

**File: City of Milpitas
Lower Penitencia Creek
Penitencia East Channel**

**JOINT USE AGREEMENT
between City of Milpitas and Santa Clara Valley Water District
for portions of Lower Penitencia Creek and
Penitencia East Channel**

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 _____, 2015 ("Agreement Effective Date,") as follows:

- A. Whereas, District is the owner of certain real property along Lower Penitencia Creek from Great Mall Parkway to Montague Expressway and along Penitencia East Channel from the confluence with Lower Penitencia Creek to about 250 feet east of McCandless Drive shown on "Exhibit A" hereto ("Premises"), so marked and by this reference made a part hereof.
- B. Whereas, the City has an interest in using the Premises to provide certain recreational opportunities to the public that do not unreasonably interfere with the primary use of the Premises which is for the District to carry out its mission of flood protection, water resource management, and stream stewardship.
- C. Whereas, City desires to construct, operate, and maintain trail and recreational improvements on the Premises ("City Improvements"). The trail will provide a regional recreational resource, consistent with the City's General Plan and the City's Transit Area Specific Plan.
- D. Whereas, the Premises contain flood protection, water resource management and stream stewardship features and improvements made by the District ("District Improvements").
- E. Whereas, the City and the District acknowledge that there will be future construction of District Improvements along Lower Penitencia Creek and Penitencia East Channel.
- F. 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 non-exclusive license to access and do any or all of the following on the Premises:
 - a. To construct, operate, maintain, repair, replace, and remove City Improvements on the Premises including, but not limited to, decomposed granite surfaced pedestrian and bicycle trails, pedestrian bridge, fencing and signage. The construction of such City Improvements shall require prior review and approval by the District as signified by issuance of a Water Resources Protection Ordinance Encroachment Permit ("District Permit"), and shall be 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 a permit to construct a City Improvement on the Premises.

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

c. To host special recreational events (e.g., races) that may include an otherwise restricted component such as allowing private vehicular access for safety purposes, so long as the City first receives a District Permit to host that event.

2. Prohibited Uses of Premises. 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, fishing
- Picnicking

Subject to the foregoing prohibitions and any other restrictions set forth in this Agreement, City shall have the sole authority to adopt any trail rules and regulations pursuant to the Milpitas Municipal Code for any City Improvements on the Premises that will not 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 shall 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, to alter the grade and cross section of the channel, to build levees and floodwalls, or to allow the raising or lowering of the height of the water present upon the Premises. To the extent such work by District is anticipated to negatively impact City Improvements, District shall include City in the planning process and provide reasonable notice of such work to City prior to its commencement. This notice requirement shall not apply in the event District needs to perform emergency repairs or other work upon the Premises.

4. City's Subordinate Rights. City will have the right to build 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 as signified by issuance of a District Permit.

5. City's Responsibility for Public Use. Subject to the conditions and restrictions contained in this Agreement, City has the full control and responsibility, for public and recreation purposes over the use of the Premises, and City shall restrict, control, regulate, and/or supervise the public use thereof as may be necessary. 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 or other applicable laws 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 to be 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 Improvements on the Premises, including the public trail, and to all inquiries regarding the public's use of the Premises.
- 9. Disclosures.** City shall ensure disclosures for adjacent development identifies the public use of the Premises and the potential noise, dust, and vehicular use associated with the District's periodic inspections, maintenance construction and future channel reconstruction activities along the creek.
- 10. Damage to City's Improvements on Premises.** District is not responsible for any damage occurring to City Improvements or structures within the 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. All such costs for repairing said damage shall be borne by City. District and District's agents shall endeavor not to unnecessarily damage or destroy improvements made by City. However, City is solely responsible for any damage occurring to City Improvements or structures located on the Premises that results from the public's use of the Premises.
- 11. Channel condition.** City acknowledges existing erosive conditions of creek banks on the Premises and agrees to adjust the trail location, reduce its width, close the trail or repair the creek banks to accommodate continued use of City Improvements on the Premises and ensure the health and safety of the trail users. City further agrees and acknowledges that District may require reconfiguration of the trail due to erosive conditions of creek banks; however, District has no affirmative duty to guard against such conditions, and any failure to request such a change shall not be deemed a guaranty or warranty of safe conditions.
- 12. Maintenance and Repair.** District's performance of routine maintenance on the Premises for flood protection and water management purposes will be to a standard acceptable to the District for its operational and maintenance activities. City has chosen to install decomposed gravel surfacing for the trail on the maintenance road, a material inherently subject to damage from heavy vehicles and in wet conditions. City shall be responsible for the maintenance, safe upkeep, and repair of all City 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 Premises caused by surface drainage associated with City Improvements or use of the Premises by the public. If District reasonably requires that any City Improvement on the Premises be repaired, the City will do so at its own expense within ninety (90) days of receiving

notice from the District or commence the repairs within ninety (90) days and diligently complete the repairs thereafter. 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 paths (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.

