

AGREEMENT FOR POSSESSION AND USE

This Agreement for Possession and Use ("**Agreement**") is made and dated for reference purposes as of the date set forth below, by and between the San Bernardino County Flood Control District ("**District**") and the City of Eastvale ("**City**") concerning a public project related to the construction of the Limonite Gap Closure Capital Improvement Project (the "**Project**"). District and City are referred to individually in this Agreement as a "**Party**" and collectively as the "**Parties**."

Recitals

WHEREAS, District is the owner of certain real property located in ~~the County of San Bernardino~~ County, State of California, which is more particularly described and depicted in Exhibit A ("Property"), attached hereto and incorporated herein by reference; and

WHEREAS, City requires immediate possession and use of the Property to construct the Project; and

WHEREAS, the Parties acknowledge and agree that any delay in the start of construction of the Project is contrary to public interest; and

WHEREAS, the Parties are in the process of negotiating the purchase and sale of an Easement Deed (Public Road and Utilities), including the purchase price, for the construction of the Project on the Property ("**Easement**"); and

WHEREAS, the purchase price of the Easement shall also include the fair-market value of the City's use of the Property during the term of this Agreement; and

WHEREAS, District is willing to allow City to obtain possession of the Property upon the terms below;

AGREEMENT

NOW, THEREFORE, in consideration of the mutual promises, agreements, and covenants herein contained and other consideration, the receipt and sufficiency of which the Parties hereby acknowledge, the Parties agree as follows:

Effective Date

1. This Agreement is effective as of the date that it is fully executed by all Parties (the "**Effective Date**"). From and after the Effective Date, District will not voluntarily assign, sell, encumber or otherwise transfer all or any portion of the Property without first obtaining the prior written consent of City.

Possession

2. District, on behalf of itself and its successors and assigns, grants to City, its employees, contractors, agents, and all others deemed necessary by City, the irrevocable right to non-exclusively possession and use ~~of~~ the Property for the Project, including the right to

remove and dispose of improvements therein located. City is hereby authorized to take possession of the Property on the Effective Date.

~~No Revocation; Binding Upon Heirs; Covenants Run With the Land; Termination~~

~~3. The promises, obligations, and rights conveyed to herein (i) may not be unilaterally revoked by District, (ii) are binding upon and inure to the benefit of and upon the Parties, their respective heirs, executors, administrators, successors, assigns, devisees, representatives, lessees and all other persons acquiring any portion of or interest in the Property, or any interest therein whether by operation of law or any manner whatsoever, and (iii) are covenants running with the land pursuant to applicable law, including but not limited to Section 1468 of the Civil Code of the State of California. Any amounts disbursed to District pursuant to this Agreement, if any, shall be deemed to have been disbursed to the heirs, devisees, executors, administrators, legal representatives, successors, and assigns of the District.~~

~~4.~~

3. The Agreement shall terminate upon the occurrence of one of the following events (whichever occurs first):

a) The City may terminate this Agreement upon thirty (30) days written notice to the District.

b) Upon the recording of the Easement in the Official Records of the County of San Bernardino, this Agreement shall automatically terminate, unless explicitly provided in the Easement terms.

a)c) Four (4) years from the Effective Date of this Agreement.

In the event of termination under Section 3.a) or 3.c), above, City shall pay District the fair-market value for the cost of the possession and use of the Property during the term of the Agreement, which amount shall be determined by the District in its sole discretion by mutual agreement of the Parties. In the event the Parties are unable to come to an agreement on the fair-market value amount, the parties shall agree to utilize the amount determined by a third-party neutral appraiser agreed upon by the Parties. The appraisal shall be prepared in accordance with California Eminent Domain law, including Fair Market Value definitions.

Eminent Domain Proceedings

5.4. If City initiates legal proceedings in eminent domain, the Parties understand and agree it is understood and agreed that this Agreement shall continue in effect either until a settlement is reached or a Final Order of Condemnation is issued-entered by the court pursuant to Section 1268.030 of the California Code of Civil Procedure in regards to the InterestsProperty, whichever comes first.

Waiver of Challenges To Right To Take;
Admission of Public's Interest, Necessity And Use

6.5. Section 1245.235 of the California Code of Civil Procedure requires the City give each person whose property is to be acquired by eminent domain notice and a reasonable opportunity to appear before the City Council and be heard on the matters referred to in section 1240.030 of the Code of Civil Procedure, which provides:

The power of eminent domain may be exercised to acquire property for a proposed project only if all of the following are established:

- a. The public interest and necessity require the project.
- b. The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury.
- c. The property sought to be acquired is necessary for the project.
- d. The offer required by section 7267.2 of the Government Code has been made to the District or others of record.

