

**MEMORANDUM OF UNDERSTANDING BETWEEN THE CITY OF MILPITAS AND
THE SANTA CLARA VALLEY TRANSPORTATION AUTHORITY FOR THE
WRIGLEY CREEK IMPROVEMENT PROJECT (C211 PROJECT)**

THIS Memorandum of Understanding Between the City of Milptias and the Santa Clara Valley Transportation Authority for the Wrigley Creek Improvement Project (C211 PROJECT) (referred to herein as the “MOU” or the “Memorandum of Understanding”) is made by and between the CITY OF MILPITAS, a municipal corporation of the State of California, (“City”), and the SANTA CLARA VALLEY TRANSPORTATION AUTHORITY, a public agency, (“VTA”) on this date of _____, 2010.

R E C I T A L S

WHEREAS, VTA and the City wish to execute this MOU in order to outline the duties and obligations of the parties with respect to work in and around portions of Wrigley Creek in Milpitas, California, set forth in greater detail in Attachment 1 attached hereto.

NOW, THEREFORE, the parties agree as follows:

1. PURPOSE OF THIS MEMORANDUM OF UNDERSTANDING AND COVERED ACTIVITIES.

The City has easement rights over and adjacent to Wrigley Creek for purposes of access and construction, maintenance, enlargement and removal of storm water and flood control facilities. VTA wishes to restore and enhance a section of Wrigley Creek in Milpitas, California as part of its Wrigley Creek Improvement Project (sometimes referred to herein as the “C211 Project”). The C211 Project would realign the existing channel and create a more natural flow in Wrigley Creek. The C211 Project restoration would also enhance the hydrologic and geomorphic functions of the creek such as sediment transport and deposition, fish and wildlife habitats, natural water quality improvement, and flood storage. Such restoration work would fulfill environmental mitigation measures required to offset environmental impacts arising from a separate VTA project, VTA’s Freight Railroad Relocation/Lower Berryessa Creek Project (sometimes referred to herein as the “C210 Project”) as approved in the “Wrigley Creek Improvement Project, Initial Study/Proposed Mitigated Negative Declaration, dated November 25, 2009, by VTA.

In return for granting VTA access rights and permitting the relocation and modification of City storm and flood control facilities as part of the C211 Project, the City desires certain benefits. In particular, the City desires the grant of easement rights over the new alignment of Wrigley Creek identical in scope and nature to that previously held by the City. In addition, the City desires

dredging of Wrigley Creek upstream and downstream from the C211 project site as further specified herein. Such dredging shall require the City to perform mitigation measures of its own.

2. GENERAL TERMS OF AGREEMENT:

Insurance: VTA shall provide a certificate of insurance with endorsements showing evidence of general liability coverage in the amount of \$3,000,000 per occurrence and shall name the City of Milpitas and its officers, directors, agents, employees and volunteers as additional insureds, relevant to the C211 Project work to be performed by VTA's Contractor or VTA's Subcontractors pursuant to this MOU.

Indemnity: Neither City nor any officer, employee, agent, consultant or contractor thereof shall be responsible for any damage or liability occurring by reason of anything done or omitted by VTA in connection with any work performed by VTA under this MOU.

Pursuant to Government Code Section 895.4, VTA shall fully indemnify and hold the City harmless from any damage or liability occurring by reason of anything done or omitted by VTA in connection with any work performed by VTA under this MOU. This hold harmless provision shall apply to any activities, errors or omissions of VTA or VTA's officers, employees, agents, consultants or contractors or any persons or entities acting or omitting to act for or on behalf of VTA where such persons or entities are authorized and empowered by VTA to act for VTA. Said indemnity shall include, but is not limited to, all reasonable costs and attorneys' fees incurred in defense of any and all claims covered by this provision.