13. Pedestrian Bridges. City is responsible for maintaining the aesthetic, structural integrity, and safety of pedestrian bridges constructed by City as part of the City Improvements, including the bridge decks, piers, foundations, railings, abutment walls, and ramps. City will conduct a biennial safety inspection of the bridge structure, including the footings, to evaluate whether the bridge is safe and to take any corrective action if the bridge is not safe. City shall reimburse the District for reasonable unavoidable, additional demonstrable costs of the flood protection, water management or other lawful activities, including the removal of sediment under the bridges not reached by equipment used on the rest of the creek and for bird exclusion measures on the bridge necessary to perform work during bird nesting season. City shall reimburse District for such costs within forty five (45) days of demand by the District

14. Bird Nesting Season. Any construction and maintenance work during nesting season (generally between February 1st and July 15th) will be avoided by City whenever possible. If construction or maintenance work must be done during the nesting season, a pre-construction survey by a qualified biologist retained by City 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 13 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 Wildlife Code and the Porter-Cologne Act and any current and future amendments thereto.

15. Notification of Trail Closures. For non-emergency or planned maintenance, 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 trails for public safety purposes should it be reasonably necessary to accommodate the District's maintenance and operations. For non-emergency or planned maintenance, City will notify the District's Watershed Operations and Maintenance Division at least ten (10) working days prior to City's maintenance work within the Premises. District will notify City's Department of Public Works 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. In cases of emergency maintenance or repairs, the responsible party will provide as much prior notice as is reasonably possible.

16. Trail Access Points. Public access entry points to the Premises between street crossings will be minimized and 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 access points and pioneer trails, including signage and fencing to prohibit access. If unauthorized trails or access points cause damage to the District Premises, 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 or commence the repairs within ninety (90)

days and diligently complete the repairs thereafter.

17. **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 Premises. City will be responsible for maintaining and emptying trash receptacles and rubbish removal as reasonably necessary.
18. **Graffiti Removal.** City will provide graffiti removal in compliance with City's graffiti abatement program, including graffiti removal from walls, fences and signs installed in conjunction with and/or accessory to the establishment of a public trail 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.
19. **Vegetation Management.** District will be responsible for the weed control activities of mitigation areas 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 District's QEMS procedure Q751D02 Rev D (09-13-12) which will be amended from time to time. Application of approved herbicides by City will be limited to within 18 inches from the edge of trail pavement. Herbicides and pesticides to be used should be applied only after notification to the District and may be applied only by a staff possessing a Qualified Applicator Certificate (QAC) or Qualified Applicator License (QAL). City shall be responsible for the trimming of trees planted on property adjacent to the Premises that overhang the trail and maintenance road in order to ensure a minimum of 15 feet of vertical clearance.
20. **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 City shall install and maintain creek identification signage at street crossings. All signs placed on the Premises by City (except existing signs that identify the facility (e.g. Lower Penitencia Creek)) 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 or referencing the Premises that describe water resources must be developed in conjunction with the District's Communications Unit. Each party is responsible for the maintenance and upkeep of its signage installed on the Premises.
21. **Flood Protection Projects.** Lower Penitencia Creek and Penitencia East Channel have both been identified as inadequate to convey flows from a 100 year flood event. When funding becomes available the District will plan, design and construct flood protection improvements that would likely result in the need to modify, remove or relocate City Improvements.
22. **Removal and Relocation of Improvements.** If District requires that any City improvement on the Premises be removed or relocated, the City will do so at its own expense within 180 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 proposed on the Premises, in order to reasonably minimize District's project impact on City Improvements, and allow for City to budget funds for relocation, removal or modifications of trail improvements impacted by the District's Project. The City will be responsible for all costs including any mitigation requirements associated with the trail due to the District Project.
23. **Term of Agreement and Renewal Option.** The term of this Agreement (including the rights and obligations contained therein) is ten (10) 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 10-year term, may renew this Agreement for one additional 10-year period.

24. Termination of Agreement. A party may terminate this Agreement after providing the other party with at least 180 days prior written notice and its intent to terminate this Agreement. Upon the termination or expiration of this Agreement, City must remove all City 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 of at least 180 days.

25. Indemnification by City. 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 active 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. The indemnity and other rights afforded to the District by this section 24 survive the termination or expiration of this Agreement.

26. 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 copy to the Community Project Review Unit

27. 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.

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

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

30. 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.

31. 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.

32. 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.

33. 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:

Steve Machida, Public Works Director/City Engineer

Approved as to form:

Michael J. Ogaz, City Attorney

Approved as to form:

Brian C Hopper, Senior Assistant District Counsel

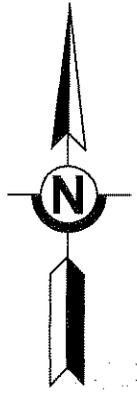
ATTEST:

Mary Lavelle, City Clerk

ATTEST:

Michele King, Clerk/Board of Directors

SANTA CLARA COUNTY



1"=500'

MAIN STREET

GREAT MALL PKWY

GREAT

MALL DRIVE

SOUTH ABEL ST.

SOUTH MAIN STREET

LOWER PENITENCIA CREEK

MCCANDLESS DR

Penitencia East Channel

MCCANDLESS DR

EXPY

MONTAGUE

WEST

S.C.V.W.D. FEE TITLE

COYOTE WATERSHED

EXHIBIT

Santa Clara Valley Water District



LOWER PENITENCIA CREEK TRAIL JOINT USE AGREEMENT

A