.

7.1.3 *Encumbrances.* The conveyance of the Conservation Bank Lands by the Property Owner hereunder shall be subject to any and all rights of way, easements, encumbrances, and other matters existing at the time of creation of the Conservation Bank and reflected in the Title Report.

- 7.2 **Remaining Funds.** Except as provided in sections 5.3.2.1, 7.1.1, and 9.1.2.2, any balance remaining in the Management Fund at the time of the Transfer of Title shall be returned to the Property Owner.
- 7.3 **Documents and Records.** Copies of all books and records shall be provided to the City of San Diego or the Trust.

## ARTICLE VIII. PROPERTY OWNER COVENANTS

- 8.1 **Covenants.** Property Owner hereby agrees and covenants for so long as this Agreement is in effect and has not been terminated pursuant to Article IX below, that Property Owner:
- 8.1.1 *Hazardous Materials.* Property Owner shall not discharge or release on the Conservation Bank Lands, or permit others to discharge or release on the Conservation Bank Lands, any material or substance deemed hazardous or toxic under any applicable federal, state, or local environmental laws.
- 8.1.2 *Additional Encumbrances.* Property Owner shall not create any encumbrances to the title of the Conservation Bank Lands other than those set forth in the Title Report, attached hereto as Exhibit H, nor shall Property Owner execute, renew, or extend any liens, licenses or similar interests if the proposed encumbrances, liens, lease, license or similar interests will affect the biological values of property as determined by the City, or execute, renew, or extend any leases, licenses or similar interests covering any lands within the Deer Canyon Conservation Bank without the prior written consent of the City of San Diego, Planning Department/MSCP and Park and Recreation Department/Open Space.
- 8.1.3 *Construction or Development.* Property Owner shall not construct any structure or engage in any development activities on or uses of the Conservation Bank Lands that degrade biological value, or allow any other party to do so without the prior written consent of the City.
- 8.1.4 *Maintain Biological Value.* Property Owner shall maintain the biological value of lands to insure the suitability as habitat for wildlife and plant species.

## ARTICLE IX. DEFAULT, BREACH, AND TERMINATION

- 9.1 **Default.** The failure of the Property Owner or the Managing Agency to fulfill or adequately perform any obligation or duty under the Conservation Easement or this Agreement shall be deemed a breach of this Agreement. In addition, the breach of one or more of the covenants under the Conservation Easement or this Agreement shall also be deemed a breach of this Agreement.
- 9.1.1 *Notice of Default.* The City shall provide a Notice of Default to the Property Owner and the Managing Agency, explaining the nature of the default and the actions that must be taken to remedy the default.
- 9.1.1.1 *Failure to Provide Notice of Default.* The failure of the City to provide a Notice of Default shall not be a waiver of the obligations of the Property Owner or the Managing Agency, nor shall it relieve them from liability therefrom. The Notice of Default shall only be used to establish the beginning of the timeframe under which the Property Owner and Managing Agency have the right to cure and the date on which the City may begin the suspension of Conservation Credit sales.
- 9.1.2 *Remedies.* In addition to those remedies available by law or equity, the City shall have the following remedies:
- 9.1.2.1 *Right to Suspend.* The City shall have the right to suspend the sale of Conservation Credits if financing, management, and/or reporting are not undertaken in a manner consistent with the Management Plan and this Agreement. The suspension of the sale of

Conservation Credits shall begin on the date the Notice of Default is mailed or faxed and continue until such time as all deficiencies have been remedied.

9.1.2.2 **Terminate for Default.** If the Property Owner or the Managing Agency fails to undertake all reasonable efforts to the satisfaction of the City, within thirty (30) Calendar Days of receiving written notice from the City specifying the nature of the Default, in order to ensure that the Default will be fully and completely remedied within a reasonable period of time thereafter, the City may immediately cancel and/or terminate this Agreement, and terminate each and every right of the Property Owner, and any person claiming any rights by or through the Property Owner under this Agreement. The rights and remedies of the City enumerated in this Section are cumulative and shall not limit, waive, or deny any of the City's rights under any other provision of this Agreement. Nor does this section otherwise waive or deny any right or remedy, at law or in equity, existing as of the date of this Agreement or hereinafter enacted or established, that may be available to the City against the Property Owner.

9.1.2.2.1 In the event of a Default, to the extent that any Conservation Credits have been sold, transferred, applied, or used, the City may require the Property Owner to transfer the equivalent amount of Conservation Bank Land to the City or Trust, in the manner required and according to the conditions for Earlier Transfer in section 7.1.1, as if the Default were an Earlier Transfer of title under this Agreement. This remedy shall not be exclusive of other remedies, nor shall it otherwise waive or deny any right or remedy, at law or in equity, existing as of the date of this Agreement or hereinafter enacted or established, that may be available to the City against the Property Owner or the Managing Agency.

9.1.3 **Delay.** If a delay in the performance of work required under this Agreement is caused by unforeseen events beyond the control of the Parties, such delay may entitle the Property Owner or the Managing Agency to a reasonable extension of time. Any such extension of time must be approved in writing by the City. The following conditions may justify such a delay: war; changes in law or government regulation; labor disputes; strikes; fires, floods, adverse weather or other similar condition of the elements necessitating cessation of the Managing Agency's work; inability to obtain materials, equipment, or labor; required additional Professional Services; or other specific reasons agreed to between the City and the Property Owner or Managing Agency; provided, however, that: (i) this provision shall not apply to, and the Property Owner or the Managing Agency shall not be entitled to an extension of time, additional costs, or expenses for, a delay caused by the acts or omissions of the Property Owner or Managing Agency, its consultants, contractors, employees, or other agents.

