**AND MAIL TO:**

***CITY CLERK***

***CITY OF LEMON GROVE***

***3232 MAIN STREET***

***LEMON GROVE, CA 91945***

**Recorded by Request of:**

**CITY OF LEMON GROVE PUBLIC WORKS**

**SPACE ABOVE FOR RECORDER'S USE ONLY**

**STORMWATER FACILITIES MAINTENANCE AGREEMENT**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Assessor’s Parcel No.:** | **[Fill in]** | **Project No.:** | **[Fill in]** | |
| **Log No.:** |  | **Location:** | **[Fill in street address]** | |
|  |  |  | |  |

This AGREEMENT for the maintenance and repair of certain Stormwater Management Facilities is entered into between WC GROUP, LLC (hereinafter referred to as “OWNER”) and the City of Lemon Grove (hereinafter referred to as “CITY”) for the benefit of the CITY, the OWNER, the successors in interest to the CITY or the OWNER, and the public generally.

RECITALS

A. OWNER is the owner of certain real property located in the City of Lemon Grove, California, more particularly described in Exhibit “A” hereto (hereinafter referred to as the “PROPERTY”).

B. In accordance with the City of Lemon Grove’s Urban Runoff Regulations, Lemon Grove Municipal Code, Chapter 8.48, Stormwater Management and Discharge Control (the “Stormwater Ordinance”), Chapter 8.52, Post Construction Best Management Practice (BMP) Design Standards, the City of Lemon Grove Subdivision Ordinance, the City of Lemon Grove Zoning Ordinance, The City of Lemon Grove Grading Ordinance, and/or other ordinances or regulations of CITY which regulate land development and urban runoff, OWNER has prepared and submitted to CITY, a Storm Water Quality Management Plan (hereinafter the SWQMP), which is on file with CITY’s Development Services Department. The SWQMP proposes that stormwater runoff from the PROPERTY be managed by the use of the Stormwater Management Facilities which are identified in the SWQMP as “Best Management Practices” or “BMPs”**.** The SWQMP specifies the manner and standards by which the BMPs must be repaired and maintained in order to retain their effectiveness, as set forth in the Operation Maintenance Plan (hereinafter “O&M PLAN”) described in Exhibit “B” hereto.

C. The information contained in the SWQMP and CITY has relied upon OWNER’s representations that the BMPs will be maintained pursuant to the SWQMP, in approving OWNER’s development applications. It is the purpose of this Agreement to assure that the BMPs are maintained, by creating obligations, which are enforceable against the OWNER and the OWNER’s successors in interest in the PROPERTY. It is intended that these obligations be enforceable notwithstanding other provisions related to BMP maintenance, which are provided by law.

AGREEMENT

NOW, THEREFORE, for consideration of (a) CITY’s approval of the above development applications and (b) the mutual covenants set forth herein, IT IS HEREBY AGREED AS FOLLOWS:

1. **Maintenance of Stormwater Management Facilities.** OWNER agrees, for itself and its successors in interest, to all or any portion of the PROPERTY, to comply in all respects with the requirements of the Stormwater Ordinance and the SWQMP with regards to the maintenance of BMPs designated in the SWQMP, and in particular agrees to perform, at its sole cost, expense and liability, the following “MAINTENANCE ACTIVITIES”: all inspections, cleaning, repairs, servicing, maintenance and other actions specified in the O&M PLAN, with respect to all of the BMPs listed at Recital “B” above, at the times and in the manner specified in the O&M PLAN. OWNER shall initiate, perform and complete all MAINTENANCE ACTIVITIES at the required time, without request or demand from CITY or any other agency. OWNER shall provide annual written verification of BMP maintenance and operability to the CITY. OWNER further agrees that “MAINTENANCE ACTIVITIES” shall include replacement or modification of the BMPs in the event of failure. Replacement shall be with an identical type, size and model of BMP, except that:

(a) The Development Services Director may authorize substitution of an alternative BMP if he or she determines that it will function as well as the failed BMP; and

(b) Pursuant to Section 8.48.080.E of the Stormwater Ordinance, if the failure of the BMP, in the judgment of the Development Services Director indicates that the BMP in use is inappropriate or inadequate to the circumstances, the BMP must be modified or replaced with an upgraded BMP to prevent future failure in the same or similar circumstances.