~~7.6.~~ By granting this irrevocable right to non-exclusive possession and use of the ~~Parcel~~Property to the City, District agrees to the following:

- a. District specifically waives the notice required by Code of Civil Procedure section 1245.235 of the hearing on the matters referred to in Code of Civil Procedure section 1240.030, and District shall not object to the adoption of the resolution of necessity by the City Council authorizing the taking of the Property.
- b. District shall not object to the filing of an eminent domain proceeding to acquire the Property.

~~8.7.~~ District waives any right to challenge City's right to possess, acquire, and use the ~~Parcel~~Property in any subsequent eminent domain proceedings filed by City. District also waives all claims and defenses in its favor in any subsequent eminent domain proceeding, except a claim for greater compensation.

Authority to Execute and Bind

~~8.~~ The undersigned warrants that ~~he/she/it/she~~ is the authorized signatory of the District, and is authorized to provide this irrevocable right to the non-exclusive possession to City, ~~and does so on behalf of all parties having an ownership or possessory interest in the Property.~~

Indemnity and Insurance

~~9.~~

~~9. City and District are authorized self-insured public entities for purposes of Professional Liability, General Liability, Automobile Liability and Workers' Compensation and warrant that through their respective programs of self-insurance, they have adequate coverage or resources to protect against liabilities arising out of the performance of the terms, conditions or obligations of this Agreement.~~

~~10. District agrees to indemnify, defend (with counsel reasonably approved by City) and hold harmless City, its officers, employees, agents and volunteers, from any and all claims, actions, losses, damages, and/or liability arising out of this Agreement from any cause whatsoever, including, the acts, errors or omissions of any person and for any costs or expenses incurred by City on account of any claim, except where such indemnification is prohibited by law. This indemnification provision shall apply regardless of the existence or degree of fault of indemnities. The District's indemnification obligation applies to City's~~

“active” as well as “passive” negligence but does not apply to City’s “sole negligence” or “willful misconduct” within the meaning of Civil Code section 2782.

11. City agrees to indemnify, defend (with counsel reasonably approved by District) and hold harmless District, its officers, employees, agents and volunteers, from claims, actions, losses, damages, and/or liability arising out of this Agreement from any cause whatsoever, including, the acts, errors or omissions of any person and for any costs or expenses incurred by City on account of any claim, except where such indemnification is prohibited by law. This indemnification provision shall apply regardless of the existence or degree of fault of indemnities. The City’s indemnification obligation applies to District’s “active” as well as “passive” negligence but does not apply to District’s “sole negligence” or “willful misconduct” within the meaning of Civil Code section 2782.

12. In the event District and/or City are found to be comparatively at fault for any claim, action, loss or damage which results from their respective obligations under this Agreement, District and/or City, as applicable, shall indemnify the other to the extent of its comparative fault.

13. Notwithstanding indemnification for any claim, action, loss, or damage involving a third party, District and City hereby waive any and all rights of subrogation recovery against each other.

14. Furthermore, if District or City attempts to seek recovery from the other for Workers’ Compensation benefits paid to an employee, District and City agree that any alleged negligence of the employee shall not be construed against the employer of that employee.

Entire Agreement; Severability; Amendments; Counterparts

~~10-15.~~ The recitals are incorporated into the body of this Agreement.

~~11-16.~~ This Agreement reflects the entire agreement between the Parties and shall supersede all prior or contemporaneous oral or written understandings, statements, representations or promises between the Parties concerning the matters contained herein. This Agreement may only be amended by written agreement, executed by all Parties.

~~12-17.~~ This Agreement is made and entered into in the State of California, and shall in all respects be interpreted, enforced and governed under the laws of said state. Venue for any court dispute that is filed in State Superior Court shall be in the San Bernardino County Superior Court, San Bernardino Division. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning and not strictly for or against any of the Parties.

~~13-18.~~ In case any part, term, portion or provision of this Agreement is determined to be illegal, invalid or unenforceable, the remaining parts, terms, portions and provisions shall remain valid, enforceable, and in full force and effect.

~~14-19.~~ This Agreement has been negotiated in good faith and each Party warrants and represents that in executing this Agreement, it is not relying upon any representation, promise, inducement or statement made in negotiation that has not been included in the terms of this Agreement.

20. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. The Parties shall be entitled to sign and transmit an electronic signature of this Agreement (whether by facsimile, PDF or other email transmission), which signature shall be binding on the Party whose name is contained therein. Each Party providing an electronic signature agrees to promptly execute and deliver to the other Party an original signed Contract upon request.

IN WITNESS WHEREOF the Parties have executed this Agreement the day and year set forth below.

CITY OF EASTVALE:

Mark Orme, City Manager

APPROVED AS TO FORM:

Erica L. Vega, City Attorney

ATTEST:

Marc Donohue, City Clerk

SAN BERNARDINO COUNTY
FLOOD CONTROL DISTRICT

Dawn Rowe, Chair
Board of Supervisors

Date

Approved as to Legal Form:
TOM BUNTON, County Counsel
San Bernardino County, California

Sophie A. Curtis, Deputy County Counsel