9.2 **Right to Terminate.** In addition to the right to Terminate for Default under section 9.1.2.2, the City shall have the Right to Terminate this Agreement based on the following:

9.2.1 ***Bankruptcy or Assignment for the Benefit of Creditors.*** If the Property Owner or the Managing Agency files a voluntary petition in bankruptcy, is adjudicated bankrupt, or makes a general assignment for the benefit of creditors, the City may at its option and without further notice or demand upon the Property Owner or Managing Agency, immediately cancel and/or terminate this Agreement, and terminate each and every right of the Property Owner and Managing Agency under this Agreement, and any person claiming any rights by or through the Property Owner or Managing Agency. The rights and remedies of the City enumerated in this Section are cumulative and shall not limit, waive, or deny any of the City's rights under any other provision of this Agreement. Nor does this section otherwise waive or deny any right or remedy, at law or in equity, existing as of the date of this Agreement or hereinafter enacted or established, that may be available to the City against the Property Owner or the Managing Agency.

9.2.2 ***Transfer of Conservation Bank Lands.***

9.2.2.1 Prior to the Establishment of the Conservation Bank. The Property Owner shall have the

right to convey or transfer the Conservation Bank Lands prior to establishment of the Conservation Bank in accordance with Article III. In the event that such transfer is made without the prior written concurrence of the City, such transfer shall result in the termination of this Agreement.

9.2.2.2 After the Establishment of the Conservation Bank. Once the Conservation Bank has been established, no conveyance or assignment of any portion of, or interest in, the Conservation Bank Lands shall be made absent the following:

9.2.2.2.1 Prior written approval of the City.

9.2.2.2.2 The successor or assignee assumes all of the management and other obligations under this Agreement and the Conservation Easement.

9.2.2.2.3 The successor or assignee has sufficient financial capacity to carry out any unfunded obligations under this Agreement.

9.2.2.2.3.1 As a condition to granting approval, the City may require, in its sole discretion, that the transferee (i) deposit a letter of credit to cover the estimated costs of the Management and Monitoring obligations remaining as of the date of such transfer; or (ii) deposit other substantially equivalent security for such transferee's obligations to deliver Management Deposits and Minimum Balances as required under Article V.

9.3 **Natural Termination.** This Agreement shall terminate upon the filing of the final annual report to the City described in section 6.1.2 (filed after all Credits have been applied to development projects), provided that (i) the Management and Monitoring obligations, including funding requirements, under the Management and Monitoring Plan have been completed in accordance with this Agreement, (ii) the Conservation Lands have been transferred according to section 7.1, (iii) the Conservation Easement continues in perpetuity as a covenant running with the land, and (iv) the balance of the Management Fund has been transferred in accordance with section 7.2.

## ARTICLE X. NOTICES

10.1 **Writing.** Any demand upon or notice required or permitted to be given by one Party to the other Party shall be in writing.

10.2 **Effective Date.** Except as otherwise provided by law, any demand upon or notice required or permitted to be given by one Party to the other Party shall be effective: (i) on personal delivery, (ii) on the second business day after mailing by certified or registered U.S. Mail, return receipt requested, (iii) on the succeeding business day after mailing by Express Mail or after deposit with a private delivery service of general use (e.g., Federal Express) postage or fee prepaid as appropriate, or (iv) upon successful transmission of facsimile.

10.3 **Recipients.** All demands or notices required or permitted to be given shall be sent to all of the following:

10.3.1 City Agency:  
City of San Diego  
Planning Department, MS 5A  
202 C Street  
San Diego, CA 92101

10.3.2 Property Owner:  
Mr. James Carter  
2516 La Costa Avenue  
Rancho La Costa, CA 92009

10.3.3 Managing Agency:  
HDR  
8690 Balboa Avenue  
Suite 200  
San Diego, CA 92123

10.3.4 Fund Manager:  
The San Diego Foundation  
1420 Kettner Blvd., Suite 500  
San Diego, CA 92101-9693

10.4 Copies of Notices. Copies of all Notices shall be provided to the following:

CDFG:  
California Department of Fish and Game  
Legal Advisor's Office  
1416 9th Street  
Sacramento, California 94236  
Fax No. (916) 654-3805

California Department of Fish and Game  
NCCP Office  
4949 Viewridge Ave  
San Diego, California 92123

USFWS:  
United States Fish and Wildlife Service  
911 N.W. 11th Ave.  
Portland, Oregon  
Attn: Regional Director  
Fax No. (503) 872-2716

United States Fish and Wildlife Service  
6010 Hidden Valley Road  
Carlsbad, California 92008  
Attn: Field Supervisor  
Fax No. (760) 431-9618

10.4 **Change of Address(es)**. Notice of change of address shall be given in the manner set forth in this Article.

10.5 **Facsimiles**. The Parties agree to accept facsimile transmitted signed documents and agree to rely upon such documents as if they bore original signatures. Each Party agrees to provide to the other Parties, within seventy-two (72) hours after transmission, such documents bearing the original signatures.

#### ARTICLE XI. JURISDICTION

11.1 **No Limitation of Jurisdiction of Municipality, County, or Agencies**. Nothing contained in this Agreement shall be deemed to limit the City, other local jurisdictions or the Wildlife Agencies' respective jurisdiction over impacts and applicable mitigation of endangered, threatened, and sensitive species and biological resources, or to restrict the ability of CDFG and USFWS to fully discharge their responsibilities under applicable law, including, without limitation, CESA and ESA, respectively; provided, however, that subject to Section 2, the City will not object to the use of Conservation Credits for mitigation on a one acre-for-one credit basis.

