

**ENCROACHMENT PERMIT  
AND MAINTENANCE AGREEMENT  
(for Fronting Property)**

**1. PARTIES AND BACKGROUND**

The City and County of San Francisco Public Works (the “**Department**”) enters into this Encroachment and Maintenance Agreement (“**Agreement**”) with Sunnydale Infrastructure, LLC (the “**Permittee**”), on this date, \_\_\_\_\_, 20\_\_\_\_ for reference purposes only (“Reference Date”). The Master Major Encroachment Permit or Permit collectively refers to the Encroachment Permit as referenced or shown on the Department approved plan(s), the associated Street Improvement Permit, and this Agreement, including its Attachments and accompanying documents (the “**Permit**”). In this Agreement, “the **City**” refers to the City and County of San Francisco and all affiliated City agencies including, but not limited to, the Department, the San Francisco Public Utilities Commission (“**SFPUC**”) and the San Francisco Municipal Transportation Agency (“**SFMTA**”).

Permittee is an affiliate of the Sunnydale Development Co. LLC, the master developer (“**Master Developer**”) of the Sunnydale HOPE SF Project to redevelop the Sunnydale-Velasco public housing site, approved by the City pursuant to that certain Development Agreement dated as of March 3, 2017 recorded in the Official Records of the City and County of San Francisco (the “**Official Records**”) on March 3, 2017 as Document No. K416604-00 (the “**DA**”), and pursuant to that certain Master Developer Agreement dated as of March 3, 2017, and recorded in the Official Records of the Official Records on March 3, 2017 as Document No. K416598-00 (the “**MDA**”). Together, the DA and MDA approve and describe the comprehensive redevelopment of the above referenced site, including but not limited to the construction of new public housing, new market rate housing, and new public and private infrastructure to support the redevelopment of the site (the “**Project**”).

The infrastructure associated with the Project will be constructed in phases, in connection with the recording of Final Maps for the applicable phase. The Permittee anticipates that each such infrastructure phase will be developed by separate affiliates of the Master Developer (each a “Phase Infrastructure Developer”). It is anticipated, therefore, that the Permittee will assign its rights and obligations under this Agreement to the applicable Phase Infrastructure Developer. Upon completion of each phase, the parties anticipate that the applicable Phase Infrastructure Developer will assign ownership and maintenance obligations for certain “Improvements” constituting major encroachments (as defined in Section 2.4, below) in whole or in part to a homeowners’ association or a commercial owners’ master association. In some instances, the Phase Infrastructure Developer may retain ownership and maintenance obligations over certain Improvements, or may assign ownership and maintenance obligations to a Fronting Property Owner, in accordance with Sections 5.5, 6, 16, below.

**2. PERMIT INFORMATION**

**2.1 Master Encroachment Permit No. (“Permit”):** \_\_\_\_\_ under Public Works Code Section 786(b). Other Public Works Permit number(s) if Public Works allowed construction prior to Board of Supervisors approval of the Encroachment Permit: Street Improvement Permit 19IE-00564 for Phase 1A-1 and 1A-2.

**2.2 Description/Location of Property (See Attachment 1):** The Project is described in the DA and the MDA, and includes all blocks and lots in City-approved Tentative Map 9537.

**2.3 Description/Location of Permit Area (See Attachment 2):** The Permit Area is defined, generally, as the locations of the Improvements (defined in Section 2.4, below) to be constructed in the newly constructed rights of way as shown in the City-approved Tentative Map 9537. The parties anticipate that the location and description of the rights of way and Improvements within the rights of way may be adjusted in non-substantial ways in connection with development of detailed design documents for the to-be-constructed infrastructure, which would be finalized in each Final Subdivision Map for each phase. The parties nevertheless intend for this Agreement to permit the types and general scope of the Improvements described herein.

**2.4 General Description of Proposed Improvements that will be Major Encroachments (See Attachment 2):**

The term “**Improvements**” shall mean those private improvements in the public right-of-way, as described in the applicable this Section 2.4, the attachments listed in Section 2.8, as described in plans approved in connection with a Street Improvement Permit for each applicable phase of development (“Construction Plans.”). The parties anticipate the following categories of Improvements will constitute major encroachments permitted by this Agreement:

- Retaining Walls
- Wall-Mounted Fencing
- Irrigation lines (temporary based upon project phasing)
- Stairwell handrails (interim conditions to connect proposed roadway grades to existing residential buildings)
- Community Gateway & Perimeter Marker(s)
- Vehicular and Pedestrian Directional Signs and Information Kiosks
- Private storm drain and combined sewer laterals and temporary mains

**2.5 Permit Type:** Master Encroachment Permit.

**2.6 Developer/Builder/Owner of the Fronting Property:** Sunnydale Infrastructure, LLC, 1256 Market Street, San Francisco, CA 94102, attn: Ramie Dare, Vice President.

