

**JOINT USE AGREEMENT
between City of Milpitas and Santa Clara Valley Water District
Coyote Creek Trail Reach 1
from North McCarthy Boulevard to Montague Expressway**

Santa Clara Valley Water District, a California Special District, hereinafter referred to as "District," and the City of Milpitas, a California general law city and municipal corporation of the State of California, hereinafter referred to as "City," agree this _____ day of _____, 2011 ("Agreement Effective Date,") as follows:

- A. Whereas, District is the owner of certain real property along Coyote Creek between North McCarthy Boulevard and Montague Expressway as described on "Exhibit A" hereto ("Premises"), so marked and by this reference made a part hereof.
- B. Whereas, the parties acknowledge that this agreement is intended to supersede the previous joint use agreement entered into between the parties on April 5, 2005 for District property extending from North McCarthy Blvd to Highway 237 ("2005 Agreement").
- C. Whereas, the City has an interest in using the Premises to enable it to provide certain recreational opportunities to the public that do not unreasonably interfere with the District's use of the Premises to carry out its mission of flood protection, water resource management, and stream stewardship.
- D. Whereas, City desires to operate trail and recreational improvements on the Premises constructed pursuant to the 2005 Agreement and to construct a trail access entry for pedestrians and bicycles along Coyote Creek. These past and future improvements by City on the Premises are collectively referred to as ("City Improvements"). The trail is a regional recreational and transportation resource, consistent with the City's General Plan.
- E. Whereas, the Premises contain flood protection, water resource management and stream stewardship improvements made by the District or on District property or easement, such as levees, slope protection, and vegetation ("District Improvements").
- F. Whereas, the City and the District anticipate that there may be future construction of City improvements and District Improvements along Coyote Creek.
- E. Whereas, the City and District find it to be in the public interest to provide for joint use of the Premises by means of an agreement under the terms and conditions set forth herein ("Agreement").

Now, therefore, District and City hereby agree as follows:

- 1. Scope of the License Grant to the City.** Subject to the terms and conditions of this Agreement, the District hereby grants to City a nonexclusive license to access and do any or all of the following on the Premises, the boundaries of which are particularly described on Exhibit A and incorporated into this Agreement by this reference:
 - a. To operate, maintain, and repair its City Improvements currently located on the Premises

and City Improvements that may be constructed in the future including, but not limited to, asphalt concrete surfaced pedestrian and bicycle trails, pedestrian bridges, access ramps, landscaping, irrigation systems, fencing, benches, signage, and emergency call boxes.

b. To provide non-motorized bicycling and hiking activities in accordance with all applicable legal and permitting requirements to the extent such activities do not unreasonably interfere with the District's mission of flood protection, water resource management, and stream stewardship.

c. To construct improvements that provide the public with access to non-motorized bicycling, hiking, and other recreational activities so long as the design and construction of such improvements receive the prior review and approval of the District which is signified by issuance of a District permit, and are compliant with all applicable legal and permitting requirements. It is fully understood and agreed that District in its reasonable discretion may approve or disapprove a request for any permit to construct any improvement on District Premises.

d. To host special recreational events that may include an otherwise restricted component such as allowing a motor boat for safety purposes, so long as the City first receives a permit from the District to host that event.

2. Prohibited Uses of Trail. City shall post notices at all trail entrances that notify users of the trail that the following activities are prohibited :

- Entry of motor vehicles (except for maintenance, emergency, and enforcement vehicles and mobility devices otherwise allowed by law)
- Unleashed dogs
- Equestrians
- Swimming, rafting, boating
- Picnicking

Subject to the foregoing prohibitions and any other restrictions set forth in this Agreement, City shall have the sole authority to adopt any park and trail rules and regulations pursuant to the Milpitas Municipal Code for any City Improvements on the Premises that will not unreasonably interfere with District's mission of flood protection, water resource management, and stream stewardship.

3. District's Superior Rights. It is expressly understood that District is engaged in flood protection, the protection of water resources, and stream stewardship and that the terms and conditions of this Agreement will not in any way interfere with the absolute, free and unrestricted right of District to operate and maintain for flood protection, water resource management, and stream stewardship purposes the stream bed and banks or any appurtenant works thereto, or to repair or construct any of its works, or to allow the raising or lowering of the height of the water present upon the Premises.

4. City's Subordinate Rights. City will have the right to build any improvements on the Premises necessary, or convenient to the enjoyment of this Agreement, provided the location and design of any such improvement is, in each case during the term of this Agreement, first approved by District and signified by issuance of a District permit. It is fully understood and agreed that District's basis of approval or disapproval of improvements is its responsibility to insure the same will not constitute an obstruction to flood flows and will not interfere with the maintenance, repair, access, inspection, construction, reconstruction, or use of the Premises for any District purpose, and does not in any way extend to consideration of the health and safety of users of the Premises, which latter consideration is the sole responsibility of City.