## ARTICLE XII. MISCELLANEOUS PROVISIONS

- 12.1 **Headings.** All article headings are for convenience only and shall not affect the interpretation of this Agreement.
- 12.2 **Gender & Number.** Whenever the context requires, the use herein of (i) the neuter gender includes the masculine and the feminine genders and (ii) the singular number includes the plural number.
- 12.3 **Reference to Paragraphs.** Each reference in this Agreement to a section refers, unless otherwise stated, to a section this Agreement.
- 12.4 **Incorporation of Recitals.** All recitals herein are incorporated into this Agreement and are made a part hereof.
- 12.5 **Covenants and Conditions.** All provisions of this Agreement expressed as either covenants or conditions on the part of the City or the Consultant, shall be deemed to be both covenants and conditions.
- 12.6 **Integration.** This Agreement and the Exhibits and references incorporated into this Agreement fully express all understandings of the Parties concerning the matters covered in this Agreement. No change, alteration, or modification of the terms or conditions of this Agreement, and no verbal understanding of the Parties, their officers, agents, or employees shall be valid unless made in the form of a written change agreed to in writing by both Parties or an amendment to this Agreement agreed to by both Parties. All prior negotiations and agreements are merged into this Agreement.
- 12.7 **Severability.** The unenforceability, invalidity, or illegality of any provision of this Agreement shall not render any other provision of this Agreement unenforceable, invalid, or illegal.
- 12.8 **Drafting Ambiguities.** The Parties agree that they are aware that they have the right to be advised by counsel with respect to the negotiations, terms and conditions of this Agreement, and the decision of whether or not to seek advice of counsel with respect to this Agreement is a decision which is the sole responsibility of each Party. This Agreement shall not be construed in favor of or against either Party by reason of the extent to which each Party participated in the drafting of the Agreement.
- 12.9 **Conflicts Between Terms.** If an apparent conflict or inconsistency exists between the main body of this Agreement and the Exhibits, the main body of this Agreement shall control. If a conflict exists between an applicable federal, state, or local law, rule, regulation, order, or code and this Agreement, the law, rule, regulation, order, or code shall control. Varying degrees of stringency among the main body of this Agreement, the Exhibits, and laws, rules, regulations, orders, or codes are not deemed conflicts, and the most stringent requirement shall control. Each Party shall notify the other immediately upon the identification of any apparent conflict or inconsistency concerning this Agreement.
- 12.10 **Prompt Performance.** Time is of the essence of each covenant and condition set forth in this Agreement.
- 12.11 **Good Faith Performance.** The parties shall cooperate with each other in good faith, and assist each other in the performance of the provisions of this Contract, which shall include the following:
- 12.11.1 Confirming to prospective Credit Purchasers that Conservation Credits are available to offset biological mitigation as provided in Sections 2 and 4 above.
- 12.11.2 Acknowledging the delivery of the Interim Management Funds Endowment Deposits when actually delivered in accordance with Section 5 above.
- 12.11.3 Acknowledging, to the extent applicable, that this Agreement remains in full force and effect.
- 12.11.4 Acknowledging that the Deer Canyon Conservation Bank is a conservation bank "approved" by the City and prepared consistent with the State's Guidelines.

- 12.11.5 Agreement by the Parties to meet annually, if requested, following the delivery of the annual report provided by the Managing Agency to the City to discuss and coordinate any and all activities related to the Funding, Management, and Monitoring of the Conservation Bank Lands.
- 12.12 **Further Assurances.** City and Property Owner each agree to execute and deliver such additional documents as may be required to effectuate the purposes of this Agreement.
- 12.13 **Exhibits.** Each of the following Exhibits is attached hereto and incorporated herein by this reference:
- |             |   |
|-------------|---|
| Exhibit A   | - General Location Map and Legal Decryption of the Property |
| Exhibit B   | - Assessor's Parcel map of Property                         |
| Exhibit C   | - Multi-Habitat Planning Area Map                           |
| Exhibit D   | - Habitat Value Map   |
| Exhibit E   | - Biological Resources Report and Credit Area               |
| Exhibit F   | - Management and Monitoring Plan                            |
| Exhibit G-1 | - Conservation Easement                                     |
| Exhibit G-2 | - Grant Deed  |
| Exhibit H   | - Title Report  |
| Exhibit I-1 | - Fund Management Agreement                                 |
| Exhibit I-2 | - Managing Agency Agreement                                 |
| Exhibit J   | - Environmental Credit Sales                                |
| Exhibit K   | - Phase I Environmental Site Assessment                     |
- 12.14 **Compliance with Controlling Law.** The Property Owner and Managing Agency shall comply with all laws, ordinances, regulations, and policies of the federal, state, and local governments applicable to this Agreement. This Agreement shall be governed by and construed in accordance with the City of San Diego Incidental Take Permit dated July 17, 1997 and other associated documents approved pursuant to the MSCP, internal laws of the State of California, the Federal Endangered Species Act and other applicable federal law.
- 12.15 **Jurisdiction, Venue, and Attorney Fees.** The venue for any suit or proceeding concerning this Agreement, the interpretation or application of any of its terms, or any related disputes shall be in the County of San Diego, State of California. The prevailing Party in any such suit or proceeding shall be entitled to a reasonable award of attorney fees in addition to any other award made in such suit or proceeding.
- 12.16 **Municipal Powers.** Nothing contained in this Agreement shall be construed as a limitation upon the powers of the City as a chartered city of the State of California.
- 12.17 **Third Party Relationships.** Nothing in this Agreement shall create a contractual relationship between City and any third party; however, the Parties understand and agree that City, to the extent permitted by law, is an intended third party beneficiary of all Property Owner's contracts, purchase orders and other contracts between Property Owner and third party services. Property Owner shall incorporate this provision into its contracts, supply agreements and purchase orders.
- 12.18 **Non-Assignment.** The Property Owner shall not assign the obligations under this Agreement, whether by express assignment or by sale of the company, nor any monies due or to become due, without the City's prior written approval. Any assignment in violation of this paragraph shall constitute a Default and is grounds for immediate termination of this Agreement, at the sole discretion of the City. In no event shall any putative assignment create a contractual relationship between the City and any putative assignee.
- 12.19 **Successors in Interest.** This Agreement and all rights and obligations created by this Agreement shall be in force and effect whether or not any Parties to the Agreement have been succeeded by another entity, and all rights and obligations created by this Agreement shall be vested and binding on any Party's successor in interest.
- 12.20 **Independent Contractors.** The Property Owner, any consultants, contractors, subcontractors, and any other