**2.7 Contact Information.** The Permittee shall provide to Public Works, Bureau of Street Use and Mapping (“BSM”), SFMTA, 311 Service Division, and SFPUC the information below regarding a minimum of two (2) contact persons with direct relation to or association with,

or is in charge of or responsible for, the Permit. Permittee shall notify both Public Works' Bureau of Street Use and Mapping and SFMTA within thirty (30) calendar days of any changes in the Permittee's personnel structure, and submit the required contact information of the current and responsible contacts. If and when the City's 311 Service Division (or successor public complaint system program) allows direct communications with the contact person(s) for the Permit, the Permittee shall participate in this program.

#### Contact Person Number 1

Last Name, First Name: Dare, Ramie  
Title/Relationship to Owner: Vice President  
Phone Numbers: (415) 355-7118 direct  
Email Addresses: rdare@mercyhousing.org  
Mailing Address: 1256 Market Street, San Francisco, CA 94102  
Office Address: same as mailing

#### Contact Person Number 2

Last Name, First Name: Nguyen, Thu  
Title/Relationship to Owner: Senior Project Manager  
Phone Numbers: (415) 653-3167  
Email Addresses: TNguyen@Related.com  
Mailing Address: 44 Montgomery Street, Suite 1300, San Francisco, CA 94104  
Office Address: same as mailing

**2.8 List of Attachments.** The following additional documents are attached to or accompany this Permit, which may be amended or further supplemented with the documents identified in Section 5 following annexations of Permit Areas into the Permit:

- Attachment 1: **Property Information.** Written description of the project site and location map identifying the property upon which the Project, including the Improvements, will be constructed.
- Attachment 2: **Permit Area Documentation.** “Permit Area” refers to public rights of way that include Improvements and any real property in connection with the applicable Improvement that is subject to Permittee’s maintenance responsibility. The Permit Area shall also refer to areas for which a Notice of Annexation has been recorded, which may include Improvements, and any real property subject to maintenance responsibilities that have been assigned to a homeowners’ association or a commercial owners’ master association. As described in Section 4, subsequent Notices of Annexation shall establish specific Permit Areas and identify the fronting properties associated with the Permit Areas (each, a “Fronting Property”).

- The “**Permit Area Documentation**” shall consist of the following:
- o Written description of the area where the encroachment(s) exist and the boundaries.
  - o Diagram showing the boundary limits of the Permit Area and identifying all Improvements in the Permit Area (“**Precise Diagram**”). The Precise Diagram shall

be a separate document from the engineered construction plans for the encroachments submitted to Public Works for review and approval (“**Improvement Plans**”).

o Table listing all Improvements in the Permit Area and identifying the maintenance responsibility for them (“**Maintenance Table**”). The table shall include all physical treatments, facilities, and elements, whether standard or non-standard, to clarify responsibility.

The Permit Area Documentation attached to this Agreement contains final information for **Phase 1A-1/1A-2**, and preliminary information for the anticipated future phases of the Project. As design details are finalized for each subsequent phase, the Permittee (or applicable Phase Infrastructure Developer) will submit updated Permit Area Documentation in connection with a Notice of Annexation for such phase.

- Attachment 3: **Maintenance Plan**. A written document that contains a detailed description of the means and methods to maintain the Improvements within the Permit Area (the “**Maintenance Plan**”). The Maintenance Plan shall identify the daily, weekly, monthly, and annual routine maintenance, repair and replacement tasks, as applicable (“**Permitted Activities**”), and any specialized equipment (in the event that the Improvements incorporate such specialized equipment) necessary for continued operation of the Improvements. For each category of the Permitted Activities, Permittee shall provide the regular (e.g. daily, weekly, etc.) estimated expenses, including labor hours, cost per hour, and materials needed for maintenance. In addition, Permittee shall provide a total estimated annual operating expense and include: regular maintenance expenses, replacement costs, costs for any specialized equipment (in the event that the Improvements incorporate such specialized equipment) necessary for continued operation of the Improvements, and the expected lifespan of any non-standard materials subject to regular use. The Maintenance Plan also shall identify whether a Community Benefit District, Business Improvement District, Community Facilities District or similar Special Tax-Based Entity (a “**Special Tax Entity**”) will expend monetary or staff resources on the Permit Area for maintenance or other activities, and documentation, to the Director’s satisfaction, that the monetary and/or staff resources are available and committed to perform the maintenance obligation. The Maintenance Plan attached to this Agreement contains final information for **Phase 1A-1/1A-2**, and preliminary information for the anticipated subsequent phases. As design details are finalized for each subsequent phase, the Permittee (or applicable Phase Infrastructure Developer) will submit an updated Maintenance Plan in connection with a Notice of Annexation for such phase.