- 5. City's Responsibility for Public Use.** Subject to the conditions and restrictions contained in this Agreement, City has the full control and authority, for public and recreation purposes over the use of the Premises, and City may restrict, control, regulate, and/or supervise the public use thereof. City may, at its discretion, consistent with the rights of District described herein, and without diminution of the flood protection, the water resources management function, or the physical integrity of the Premises, take measures of any kind as may in the opinion of City be necessary for the health and safety of the users of the Premises for any purpose under this Agreement. Such measures shall include the legal right by the City to cite and enforce all provisions of the Milpitas Municipal Code against persons for purposes of furthering and protecting the public and recreation uses of the Premises. City has the sole responsibility for maintaining in a usable and safe condition every City Improvement on the Premises.
- 6. Water Level Fluctuations.** It is expressly understood by City that the level of water upon the Premises may fluctuate from day to day due to controlled or uncontrolled flows upon and across the same. City is responsible for the control of or limiting the public's use of Premises because of such water levels, flood flows or for any other reason. City is responsible for determining the conditions under which to exercise said control for limiting use of the Premises to ensure the well-being and the health and safety of members of the public using the Premises.
- 7. Security.** The public trail contained within or adjacent to the Premises must be reasonably patrolled by City personnel and/or ranger services under contract with City and/or volunteers supervised by City. District has no obligation whatsoever to provide or pay for any such patrol services. Notwithstanding the foregoing, District and City agree that nothing within this Agreement requires the City to provide security or police services on the Premises greater than that provided elsewhere within City boundaries, or sets a special standard of care different than that generally applied by law to the provision of police services to persons and businesses within the boundaries of a general law city.
- 8. Public Complaints.** City is responsible for responding to all public complaints and inquiries regarding City's improvements on the Premises, including the public trail, and to all inquiries regarding the public's use of the Premises
- 9. Damage to City's Improvements on District Premises.** District is not responsible for any damage occurring to the City's improvements or structures within the District Premises that results from the District's maintenance, construction or reconstruction activities, or from its water management and/or flood control facilities located on or near the Premises, including (without limitation) any flood flows, or inundation onto the Premises, except where damage is a result of District's active negligence. All such costs for repairing said damage shall be borne by City. District and District's agents shall endeavor not to damage or destroy improvements made by City. However, City is solely responsible for any damage occurring to either the Districts or City's improvements or structures located on the premises that results from the public's use of the Premises.
- 10. Maintenance and Repair.** District is responsible for performing routine maintenance on the Premises for flood protection and water management purposes to a standard acceptable to the District for its operational and maintenance activities. City shall be responsible for the maintenance, safe upkeep, and repair of all City's improvements on the Premises. If the City desires an enhanced level of maintenance of the District's maintenance roads, then City shall be responsible for performing such enhanced level of maintenance. City shall be responsible for repairing damage to the levee structure caused by surface drainage associated with past or future City Improvements on the Premises. If District reasonably requires that any City improvement on the Premises be repaired, the City will do so at its own expense within 90 days of receiving notice from the District. In non-emergency situations, City and District staff will meet whenever necessary for the purpose of scheduling routine maintenance, including, but not limited to:

- (a) Maintenance issues related to improvements;
- (b) Inspection for unauthorized pioneer trails and access points
- (c) Method and timing of issues related to affected wildlife; and
- (d) Non-emergency work requiring the use of heavy equipment, barricading, and/or restricting access to the Premises.