Neither VTA, nor any officer, employee, agent, consultant or contractor thereof shall be responsible for any damage or liability occurring by reason of anything done or omitted by the City in connection with any work performed by the City under this MOU. Pursuant to Government Code Section 895.4, the City shall fully indemnify and hold VTA harmless from any damage or liability occurring by reason of anything done or omitted by the City in connection with any work performed by the City under this MOU. This hold harmless provision shall apply to any activities, errors or omissions of the City and the City's officers, employees, agents, consultants or contractors or any persons or entities acting or omitting to act for or on behalf of the City where such persons or entities are specifically authorized and empowered by the City to act for the City. Said indemnity shall include, but is not limited to, all reasonable costs and attorneys' fees incurred in defense of any and all claims covered by this provision.

Written Notices: Any notices which either party may desire to give to the other party under this MOU must be in writing and may be given (i) by personal service; (ii) by delivery by a reputable document delivery service such as, but not limited to, Federal Express, that provides a receipt showing date and time of delivery; or (iii) by mailing in the United States Mail, Certified Mail, postage prepaid, return receipt requested, addressed to the address of the party as set forth below or at any other address as that party may later designate by Notice:

To Milpitas:

City of Milpitas
Attention: Greg Armendariz, P.E.
Director of Public Works/City Engineer
455 E. Calaveras Blvd
Milpitas, CA 95035-5411

To Owner:

Santa Clara Valley Transportation
Authority
Attention: Jim Costantini, P.E.
Deputy Director - Engr. & Constr. 3331
North First Street, Building A, San Jose,
CA 95134-1927

Costs: VTA agrees to pay for the construction/reconstruction and repair of City facilities associated or damaged by the C211 Project and offer for dedication all improvements after the project is completed. VTA shall provide As-Built drawings in hard copy format, and electronic AutoCAD format 2009 or latest edition. VTA further agrees to provide to the City payments under PJ 2470 for full cost recovery for staff support for this project. Upon execution of this MOU, VTA shall deposit an amount of \$80,000 for additional staff support for this project in the PJ 2470 account. After that additional deposit, VTA shall maintain a minimum monthly account balance of at least \$5,000 in this account and shall further replenish said account as needed to meet minimum account balance requirements.

3. PROJECT SPECIFIC TERMS AND OBLIGATIONS OF AGREEMENT:

- A. City agrees to allow VTA and its contractors to use its easement rights to access Wrigley Creek in order to perform the work under the C211 contract. VTA and City agree that Industrial Way will be used for access to the Project site and that construction traffic for the C211 Project may have an adverse impact on the pavement condition. Furthermore, VTA and City agree that repairs to the Industrial Way pavement (such as AC overlay) will be deferred and shall be included in the BART extension to Berryessa (SVBX Project). All such roadway repairs will be to the reasonable satisfaction of City's Public Works Director/City Engineer.
- B. The City will issue a major encroachment permit agreement to VTA for the C211 Project that will allow VTA and its contractors to use City easement rights to access Wrigley Creek in order to perform the work under the C211 Project contract. The Contractor, and its subcontractors, will also be required to apply for and obtain an encroachment permit from the City for work performed within City right of way. City agrees that because the construction work within Wrigley Creek must be completed by the Contractor no later than October 31, 2010, it will make good faith efforts to expedite the processing and issuance of the encroachment permits. VTA agrees to pay the City's encroachment permit fees as set forth in the cost terms of this MOU.
- C. The City and VTA agree to the following conditions for the Wrigley Creek C211 Project:
 - 1. Sediment Removal (Dredging):