- Attachment 4: **Operations Manual**. Permittee shall submit a document or manual describing how to operate any specialized equipment necessary for continued operation of the Improvements along with manufacturer’s instructions for operation and maintenance (“**O&M Manuals**”) and other pertinent information about the equipment. These documents are for Public Works file purposes and not attached to this Agreement. The City Engineer, in his or her discretion, may allow the Permittee to defer submission of the Operations Manual until completion of the Improvements in accordance with the Improvement Plans. The Operations Manual attached to this Agreement contains final information for **Phase 1A-1/1A-2**, and preliminary information for the anticipated subsequent phases. As design details are finalized for

each subsequent phase, the Permittee (or applicable Phase Infrastructure Developer) will submit an updated Operations Manual for such phase.

- Attachment 5: **Global Diagram**. The Global Diagram generally describes the type and location of Improvements subject to this Permit.

The City Engineer shall review and certify the description of the **Permit Area** (Attachment 2), **Maintenance Plan** (Attachment 3), **O&M Manuals** (Attachment 4), and the **Global Diagram** (Attachment 5), and any necessary updates submitted with a Notice of Annexation. The Department shall not issue the permit until the City Engineer has completed his or her review and certified the required attachments.

### **3. EFFECTIVE DATE; REVOCABLE, NON-EXCLUSIVE PERMIT; RECORDATION**

(a) Following Board of Supervisors approval and confirmation the Department has received all required permit documents and fees, the Department shall issue the approved Permit. The date the Permit is issued shall be the “**Effective Date**.”

(b) The privilege given to Permittee under this Agreement is revocable, personal, non-exclusive, non-possessory, and effective only insofar as the rights of City in the public right-of-way (“**PROW**”) are concerned. This Permit does not grant any rights to construct or install Improvements in the Permit Area until the Public Works Director issues written authorization for such work.

Commencing on the Effective Date, Permittee shall be authorized to enter upon and use the PROW for the limited purpose of maintaining the Improvements within the Permit Area(s) subject to the terms, conditions, and restrictions set forth herein.

(c) Upon Board of Supervisors’ approval of this Permit, Permittee shall record this Permit against any parcel in the Project for which a Final Map has been recorded. and no later than City’s acceptance of the infrastructure improvements for the applicable Final Map phase. From and after the date of this Permit, Permittee shall record this Permit together with any applicable Notice of Annexation (as described in Section 6.1(c), below) against any parcel in the Project for which a Final Map is recorded. Permittee shall cause such recording to occur no later than City’s acceptance of the infrastructure improvements for the applicable Final Map phase.

### **4. MONITORING AND MAINTENANCE RESPONSIBILITIES**

Permittee acknowledges its responsibility to maintain and monitor the Permit Area and its Improvements according to a “**Maintenance Monitoring and Reporting Program**,” document performance of the maintenance activities as described herein, and retain documentary evidence of the maintenance activities (the “**Maintenance Report**”) for a minimum of three (3) years. Within three (3) days from the date of the Director’s written request for maintenance

information, the Permittee shall provide proof that the maintenance activities have been performed.

The Permittee shall: 1) on a regular quarterly basis commencing upon the Department's determination that the Permittee has completed the Improvements for the applicable phase in accordance with the Construction Plans, document the general condition of the entire Permit Area and all elements with date stamped digital images in JPEG format, or other video or picture imaging acceptable to the Director, and 2) maintain a written and image log of all maintenance issues, including, but not limited to: defects, damages, defacing, complaints, and repairs performed on Permit elements and the Permit Area. The regular monitoring images and/or video shall be taken from all angles necessary to show the entirety of the Permit Area and all Improvements therein. The images for the logged maintenance issues and repairs shall clearly show the location and detail of the damaged or defaced element or area, and its repair and restoration. Permittee shall maintain all files and provide them in a format and media consistent with current standards for data retention and transfer, such as a USB flash drive with connective capability to a commonly available personal computer.