individuals employed by the Property Owner shall be independent contractors and not agents of the City. Any provisions of this Agreement that may appear to give the City any right to direct the Property Owner concerning the details of performing the Services under this Agreement, or to exercise any control over such performance, shall mean only that the Property Owner shall follow the direction of the City concerning the end results of the performance.

- 12.21 **Approval.** Where the consent or approval of a party is required or necessary under this Agreement, the consent or approval shall not be unreasonably withheld.
- 12.22 **No Waiver.** No failure of the City to insist upon the strict performance of any covenant, term or condition of this Agreement, nor any failure to exercise any right or remedy consequent upon a breach of any covenant, term, or condition of this Agreement, shall constitute a waiver of any such breach of such covenant, term or condition. No waiver of any breach shall affect or alter this Agreement, and each and every covenant, condition, and term hereof shall continue in full force and effect to any existing or subsequent breach.
- 12.23 **Signing Authority.** The representative for each Party signing on behalf of a corporation, partnership, joint venture or governmental entity hereby declares that authority has been obtained to sign on behalf of the corporation, partnership, joint venture, or entity and agrees to hold the other Party or Parties hereto harmless if it is later determined that such authority does not exist.
- 12.24 **Additional Agreements.** Property Owner shall enter into agreements with the Fund Manager and the Managing Agency. Such agreements shall incorporate the obligations of the Fund Manager and Managing Agency identified in this Agreement and obligate the Fund Manager and Managing Agency to perform the obligations so identified.

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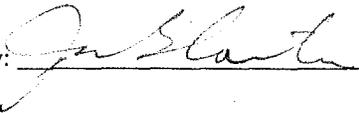
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**IN WITNESS HEREOF**, the Parties hereto have executed and delivered this Conservation Bank Agreement as of the date first forth below.

This Agreement is dated September 21, 2005 and this date shall constitute the effective date of this Agreement.

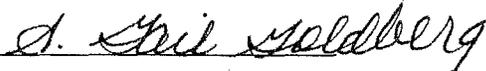
PROPERTY OWNER:

By: 

Date: 9/13/05

Title: Manager

CITY OF SAN DIEGO:

By: 