2. **Notices.** OWNER further agrees that it shall, prior to transferring ownership of any land on which any of the above BMPs are located, and also prior to transferring ownership of any such BMP, provide clear written notice of the above maintenance obligations associated with that BMP to the transferee. OWNER further agrees to provide evidence to Development Services Director that OWNER has requested the California Department of Real Estate to include in the public report issued for the development of the PROPERTY, a notification regarding the BMP maintenance requirements described herein.

3. **CITY’s Right to Perform Maintenance.** It is agreed that CITY shall have the right, but not the obligation, to elect to perform any or all of the MAINTENANCE ACTIVITIES if, in the CITY’s sole judgment, OWNER has failed to perform the same. It is recognized and understood that the CITY makes no representation that it intends to or will perform any of the MAINTENANCE ACTIVITIES, and any election by CITY to perform any of the MAINTENANCE ACTIVITIES, shall in no way relieve OWNER of its continuing maintenance obligations under this agreement. If CITY elects to perform any of the MAINTENANCE ACTIVITIES, it is understood that CITY shall be deemed to be acting as the agent of the OWNER and said work shall be without warranty or representation by CITY as to safety or effectiveness, shall be deemed to be accepted by OWNER “as is”, and shall be covered by OWNER’s indemnity provisions below.

If CITY performs any of the MAINTENANCE ACTIVITIES, after CITY has demanded that OWNER perform the same and OWNER has failed to do so within a reasonable time stated in the CITY’s demand, then OWNER shall pay all of CITY’s costs incurred in performing the MAINTENANCE ACTIVITIES. OWNER’s obligation to pay CITY’s costs of performing MAINTENANCE ACTIVITIES is a continuing obligation and shall apply whether or not CITY has utilized all or any portion of the security provided pursuant to Paragraph 5.

4. **Grant of Easement to CITY.** OWNER hereby grants to CITY a perpetual easement over, under and across all of the PROPERTY for purposes of accessing the BMPs and performing any of the MAINTENANCE ACTIVITIES specified in Paragraph 1 above. CITY shall have the right, at any time and without prior notice to OWNER, to enter upon any part of said area as may be necessary or convenient for such purposes. OWNER shall at all times maintain the PROPERTY so as to make CITY’s access clear and unobstructed.

5. **Security.** OWNER shall provide security to assure faithful performance of the obligations of this agreement. The security shall be in the form of an easement as referenced in Section 4, above. CITY shall have the right to enforce its rights under the agreement through specific performance and any other remedies available to it in law. In the event that OWNER violates this agreement, CITY retains the sole right to require the posting of a performance bond or letter of credit to ensure compliance with the provisions of this agreement. The form of bond and/or letter of credit shall be subject to the approval of the City Attorney.

6. **Administration of Agreement for CITY.** CITY hereby designates the Development Services Director as the officer charged with responsibility and authority to administer this Agreement on behalf of CITY. Any notice or communication related to the implementation of this Agreement desired or required to be delivered to CITY shall be addressed to:

Development Services Director

City of Lemon Grove

3232 Main St.

Lemon Grove, CA 92054

The Development Services Director is also granted authority to enter into appropriate amendments to this Agreement on behalf of CITY, provided that the amendment is consistent with the purposes of this Agreement as set forth above.

7. **Defense and Indemnity.** CITY shall not be liable for, and OWNER and its successors in interest shall defend and indemnify CITY and the employees and agents of CITY (collectively “CITY PARTIES”), against any and all claims, demands, liability, judgments, awards, fines, mechanic’s liens or other liens, labor disputes, losses, damages, expenses, charges or costs of any kind or character, including attorneys’ fees and court costs (hereinafter collectively referred to as “CLAIMS”), related to this Agreement and arising either directly or indirectly from any act, error, omission or negligence of OWNER, OWNER’s successors, or their contractors, licensees, agents, servants or employees, including, without limitation, claims caused by the concurrent negligent act, error or omission, whether active or passive of CITY PARTIES. OWNER shall have no obligation, however, to defend or indemnify CITY PARTIES from a claim if it is determined by a court of competent jurisdiction that such claim was caused by the sole negligence or willful misconduct of CITY PARTIES. Nothing is this Agreement, CITY’s approval of the subdivision or other applications or plans and specifications, or inspection of the work, is intended to acknowledge responsibility for any such matter, and CITY PARTIES shall have absolutely no responsibility or liability therefore unless otherwise provided by applicable law.