- (a) VTA agrees to include the removal of sediment from approximately 1,900 linear feet of Wrigley Creek immediately south (upstream) of the mitigation site (as shown in Attachment 1), as an optional bid item in the C211 Project contract documents (“Upstream Sediment Removal Work”). The Upstream Sediment Removal Work shall be performed as part of the C211 Project as a contract change order if the City is able to get the work permitted by the applicable regulatory agencies such that the work can be completed by VTA no later than October 31, 2010. Such work shall be performed at VTA’s sole expense. If the City is not able to get regulatory approval for the Upstream Sediment Removal Work prior to VTA’s completion of the C211 project, the City shall perform such work on its own, separate from the C211 Project. In such event, the City shall perform the Upstream Sediment Removal Work and VTA shall pay to the City the actual contract amount paid by the City for this work within 30 days of invoice by the City.
 - (b) VTA agrees to include in the C211 Project and perform, at its sole expense, the removal of sediment from approximately 360 linear feet of the box culvert extending under Industrial Way and the Calaveras Boulevard/SR237 overpass that lies north (downstream) of the mitigation site (“Downstream Sediment Removal Work”), as shown in Attachment 1.
2. VTA agrees to apply for and obtain all permits necessary for the Downstream Sediment Removal Work. City agrees to apply for and obtain all permits necessary for the Upstream Sediment Removal Work, and that VTA’s performance of the Upstream Sediment Removal Work is contingent on City obtaining all necessary approvals and permits.
3. The City of Milpitas shall be responsible for all mitigation that may be required by any activities, including sediment removal, outfall repair, and mowing of vegetation, within Wrigley Creek outside the limits of the mitigation site.
4. VTA shall be responsible for maintaining the mitigation planting area for the life of the monitoring effort (i.e., five years) or until the project has been accepted by the regulatory agencies. Maintenance shall include, but is not limited to, replacement planting, irrigation system repair, and debris and trash removal.
5. VTA and City agree that after acceptance of the C211 Project by the regulatory agencies that only routine maintenance shall be required (trash and debris removal) and the mitigation site is self-maintaining in terms of major maintenance (i.e., sediment removal). City will be responsible for emergency repair to the channel after acceptance of the C211 Project, including obtaining all approvals and permits.
6. VTA agrees to dedicate all C211 Project improvements and easements with equivalent property rights to the City for the new improvements outside the existing City easement boundary. City agrees to accept all C211 Project improvements within existing or newly dedicated easements that comply with City standards and requirements. City’s

acceptance of improvements shall be concurrent with the regulatory agencies' approval of required environmental mitigations. City agrees to obtain VTA approval before entering the mitigation site for any maintenance work that may be required prior to completion of the C211 Project and turnover to the City.

7. VTA shall perform all work and associated inspections in accordance with the approved plans and specifications and the final "Wrigley Creek Improvement Project Initial Study/Proposed Mitigated Negative Declaration," (November, 25, 2009). The City's participation will be limited to coordination of all City permits, inspection of any work and repairs to existing City facilities outside the C211 Project limits, attending preconstruction meetings, attending on-going construction progress meetings, final inspection, irrigation water service connection, pavement repairs for local streets as defined in the final pavement survey report, and as deemed necessary, protecting the best interest of the City owned facilities not covered by the C211 Project.

WITNESS THE EXECUTION HEREOF the day and year set forth below.

"CITY"
City of Milpitas
a municipal corporation

"VTA"
Santa Clara Valley Transportation Authority
a public agency

By: _____
Thomas C. Williams
City Manager

By: _____
Michael T. Burns
General Manager

Date: _____

Date: _____

APPROVED AS TO FORM:

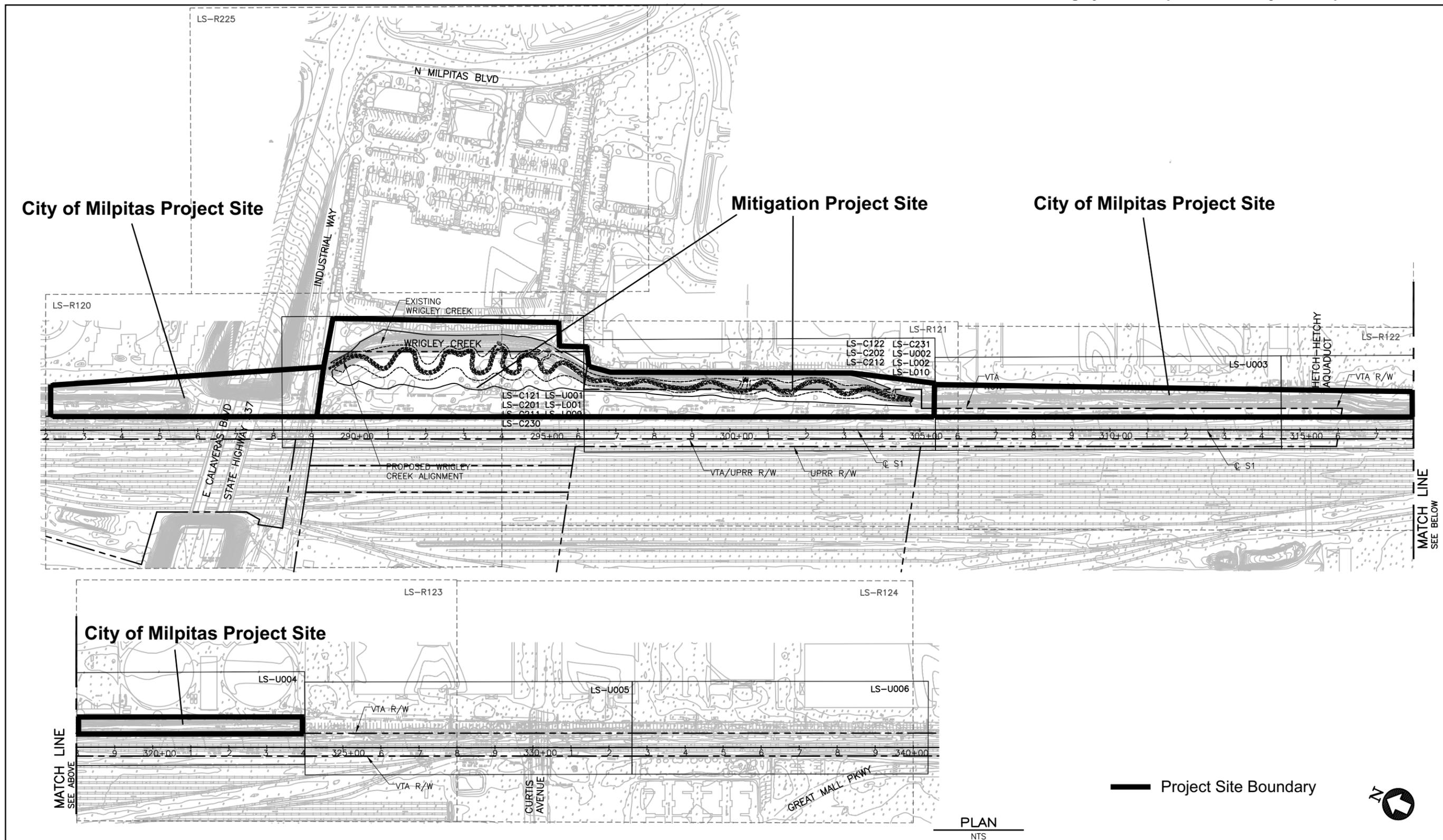
APPROVED AS TO FORM:

By: _____
Michael J. Ogaz
City Attorney

By: _____
Counsel

Date: _____

Date: _____



Sources: HNTB Corporation and Santa Clara Valley Transportation Authority, July 24, 2009.

Permittee: _____
Project Name: _____

File No. _____
Private Job Account No. _____
Improvement Plan No.: _____

DRAFT

Encroachment Permit Agreement Upon Public Right of Way

This authorization ("Permit") is entered into between The City of Milpitas, a municipal corporation ("the City") and Santa Clara Valley Transportation Authority ("Permittee"). This permit and VTA's obligation for the permitted work is more specifically defined in the "Memorandum of Understanding Between the City of Milpitas and Santa Clara Valley Transportation Authority for the Wrigley Creek Improvement Project C211."