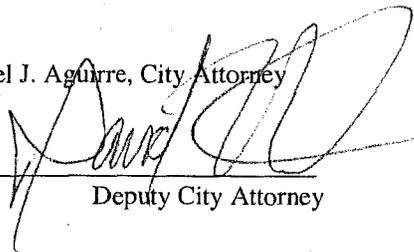
Date: 9/19/05

Title: Planning Director

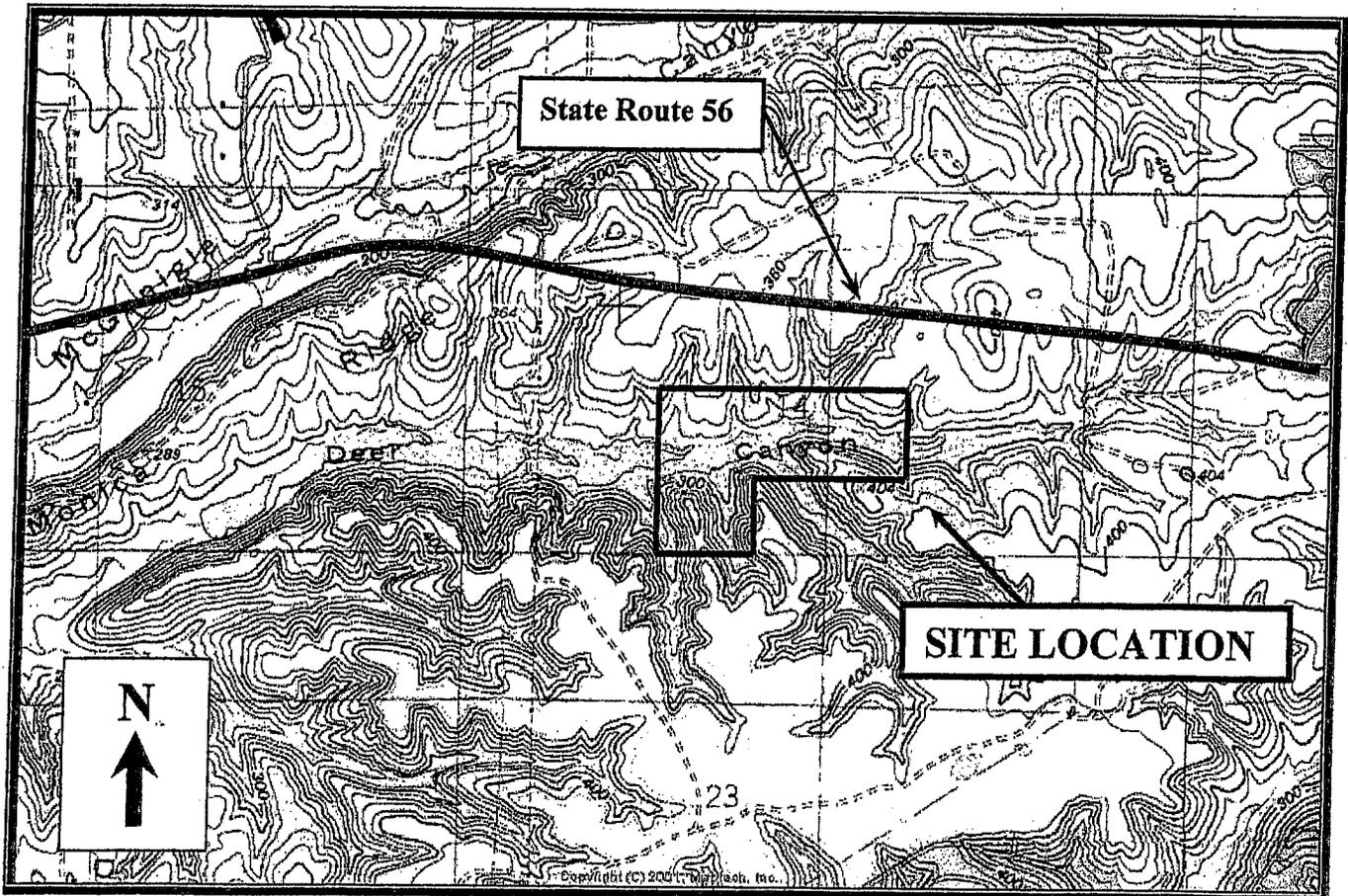
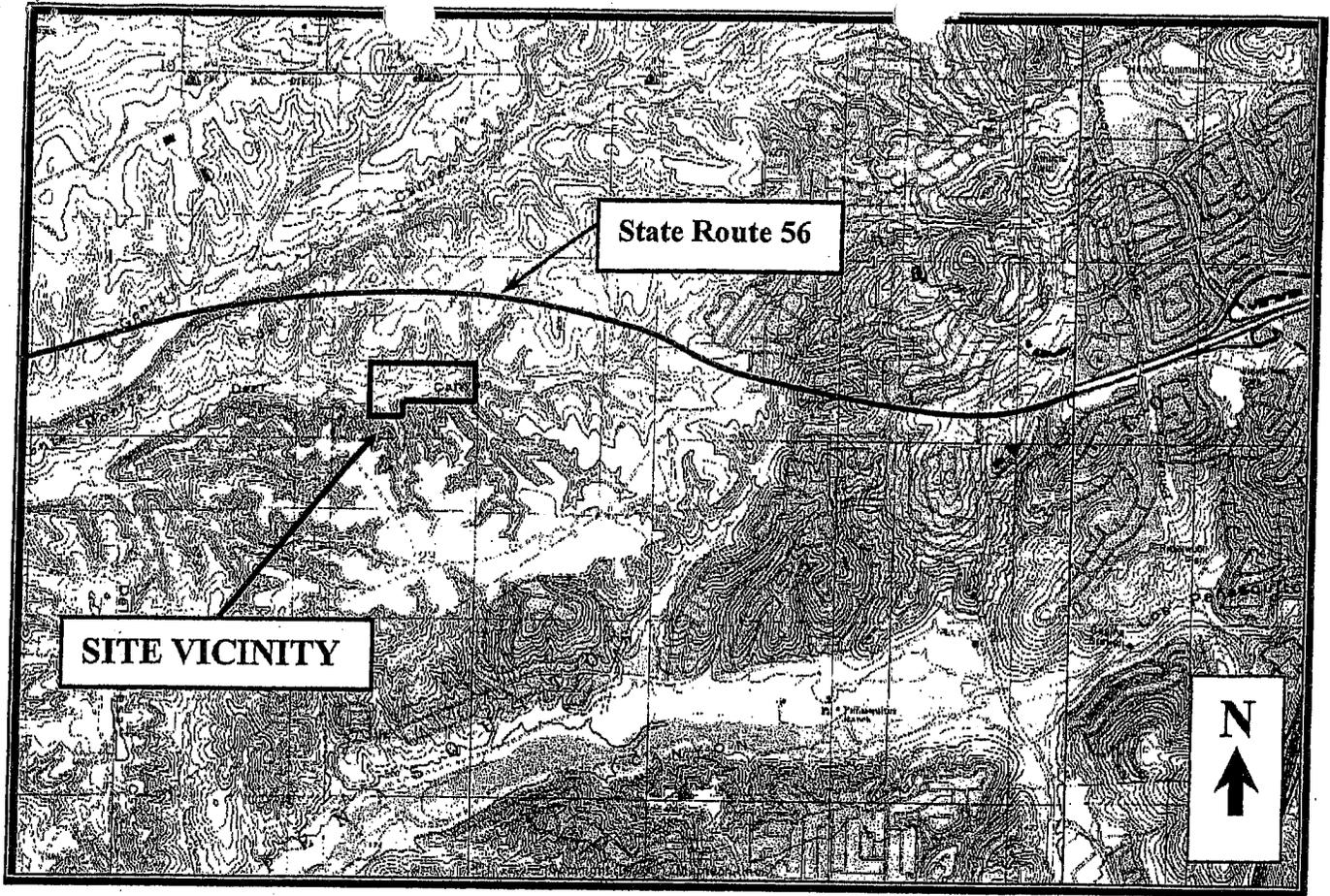
Approved as to form and legality:

Dated 9/21/05

Michael J. Aguirre, City Attorney

By:   
Deputy City Attorney

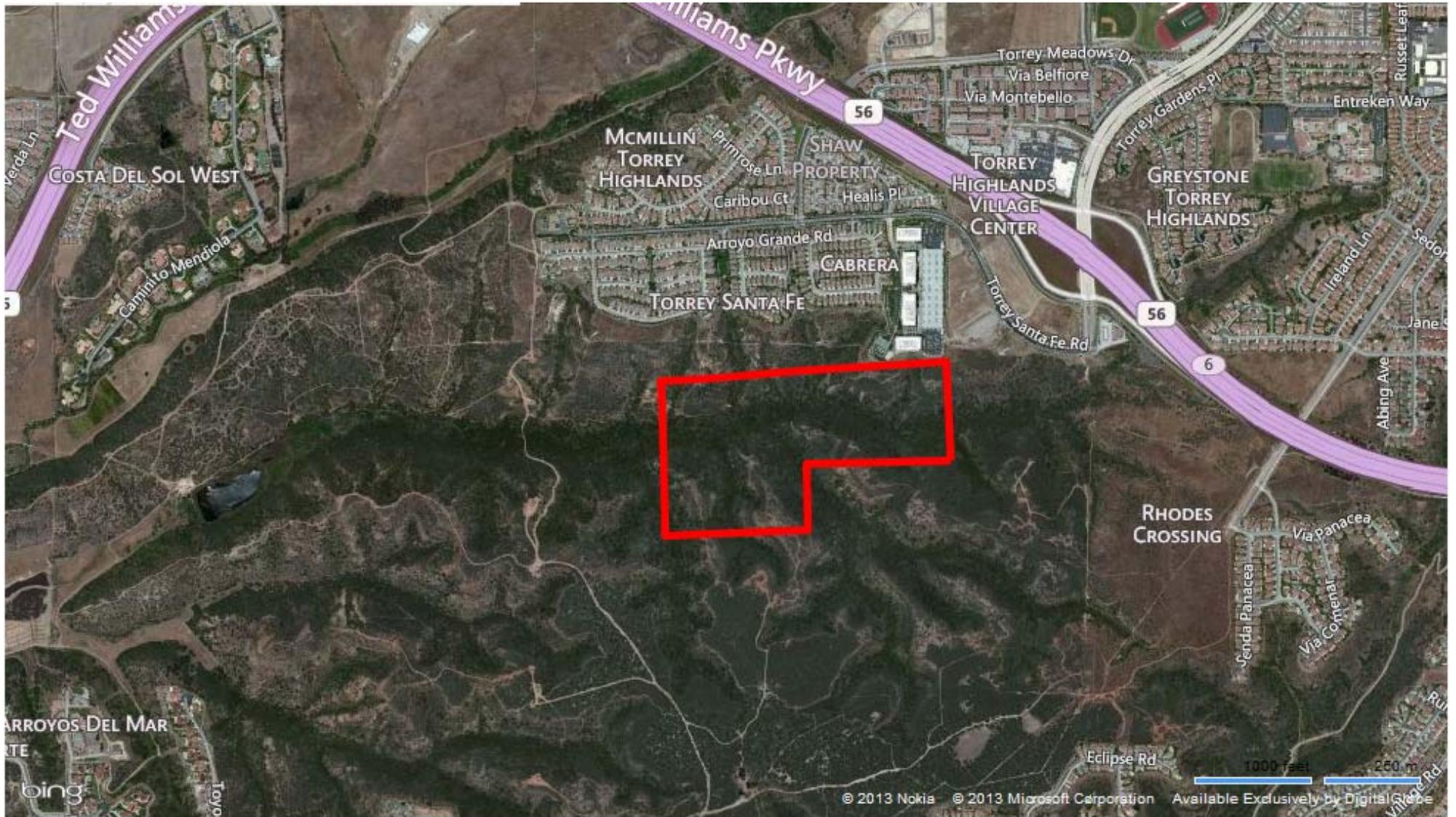
**EXHIBIT A**  
**General Location Map and Legal Description of Property**



**60-ACRE DEL MAR MESA MITIGATION SITE**  
**Site Location and Vicinity Map**



DEER CANYON ENVIRONMENTAL MITIGATION PRESERVE – APN: 306-050-20-00



# *Deer Canyon*

## *Environmental Mitigation Preserve, LLC*

2608 La Costa Avenue Carlsbad, CA 92009 (760) 942-2397 FAX (760) 942-5015

January 4, 2012

Jeannie Krosch  
CITY OF SAN DIEGO - MSCP  
202 C Street, MS5A  
San Diego, CA 92101-3864

RE: Deer Canyon Conservation Bank

Dear Mrs. Krosch:

This letter is to request that the City of San Diego complete the land transfer of the Deer Canyon Conservation Bank property from the Deer Canyon Environmental Mitigation Preserve, LLC ("Deer Canyon LLC") to the City.