8. **Common Interest Developments.** If the PROPERTY is developed as a “Common Interest Development” as defined in Civil Code section 4100 which will include membership in or ownership of an “ASSOCIATION” as defined in Civil Code section 4080 then the following provisions of this Paragraph 8 shall apply during such time as the PROPERTY is encumbered by a “DECLARATION” as defined in Civil Code section 4135, and the Common Area, as “Common Area” is defined in Civil Code section 4095, of the PROPERTY is managed and controlled by the ASSOCIATION:

(a) The ASSOCIATION, through its Board of Directors, shall assume full responsibility to perform the MAINTENANCE ACTIVITIES pursuant to this Agreement, and shall undertake all actions and efforts necessary to accomplish the MAINTENANCE ACTIVITIES, including but not limited to, levying regular or special assessments against each member of the ASSOCIATION sufficient to provide funding for the MAINTENANCE ACTIVITIES, conducting a vote of the membership related to such assessments if required by law. In the event insufficient votes have been obtained to authorize an assessment, the ASSOCIATION shall seek authority from a court of competent jurisdiction for a reduced percentage of affirmative votes necessary to authorize the assessment, re-conducting the vote of the membership in order to obtain the votes necessary to authorize an assessment, and the ASSOCIATION shall take all action authorized by the DECLARATION or California law to collect delinquent assessments, including but not limited to, the recording and foreclosure of assessment liens.

(b) No provision of the DECLARATION, nor any other governing document of the ASSOCIATION or grant of authority to its members, shall grant or recognize a right of any member or other person to alter, improve, maintain or repair any of the PROPERTY in any manner which would impair the functioning of the BMPs to manage drainage or stormwater runoff as described in the SWQMP. In the event of any conflict between the terms of this Agreement and the DECLARATION or other ASSOCIATION governing documents, the provisions of this Agreement shall prevail.

9. **Agreement Binds Successors and Runs With the PROPERTY.** It is understood and agreed that the terms, covenants and conditions herein contained shall constitute covenants running with the land and shall be binding upon the heirs, executors, administrators, successors and assigns of OWNER and CITY, shall be deemed to be for the benefit of all persons owning any interest in the PROPERTY (including the interest of CITY or its successors in the easement granted herein). It is the intent of the parties hereto that this Agreement may be recorded and shall be binding upon all persons purchasing or otherwise acquiring all or any lot, unit or other portion of the PROPERTY, who shall be deemed to have consented to and become bound by all the provisions hereof.

10. **Amendment and Release.** The terms of this Agreement may be modified only by a written amendment approved and signed by the City Council or the Development Services Director acting on behalf of CITY and by OWNER or OWNER’s successor(s) in interest. This Agreement may be terminated and OWNER and the PROPERTY released from the covenants set forth herein, by a Release, which CITY may execute if it determines that another mechanism will assure the ongoing maintenance of the BMPs or that it is no longer necessary to assure such maintenance.

11. **Governing Law and Severability.** This Agreement shall be governed by the laws of the State of California. Venue in any action related to this Agreement shall be in the Superior Court of the State of California, County of San Diego, East County Division. In the event that any of the provisions of this Agreement are held to be unenforceable or invalid by any court of competent jurisdiction, the validity, and enforceability of the remaining provisions shall not be affected thereby.

**IN WITNESS WHEREOF,** the parties have executed this Agreement on the \_\_\_\_\_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_\_\_.

BY: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

A Notary Public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

ALL SIGNATURES MUST BE NOTARIZED

STATE OF }

COUNTY OF }

On before me, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ name and title of officer

Personally appeared\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_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/her/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 the 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 (Seal)

CITY OF LEMON GROVE:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Lydia Romero, City Manager

**CITY CLERK CERTIFICATION:**

This is to certify that the interest in real property conveyed by deed or grant to the City of Lemon Grove, a political corporation and/or governmental agency is hereby accepted by the undersigned officer or agent on behalf of the City Council pursuant to authority conferred by Resolution No. 53 adopted on December 19, 1977 and the grantee consents to recordation thereof by its duly authorized officer.

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

Laureen Ryan Ojeda, Deputy City Clerk