The Maintenance Report, at a minimum, shall include the following information: date and time of maintenance; description and type of encroachment element requiring repair, resolution, or restoration and method used to repair, resolve, or restore it; time and duration to repair, resolve, or restore such element; company (and contact information for the company) that performed the repair, resolution, or restoration.

If the Permit does not include any surface level or above grade elements, the Director shall not require the maintenance monitoring set forth in this Section.

## **5. CONDITIONS OF ENTRY AND USE**

By entering into this Agreement, Permittee acknowledges its responsibility to comply with all requirements for maintenance of the Improvements as specified in this Agreement, Public Works Code Section 786 et seq., Article 2.4 of the Public Works Code ("**Excavation in the Public Right-of-Way**"), the sidewalk maintenance requirements specified in Public Works Code Section 706 (if applicable), and as directed by the Director. Permittee shall comply and cause its agents to comply, with each of the following requirements in its performance of the Permitted Activities.

### **5.1 Permits, Permissions, and Approvals**

#### **5.1A Requirement to Obtain all Regulatory Permits and Approvals.**

Permittee shall obtain any permits, licenses, or approvals of any regulatory agencies ("**Regulatory Permits**") required to commence and complete construction of the Improvements and performance of the Permitted Activities. Promptly upon receipt of any such Regulatory Permits, Permittee shall deliver copies of them to the Department. Permittee recognizes and agrees that City's approval of the Permit and this Agreement for purposes of construction of the Improvements or performance of the Permitted Activities shall not be deemed to constitute the grant of any or all other Regulatory Permits needed for the Permitted Activities, and nothing

herein shall limit Permittee's obligation to obtain all such Regulatory Permits, at Permittee's sole cost.

Permittee shall obtain from other parties any further permission necessary to perform its activities under the Permit and this Agreement arising due to any other existing rights affecting the PROW.

**5.1.B Subsequent Excavation within Permit Area.** When maintenance of the Improvements requires excavation as described in Article 2.4 of the Public Works Code, or prevents public access through the Permit Area, or obstructs the movement of vehicles or bicycles where allowed by law, Permittee shall apply for applicable permits from the Department and any other affected City agencies. Permittee or agent of Permittee shall comply with all excavation permit bonding and security requirements that the Department deems necessary when performing or causing to be performed any excavations or occupancies within the Permit Area.

**5.1C Additional Approvals.**

Further permission from the Department may be required prior to Permittee's performance of work within the Permit Area including, but not limited to, the restoration of a temporarily restored trench, removal and replacement of a tree or other landscaping, or repair of damaged or uplifted sidewalk or other paving material. This Agreement does not limit, prevent, or restrict the Department from approving and issuing permits for the Permit Area including, but not limited to, occupancy, encroachment, and excavation permits. The Department shall include as a condition in all subsequent permits issued in the Permit Area that any subsequent permittee notify and coordinate with the Permittee prior to occupying, encroaching, or excavating within the Permit Area.

**5.2 Exercise of Due Care**

During any entry on the Permit Area to perform any of the Permitted Activities, Permittee shall, at all times and at its sole cost, perform the Permitted Activities in a manner that maintains the Permit Area in a good, clean, safe, secure, sanitary, and attractive condition. Permittee shall use due care at all times to avoid any damage or harm to the Permit Area or any Improvements or property located thereon or adjacent to, and to take such soil and resource conservation and protection measures within the Permit Area as are required by applicable laws and as City may reasonably request in writing. Permittee shall not perform any excavation work without City's prior written approval. Under no circumstances shall Permittee knowingly or intentionally damage, harm, or take any rare, threatened, or endangered species on or about the Permit Area. While on the Permit Area to perform the Permitted Activities, Permittee shall use commercially reasonable efforts to prevent and suppress fires on and adjacent to the Permit Area attributable to such entry.

**5.3 Cooperation with City Personnel and Agencies, and Fronting Property Owners**

Permittee shall work closely with City personnel to avoid unreasonable disruption (even if temporary) of access to the Improvements and property in, under, on or about the Permit Area

and City and public uses of the Permit Area. Permittee shall perform work in accordance with the Permit and this Agreement. Permittee also shall perform work pursuant to one or more Street Improvement Permits or General Excavation Permits and in accordance with Public Improvement Agreements if either or both are applicable.

Permittee shall provide advance notice and work closely with all Fronting Property Owners to avoid unreasonable disruption (even if temporary) of use and access to their property during any Permitted Activities or other permitted or unpermitted activity by Permittee.