Under the terms of the Deer Canyon Conservation Bank Agreement, the Agreement was to extend for a five year period from the sale of the first Conservation Credit. The first sale took place September 20, 2005. At that point, the 60 Environmental Credits were established for sale, with no further evaluation or assessment by the City as a prerequisite to sales. It was agreed to that the Deer Canyon LLC would implement a City approved Management Plan with required monitoring and reporting requirements during the sales period of the bank. The last sale of Credits out of the bank occurred on August 30, 2010. At that time, the Deer Canyon LLC did not own or control any of the Environmental Credits from the Deer Canyon Conservation Bank.

Under Article VII of the Agreement, the Transfer of Conservation Bank Lands, it was required that the Property Owner transfer the land to either the City or to a Trust established to maintain the property, at the option of the City. The City directed me to transfer the land to the City of San Diego. A Grant Deed was executed and delivered to the Real Estate Assets Department of the City on September 1, 2010. Prior to the delivery of the deed, several "walks" were done on the property to ensure all the obligation of the Property Owner had been completed. The property was deemed acceptable to the City. There were management endowment funds on deposit with the

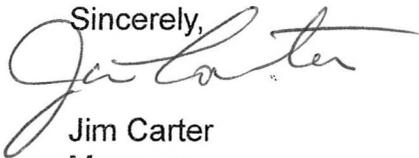
San Diego Foundation for the long term management of the property. These funds were assigned to and delivered to the City of San Diego.

The City has held the executed Grant Deed now for over a year (16 months) without recording the deed to transfer the ownership. This is in violation of the Bank Agreement and I request the City immediately record the transfer. The Property Owner has completed all its obligation under the Bank Agreement, has received acceptance from the City and has transferred all endowment funds to the City.

This Bank was originally formed at the request of the City of San Diego because the City could not complete its obligation under a contract to the Parde Construction Corporation and ask me to get investors to complete the City's obligation and purchase the property to set up a Conservation Bank on the property. I did this for the City. I would now like the City to complete their obligations under the Agreement.

Thank you for your help and time in the speedy completion of this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jim Carter".

Jim Carter  
Manager

cc: Lane MacKenzie, Real Estate Department



# State of California Secretary of State

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## STATEMENT OF INFORMATION (Limited Liability Company)

Filing Fee \$20.00. If amendment, see instructions.

**IMPORTANT — READ INSTRUCTIONS BEFORE COMPLETING THIS FORM**

1. LIMITED LIABILITY COMPANY NAME (Please do not alter if name is preprinted.)

200316910090  
DEER CANYON ENVIRONMENTAL  
MITIGATION PRESERVE, LLC  
2516 LA COSTA AVE.  
RANCHO LA COSTA CA 92009

This Space For Filing Use Only

**DUE DATE: 05/31/2007**

FILE NUMBER AND STATE OR PLACE OF ORGANIZATION

2. SECRETARY OF STATE FILE NUMBER

200316910090

3. STATE OR PLACE OF ORGANIZATION

CA

**NO CHANGE STATEMENT**

If there has been no change in any of the information contained in the last Statement of Information filed with the Secretary of State, check the box and proceed to **Item 13**.

If there have been any changes to the information contained in the last Statement of Information filed, or no Statement of Information has been previously filed, this form must be completed in its entirety.

**COMPLETE ADDRESSES FOR THE FOLLOWING** (Do not abbreviate the name of the city. Items 4 and 5 cannot be P.O. Boxes.)

4. STREET ADDRESS OF PRINCIPAL EXECUTIVE OFFICE

CITY AND STATE

ZIP CODE

5. CALIFORNIA OFFICE WHERE RECORDS ARE MAINTAINED (DOMESTIC ONLY)

CITY

STATE

ZIP CODE

CA

**NAME AND COMPLETE ADDRESS OF THE CHIEF EXECUTIVE OFFICER, IF ANY**

6. NAME

ADDRESS

CITY AND STATE

ZIP CODE

**NAME AND COMPLETE ADDRESS OF ANY MANAGER OR MANAGERS, OR IF NONE HAVE BEEN APPOINTED OR ELECTED, PROVIDE THE NAME AND ADDRESS OF EACH MEMBER** (Attach additional pages, if necessary.)

7. NAME

ADDRESS

CITY AND STATE

ZIP CODE

8. NAME

ADDRESS

CITY AND STATE

ZIP CODE

9. NAME

ADDRESS

CITY AND STATE

ZIP CODE

**AGENT FOR SERVICE OF PROCESS** (If the agent is an individual, the agent must reside in California and Item 11 must be completed with a California address. If the agent is a corporation, the agent must have on file with the California Secretary of State a certificate pursuant to Corporations Code section 1505 and Item 11 must be left blank.)

10. NAME OF AGENT FOR SERVICE OF PROCESS

11. ADDRESS OF AGENT FOR SERVICE OF PROCESS IN CALIFORNIA, IF AN INDIVIDUAL

CITY

STATE

ZIP CODE

CA

**TYPE OF BUSINESS**

12. DESCRIBE THE TYPE OF BUSINESS OF THE LIMITED LIABILITY COMPANY

13. THE INFORMATION CONTAINED HEREIN IS TRUE AND CORRECT.

James B. CARTER

TYPE OR PRINT NAME OF PERSON COMPLETING THE FORM

*[Signature]*

SIGNATURE

MANAGER

TITLE

3/9/07

DATE



# State of California

## Kevin Shelley

### Secretary of State

#### LIMITED LIABILITY COMPANY ARTICLES OF ORGANIZATION

A \$70.00 filing fee must accompany this form.  
IMPORTANT - Read instructions before completing this form.