- 11. Bird Nesting Season.** Any construction and maintenance work during nesting season (generally between February 1st and July 15th) will be avoided whenever possible. If construction or maintenance work must be done during the nesting season, a pre-construction survey by a qualified biologist must be undertaken to determine the presence of nesting. If nesting is reported, the biologist shall recommend the implementation of adequate mitigation measures. Environmental impacts will be considered prior to all work. Any and all work related to this Section 11 will be completed in accordance with applicable federal, state, and local environmental health and safety statutes, regulations, ordinances and laws including, but not limited to, the federal Migratory Bird Act of 1918, Clean Water Act, Endangered Species Act, the California Fish and Game Code and the Porter-Cologne Act and any current and future amendments thereto.
- 12. Notification of Trail Closures.** District will provide City with prior written notice of its maintenance work on the Premises at least ten (10) working days before commencing it.. District and the City will coordinate the closure of the trail in Coyote Creek for public safety purposes should it be reasonably necessary to accommodate the District's maintenance and operations. City will notify the Coyote Watershed Division of the District prior to City's maintenance work along Coyote Creek Trail. District will notify City's Department of Parks, Recreations and Neighborhood Services should closures be necessary due to District maintenance and operations. City is responsible for providing all reasonable security measures to temporarily prohibit or control public access during District maintenance of District Improvements.
- 13. Trail Access Points.** Public access entry points to the trail located along Coyote Creek Trail will be limited to those gates and access points that serve the general public. City has primary responsibility to take all reasonable measures to secure against unauthorized trail access points, including signage and fencing to prohibit access. City shall be responsible and has the full control over unauthorized access points and pioneer trails. If unauthorized trails or access points cause damage to the District levee structure, the City shall be responsible for repairs. If District reasonably requires that any damage as a result of unauthorized access points or pioneer trails be repaired, the City shall do so at its own expense within 90 days of receiving notice from the District.
- 14. Trash and Litter Removal.** City will provide for trash removal on the Premises that is reasonably likely to have been generated from the public's use of the Coyote Creek Trail. City will be responsible for maintaining and emptying trash receptacles and rubbish removal as reasonably necessary. District will retain its Good Neighbor Maintenance Program, as funding resources may allow, to respond to reports of trash along Coyote Creek. District will also manage the Adopt-A-Creek program providing an opportunity for local community volunteers to participate in litter pick-up.
- 15. Graffiti Removal.** City will provide graffiti removal in compliance with City's graffiti abatement program, including graffiti removal from signs installed in conjunction with and/or accessory to the establishment of a public pathway consistent with its implementation of the same program at comparable City facilities. City has primary responsibility for removal of graffiti on the Premises reasonably attributed to trail use.
- 16. Vegetation Management.** District will be responsible for the weed control activities of mitigation

areas located along Coyote Creek that the District planted (or caused to be planted), and for weed management necessary for fire control and flood protection. Vegetation management activities performed by City on the Premises will be accomplished by mechanical means whenever practical and will comply with District herbicide and pesticide use requirements as outlined in the Vegetation Control Work Instructions_Document WW75100, 2005 and SCVWD Policy and Procedure Ad8.2 (2002) as it may be amended from time to time. Application of approved herbicides will be limited to within 18 inches of each side of designated trails. Herbicides and pesticides to be used should be applied only after notification to the District and may be applied only by a California Licensed Qualified Applicator.

- 17. Signage.** The parties will work together to create and install signage that benefits the programs of each party such as warnings, entrance signage, interpretive signs, and joint uses when applicable. The Deputy Operating Officer of the District and the City's Parks Director or their respective designees will meet on a periodic basis to plan the installation of appropriate signage which serves the needs of both parties. All signs placed on the Premises by City (except existing signs that identify the facility (e.g. Coyote Creek Trail) by name) must include a District logo in equal size and symmetrical relationship to other logos contained on such signs. In addition, all City signs, City posters, or City flyers placed on the Premises that describe water resources must be developed in conjunction with the District's Watershed customer relations staff. Each party is responsible for the maintenance and upkeep of its signage installed on the Premises.
- 18. Removal of Improvements.** If District reasonably requires that any City improvement on the Premises be removed or relocated, the City will do so at its own expense within 90 days of receiving notice from the District. District will inform City of its preconstruction planning, in the event a District flood protection project or maintenance is performed on the Premises, in order to minimize District's project impact on City's improvements located on the Premises.
- 19. Term of Agreement and Renewal Option.** The term of this Agreement (including the rights and obligations contained therein) is twenty five (25) years commencing on the Agreement Effective Date. The City, upon providing the District with no less than 90-days written notice, but no more than 180 days notice prior to the expiration of the initial 25-year term, may renew this Agreement for an additional 25-year period.
- 20. Termination of Agreement for Cause.** A party may terminate this Agreement for "cause" after providing the other party with at least 90 days prior written notice of such "cause" and its intent to terminate this Agreement. For purposes of this Agreement, "cause" means a material breach of this Agreement, including (without limitation) a breach of a party's maintenance responsibilities and responsibilities to maintain its improvements in a safe manner. If there are deficiencies that can be corrected by either party, neither party will terminate this Agreement without first providing the other party an opportunity to correct such deficiency within said 90-day written notice period, or such longer period as agreed to by the non-breaching party in writing. Upon the termination or expiration of this Agreement, City must remove its improvements from the Premises, and leave the Premises in a condition as near as reasonably practical to its condition prior to the installation and/or development of such improvements. If the District requires the trail to be removed from the Premises due to a flood protection project or other District project, this Agreement will terminate upon District providing the City with written notice.
- 21. Indemnification by City.** Notwithstanding any other provision of this Agreement, City agrees to indemnify, defend and hold harmless the District, its agents, officers, directors, and employees from and against any and all demands, claims, damages, losses and reasonable expenses, including but not limited to liabilities, obligations, claims, costs, reasonable expenses (including without limitation interest, penalties and reasonable attorney's fees), fines, levies, assessments, demands, damages or judgments of any kind or nature, whether in law or equity (including without limitation, death or injury to any person, property damage, administrative and judicial orders and consents, or any other loss) to the extent they arise out of, pertain to, or relate to the:

(i) public use of the Premises, (ii) public's use of real property adjacent to the Premises, or (iii) negligence or willful misconduct of the City's officers, agents, employees, or independent contractors, excepting comparative liability resulting from the negligence or willful misconduct of an officer, agent, or employee of the District. This Agreement to defend, indemnify, and hold harmless the District will operate irrespective of the basis of the claim, liability, loss, damage, or injury and irrespective of whether the act, omission, or activity is a condition of Premises or any other cause of any kind or nature.

22. Indemnification by District. Notwithstanding any other provision of this Agreement, District agrees to indemnify, defend and hold harmless the City, its agents, officers, directors, and employees from and against any and all demands, claims, damages, losses and reasonable expenses, including but not limited to liabilities, obligations, claims, costs, reasonable expenses (including without limitation interest, penalties and reasonable attorney's fees), fines, levies, assessments, demands, damages or judgments of any kind or nature, whether in law or equity (including without limitation, death or injury to any person, property damage, administrative and judicial orders and consents, or any other loss) to the extent they arise out of, pertain to, or relate to the active negligence or willful misconduct of the District's officers, agents, employees, or independent contractors, excepting comparative liability resulting from the negligence or willful misconduct of an officer, agent, or employee of the City. This agreement to defend, indemnify, and hold harmless will operate irrespective of the basis of the claim, liability, loss, damage, or injury, and irrespective of whether the act, omission, or activity is a condition of Premises or any other cause of any kind or nature.

23. Notices. Any and all notices required to be given hereunder will be deemed to have been delivered upon deposit in the United States mail, postage prepaid, addressed to either of the parties at the address hereinafter specified or as later amended by either party in writing:

City:
City of Milpitas
455 East Calaveras Boulevard
Milpitas, CA 95035
Attention: City Manager
With a copy to the City Engineer

District:
Santa Clara Valley Water District
5750 Almaden Expressway
San Jose, California 95118
Attention: Clerk of the Board
With a copy to the Watershed Manager

24. Successors and Assigns. This Agreement, and all terms, covenants, and conditions hereof, will apply to and bind the successors and assigns of the respective parties hereto. City will neither assign nor sublet this Agreement without the prior written consent of District.

25. Choice of Law. This Agreement is governed by California law.

26. Amendments. This Agreement may not be modified or amended except in writing signed by both parties.

27. Compliance with Laws. Each party must, in all activities undertaken pursuant to this Agreement, comply and cause its contractors, agents and employees to comply with all federal, state and local laws, statutes, orders, ordinances, rules, and regulations.

28. Not Real Property Interest. It is expressly understood that this Agreement does not in any way whatsoever grant or convey any permanent easement, fee or other interest in a party's real property to the other party.

29. Attorneys' Fees. In the event of a dispute between the parties with respect to the terms or conditions of this Agreement, the prevailing party is entitled to collect from the other its reasonable attorneys' fees as established by the judge or arbitrator presiding over such dispute.

30. Entire Agreement. This Agreement, together with all exhibits attached hereto, constitutes the entire agreement between the parties and supersedes all prior written or oral understandings.

WITNESS THE EXECUTION HEREOF, effective on the Agreement Effective Date hereinabove set forth.

"City":

City of Milpitas, a California General Law City,
a municipal corporation

"District":

SANTA CLARA VALLEY WATER DISTRICT,
a California Special District

By: _____
Thomas C. Williams, City Manager

By: _____
Beau Goldie, Chief Executive Officer

Approved as to content:

Greg Armendariz, Public Works Director

Approved as to form:

Michael J. Ogaz, City Attorney

Approved as to form:

Anthony T. Fulcher, Assistant District Counsel

ATTEST:

ATTEST:

Mary Lavelle, City Clerk

Michele King, Clerk/Board of Directors

SANTA CLARA COUNTY



1"=2500'

COYOTE CREEK CENTERLINE

Milpitas City Line

SCVWD FEE TITLE
TRAIL ALIGNMENT

COYOTE WATERSHED

Santa Clara Valley Water District



COYOTE CREEK TRAIL
REACH 1
JOINT USE AGREEMENT

EXHIBIT

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