RECITALS

- A. Permittee has requested permission from the City to enter upon, utilize, and construct improvements within certain right of way, described as follows ("Encroachment Area"): Wrigley Creek as shown on exhibit "A" of the MOU.
- B. Permittee's utilization of the Encroachment Area will be undertaken for the benefit of the Permittee as shown on exhibit "A".
- C. Permittee desires to enter upon the Encroachment Area in order to construct and install those improvements ("the Improvements") described as follows: to restore and enhance a section of Wrigley Creek in Milpitas, California as part of its Wrigley Creek Improvement Project (sometimes referred to herein as the "C211 Project"). The C211 Project would realign the existing channel and create a more natural flow in Wrigley Creek. The C211 Project restoration would also enhance the hydrologic and geomorphic functions of the creek such as sediment transport and deposition, fish and wildlife habitats, natural water quality improvement, and flood storage. Such restoration work would fulfill environmental mitigation measures required to offset environmental impacts arising from a separate VTA project, VTA's Freight Railroad Relocation/Lower Berryessa Creek Project (sometimes referred to herein as the "C210 Project"), as shown on exhibit "A."
- D. The purpose of this Permit is to document the City's authorization of such Encroachment and describe the terms and conditions governing such Encroachment.

The parties therefore agree as follows:

1. City's Title City represents and warrants that City has title to or in interest in the real property of which the Encroachment Area is a part, and that City has the authority to grant VTA a permit to enter into, on and upon the Encroachment Area for the purposes set forth in Recital C. By acceptance of the benefits hereunder, Permittee acknowledges the City's title to or interest in the real property of which the Encroachment Area is a part and waives any right to contest the validity of such title or interest.
2. Existing Utilities Installation of the improvements shall not interfere with existing utilities within the Encroachment Area. If such interference is unavoidable, Permittee will be solely responsible for obtaining permission from the providers of such utilities, coordinating its

construction activities with such utility providers and satisfaction of any expenses resulting from such interference.

3. Maintenance, Removal or Relocation of Improvements This Permit may be terminated or subjected to a stop work notice order only for "cause." "Cause" shall exist only when there is an imminent and severe threat to public health, safety, or property. A stop work notice shall issue only when at least 24 hours notice has been given to the Permittee. The City shall have the right to remediate, when necessary, imminent and severe threats to public health, safety or property at Permittee's expense after the issuance of a stop work notice and the Permittee is unable or unwilling to take steps to remediate the noticed conditions, Termination shall require at least 90 days prior notice of termination by the City to the Permittee. Upon such termination, Permittee shall, within the time prescribed by the City, remove or relocate all improvements placed, constructed or maintained within the Encroachment Area by Permittee. If Permittee fails to comply with such termination notice within the time prescribed, the City may remove and destroy the improvements without reimbursement to Permittee, its successors and assigns, and the cost of such removal shall be paid by Permittee, its successors and assigns, to the City and shall constitute a debt owing to the city. So long as the permit remains in effect, Permittee shall be solely responsible for maintenance of the improvements, and as obligated per the "Memorandum of Understanding Between the City of Milpitas and Santa Clara Valley Transportation Authority for the Wrigley Creek Improvement Project C211."

4. Construction Standards. The Parties agree that the Permittee has certain immunities and privileges against the application of local building ordinances to Permittee's projects. Without waiving or abrogating such rights, Permittee agrees for purposes of this Permit only to ensure that construction of those improvements subject to this Permit shall conform in all respects to the standards and requirements of the City and be subject to the City's normal inspection and approval procedure, since such improvements shall be dedicated to the City.