200316910090  
File#

**FILED**  
in the office of the Secretary of State  
of the State of California

MAY - 8 2003

*Kevin Shelley*  
KEVIN SHELLEY, SECRETARY OF STATE  
This Space For Filing Use Only

1. Name of the limited liability company (end the name with the words "Limited Liability Company," "Ltd. Liability Co.," or the abbreviations "LLC" or "L.L.C.")

Deer Canyon Environmental Mitigation Preserve, LLC

2. The purpose of the limited liability company is to engage in any lawful act or activity for which a limited liability company may be organized under the Beverly-Killea limited liability company act.

3. Name the agent for service of process and check the appropriate provision below:

Jim Carter

which is

an individual residing in California. Proceed to item 4.

a corporation which has filed a certificate pursuant to section 1505. Proceed to item 5.

4. If an individual, California address of the agent for service of process:

Address: 2561 La Costa Ave.

City: Rancho La Costa

State: CA

Zip Code: 92009

5. The limited liability company will be managed by: (check one)

one manager  more than one manager  single member limited liability company  all limited liability company members

6. Other matters to be included in this certificate may be set forth on separate attached pages and are made a part of this certificate. Other matters may include the latest date on which the limited liability company is to dissolve.

7. Number of pages attached, if any:

8. Type of business of the limited liability company. (For informational purposes only)

Buying and selling environmental property

9. **DECLARATION:** It is hereby declared that I am the person who executed this instrument, which execution is my act and deed.

*Gary B. Naughton*  
Signature of Organizer

Gary B. Naughton, Esq.

Type or Print Name of Organizer

May 1, 2003

Date

10. RETURN TO:

NAME

Gary B. Naughton, Esq.

FIRM

Law Offices of Gary B. Naughton

ADDRESS

2182 El Camino Real, Suite 210

CITY/STATE

Oceanside, CA

ZIP CODE

92054



**BOARD of GOVERNORS**

Deer Canyon Conservation Endowment Fund

**CHAIR**

Jerry Hoffmeister

Ms. Lane MacKenzie  
City of San Diego

Grant I.D.: A-2011-01382

Date: December 20, 2010

**VICE CHAIR**

Jennifer Adams-Brooks

Real Property Division  
1200 3rd Ave., Ste. 1700  
San Diego, CA 92101

**SECRETARY**

Steven Smith

Dear Ms. MacKenzie:

**TREASURER**

Douglas Hegebarth

The San Diego Foundation is pleased to award City of San Diego a grant of \$1,072.47 from the Deer Canyon Conservation Endowment Fund, at the request of Jim Carter. This grant is for general support.

**IMMEDIATE PAST CHAIR**

Jack Raymond

When making any public announcement about this grant, we would appreciate it if you would recognize the support from the Deer Canyon Conservation Endowment Fund at The San Diego Foundation or, please use the fund name followed by our icon, i.e., the Deer Canyon Conservation Endowment Fund . If you elect to use the icon in lieu of our name, you may request the art file from [vanessao@sdfoundation.org](mailto:vanessao@sdfoundation.org). If you feel it necessary, please send an acknowledgement in writing rather than sending us material items, such as plaques. We prefer that your non-profit dollars be spent on the programs and people you serve.

John Cambon, Ph.D.

Ted Chan, M.D.

Roger Cornell, M.D.

James Cowley

Sandra Daley, M.D.

Robert Dynes, Ph.D.

Paul Eichen

Nora Faine, M.D.

William Geppert

Tom Hall

Conny Jamison

Jerome Katzin

Connie Matsui

Paul Meyer

Hollyce Phillips

Garry Ridge

Barbara Sawrey, Ph.D.

Nancy Spector

Raymond Thomas

Carisa Wisniewski

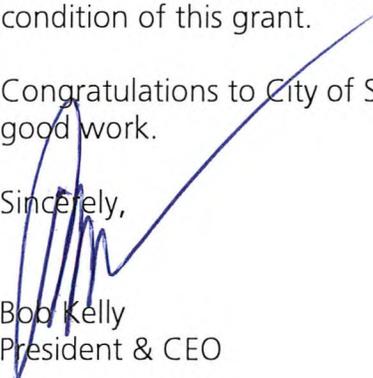
John Wylie

James Ziegler

By cashing the enclosed check, you are certifying to The San Diego Foundation that your organization is, or is the equivalent of a duly recognized charitable organization under Section 501 (c) (3) of the Internal Revenue Code. Your organization certifies to The San Diego Foundation that 1) this grant may not be used to satisfy the payment of a legally binding pledge or other personal or corporate financial obligation on behalf of the above referenced fund advisor(s); and 2) no goods or services (memberships, tickets to events, benefits of a personal or corporate nature, etc.) will be provided to any individuals or entities as a condition of this grant.

Congratulations to City of San Diego on this grant award, and thank you for your good work.

Sincerely,

  
Bob Kelly  
President & CEO

**PRESIDENT & CEO**

Bob Kelly

Main: 2508 Historic Decatur Rd., Ste. 200, San Diego, CA 92106 | T (619) 235-2300 | F (619) 239-1710

North County Offices in Rancho Bernardo and Solana Beach | [www.sdfoundation.org](http://www.sdfoundation.org)



Confirmed in Compliance with National Standards for U.S. Community Foundations.