## **5.4 Permittee's Maintenance and Liability Responsibilities**

### **5.4.A Permittee's Maintenance and Liability.**

(a) Permittee acknowledges its maintenance and liability responsibility for the Improvements (including, but not limited to, materials, elements, fixtures, etc.) in accordance with the Permit and this Agreement, and all applicable City permits, ordinary wear and tear excepted. Permittee agrees to maintain said Improvements, as reasonably determined by the Director, and in accordance with any other applicable Regulatory Permits. Permittee shall reimburse the Department for any work performed by the Department as a result of the Permittee's failure to comply with the maintenance and restoration terms as specified in this Agreement under Section 9. Permittee is wholly responsible for any facilities installed in the Permit Area that are subject to this Permit's terms and for the quality of the work performed in the Permit Area under this Agreement. Permittee is liable for all claims related to the installed facilities and any condition caused by Permittee's performed work. Neither the issuance of any permit nor the inspection, nor the repair, nor the suggestion, nor the approval, nor the acquiescence of any person affiliated with the City shall excuse the Permittee from such responsibility or liability.

(b) The City acknowledges that while the Permittee retains the primary responsibility for all construction, installation, maintenance and repair activities, certain limited or supplemental maintenance and repair activities may be performed by a Community Benefit District, Business Improvement District, Community Facilities District, Community Association or similar Special Tax-Based Entity (the "**Special Tax Entity**") (such activities may shall be denoted on the Maintenance Table) rather than the Permittee. Notwithstanding the foregoing, the Department shall hold the Permittee responsible for compliance with all provisions of the Permit and this Agreement without regard to whether the violation occurred through an act, omission, negligence, or willful misconduct of the Permittee or the Special Tax Entity. Only if Permittee can demonstrate to the satisfaction of the Director that the Special Tax Entity is solely responsible for the act, omission, negligence, or willful misconduct and the Director makes a written finding to this effect, shall the Director take action directly against the Special Tax Entity. Under such circumstances, the Permittee shall not be responsible and liable hereunder for the act, omission, negligence, or willful misconduct that the Director identifies in writing, and no Uncured Default (as hereinafter defined) shall be deemed to have occurred by the Permittee, as a result of the Special Tax Entity's acts, omissions, negligence or willful misconduct. In the event that the Special Tax Entity should cease to exist or that the Special Tax Entity's maintenance and repair responsibilities are changed, then Permittee shall be responsible or assume responsibility



for all activities that are no longer the responsibility of or being performed by the Special Tax Entity.

(c) In the event that the Director agrees to maintain one or more of the Improvements pursuant to Section 6.9.B of this Agreement, Permittee shall not be responsible for the quality of maintenance or restoration work performed, nor liable for the resulting consequences of City work.

**5.4.B Abatement of Unsafe, Hazardous, Damaged, or Blighted Conditions.**

Permittee acknowledges its maintenance responsibility to abate any unsafe, hazardous, damaged, or blighted conditions in development phases where Permittee is constructing or has constructed Improvements. Permittee does not accept responsibility for conditions in the phases of the Permit Area that have not yet been developed and incorporated into the Project. Following receipt of a notice by the Department of an unsafe, damaged, or blighted condition, Permittee shall immediately respond to the notice and restore the site to the condition specified on the Construction Plans within thirty (30) calendar days, unless the Department specifies a shorter or longer compliance period based on the nature of the condition or the problems associated with it; provided, however, to the extent that such restoration cannot be completed using commercially reasonable efforts within such thirty (30) calendar day period or other period specified by the Department, then such period shall be extended provided that the Permittee has commenced and is diligently pursuing such restoration. In addition, Permittee acknowledges its responsibility to abate any hazardous conditions as a direct or indirect result of the Improvement (e.g., slip, trip, and fall hazards), promptly upon receipt of notice from the Department. For unsafe or hazardous conditions, the Permittee shall immediately place or cause to be placed temporary measures to protect the public. Failure to promptly respond to an unsafe or hazardous condition or to restore the site within the specified time may result in the Department's performing the temporary repair or restoration in order to protect the public health, safety, and welfare. Permittee shall reimburse the Department for any such temporary repair or restoration. Failure to abate the problem also may result in the Department's issuance of a Correction Notice, Notice of Violation, and/or request for reimbursement fees to the Department for departmental and other City services necessary to abate the condition in accordance with Section 9.