5. Indemnity/Hold Harmless Permittee hereby agrees to defend, indemnify and hold harmless the City, its elected and appointed boards, officers, agents and employees, from any liability, claims or damages for personal injury or death as well as for property damage which may arise as a result of this Permit, whether due to acts or omissions of Permittee or any subcontractor, agent, employee or other persons or entities directly or indirectly employed by or acting as agent or under the direction of Permittee. In the event of any such liability, claims or damages, Permittee will defend the City, its agents and employees, with counsel reasonably acceptable to the City. The parties acknowledge that this indemnity provision is a material inducement for the City to grant this authorization and that the City would not grant this authorization without these indemnity provisions.

6. Termination/Revocation and Stop Work Notices. As set forth in paragraph 3 above, the City may terminate or issue a stop work notice under this Permit. However, a termination or stop work notice may only be issued for cause, as defined in paragraph 3 and shall be issued only when all commercially reasonable alternatives have been exhausted. The Parties agree to work in good faith to resolve possible threats to public health, safety or property in a manner that avoids the possibility of contractor delay claims or other interference with the Permittee's legal commitments to its contractor. Notwithstanding the foregoing, by acceptance hereof, Permittee waives any claim, loss, damage action against the City resulting from the termination or revocation of this Permit, issuance of a stop work notice, or removal of the improvements by the City as permitted herein.

7. Attorney's Fees In the event of legal action between the parties with respect to this authorization, the party prevailing in such action will be entitled, in addition to such other relief as may be granted, to a reasonable sum as its attorney's fees and costs.

8. Compliance with other Conditions Permittee acknowledges that the authorization contained herein is in addition to and not in lieu of any other permits, inspections or approvals which Permittee may need to obtain from the City, from other utility providers or property owners with respect to its construction of the improvements and that Permittee must comply with all additional conditions imposed by the City with respect to construction of the improvements.

9. Encroachment Authorization Based upon the terms and provisions in this Agreement, the City hereby authorizes encroachment by Permittee upon the Encroachment Area.

10. Successors and Assigns This authorization will bind and inure to the benefit of the parties, the respective heirs, successors and assigns. This authorization is intended to run with the benefited property as a covenant running with the land and the obligations of Permittee described herein will constitute continuing obligations of all persons or entities succeeding to Permittee's ownership interest in such benefited property.

11. Underground Service Alert Membership: Permittee shall become a member of the underground service alert and remain an active member for the duration of the encroachment. The telecommunication line(s) shall be located beneath the pavement section, within the subgrade of Barber Lane.

Executed on this _____ day of _____, 2010, at Milpitas, California.

PERMITEE:

By: _____
Jim Costantini, Deputy Director:

CITY OF MILPITAS, A MUNICIPAL CORPORATION:

Date: _____ By _____
Thomas C. Williams, City Manager

Attest:

Mary Lavelle, City Clerk

Approved as to form:

Michael J. Ogaz, City Attorney

Recommended by:

Greg Armendariz, Public Works Director/City Engineer

ALL PURPOSE ACKNOWLEDGMENT

State of California)
) s.s.
County of _____)

On _____, before me,
_____, personally appeared

_____ personally known to me;
_____ or 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.

WITNESS my hand and official seal. (SEAL)

Signature of Notary Public

CAPACITY CLAIMED BY SIGNER:

Though statute does not require the notary to fill in the data below, doing so may prove invaluable to persons relying on the document.

_____ Individual(s)
_____ Corporate Officer(s) Titles _____ and _____
_____ Partner(s) _____ Limited _____ General
_____ Attorney-in-Fact
_____ Trustee(s)
_____ Guardian/Conservator
_____ Other : _____

Signer is representing: _____

ATTENTION NOTARY: Although the information requested below is optional, it could prevent fraudulent attachment of this certificate to unauthorized document.

Title or type of document _____

Number of pages: _____ Date of document: _____

Signer(s) other than named above: _____

THIS CERTIFICATE MUST BE ATTACHED TO THE DOCUMENT DESCRIBED ABOVE