**5.4C Permittee Contact Information, Signage.**

Upon the Department's determination that the Permittee has completed the Improvements in accordance with the Construction Plans, Permittee shall post a sign(s) within the Permit Area, in conformity with any applicable signage program for the Permittee's property and in a location approved by the Department, that provides a telephone number and other Permittee contact information so that members of the public can contact the Permittee to report maintenance issues, problems, or any other complaints about the Permit.

**5.4.D Non-standard Elements.**

If the Permittee elects to install materials, facilities, fixtures, or features, including but not limited to streetlights or utility systems, that do not meet the City's criteria for standard construction, operation, maintenance, and repair ("**Non-standard Elements**"), and the City approves such Non-standard Elements, the Permittee shall (i) acknowledge its responsibility for the operation, maintenance, repair, and replacement of the Non-standard Elements as constructed per the Improvement Plans, (ii) separately meter any

service utility required to operate the Non-standard Elements, and (iii) be responsible for providing such utility service at Permittee's own cost. As an exception, if the Non-standard Elements are facilities such as street lights and they are installed in locations identified by the City as standard streetlight locations, the City may elect to power the streetlights and not require a separate meter. Permittee shall indemnify and hold City harmless against any claims related to Permittee's operation, maintenance, repair, and replacement of Non-standard Elements.

### **5.5 Fronting Property Owner's Maintenance, Liability, and Notice Responsibilities**

The Permittee's maintenance responsibility generally shall be limited to the Improvements in the Permit Area, and its immediate vicinity, including any sidewalk damage directly related to the Improvements or Permitted Activities. In addition, Permittee acknowledges that the Fronting Property owner shall be responsible for the sidewalk maintenance issues under Public Works Code Section 706 to the extent the fronting sidewalk is built to City-standard and is an official City-adopted sidewalk width; provided, however, that some or all of a Fronting Property Owner's obligations under Public Works Code Section 706 may be assigned to Permittee. If it is unclear whether sidewalk maintenance is the responsibility of Permittee or a Fronting Property Owner who is not the Permittee under Public Works Code Section 706, the Department shall determine which party or parties are responsible; provided, however, that where the Fronting Property Owner is the San Francisco Housing Authority, Permittee will be responsible. If the situation so warrants, the Department may assign responsibility for sidewalk maintenance to one or more parties, including a Fronting Property Owner who is not the Permittee.

If Permittee is the Fronting Property Owner, Permittee must notify any successor owner(s) of the existence of the Agreement and the successor owner's associated obligations at the time of closing on the subject property. In addition, prior to the time of closing on the subject property, Permittee shall record a Notice of Annexation that provides constructive notice to the public and to any successor owner(s) of the Permit and the Permittee's responsibilities thereunder.

### **5.6 Annual Certification of Insurance**

Upon receipt of a written request by the Department, but no more than annually, Permittee shall submit written evidence to the Department indicating that the requirements of Sections 8 (Insurance) and Section 9 (Security) have been satisfied.

### **5.7 Damage to and Cleanliness and Restoration of Permit Area and City Owned or Controlled Property**

Permittee, at all times, shall maintain the Permit Area in a clean and orderly manner to the satisfaction of the Director. Following any construction activities or other activities on the Permit Area, Permittee shall remove all debris and any excess dirt from the Permit Area and Improvements.

If any portion of the Permit Area, any City-owned or controlled property located adjacent to the Permit Area, including other publicly dedicated PROW or private property in the vicinity of the Permit Area, is damaged by any of the activities conducted by Permittee, Permittee shall immediately, at its sole cost, repair any and all such damage and restore the Permit Area or affected property to its previous condition to the satisfaction of the Director.

## **5.8 Excavation or Temporary Encroachment within the Permit Area**

Permittee acknowledges its maintenance responsibility following any excavation or temporary encroachment of any portion or portions of the Permit Area as described below.

**5.8.A Excavation by City or UCP Holders.** After providing public notice according to Article 2.4 of the Public Works Code, any City Agency or Public Utility may excavate within the PROW, which may include portions of the Permit Area. A “City Agency” shall include, but not be limited to, the SFPUC, SFMTA, and any City authorized contractor or agent, or their sub-contractor. “Public Utility” shall include any company or entity currently holding a valid Utility Conditions Permit (“UCP”) or a valid franchise with the City or the California Public Utilities Commission. Permittee acknowledges that it will provide and not obstruct access to any utilities and facilities owned and operated by any City Agency or a Public Utility at any time within the Permit Area for maintenance, repair, and/or replacement.

Emergency work. In the case of an emergency, a City Agency or Public Utility need not notify the Permittee of emergency work until after the emergency situation has been abated, at which point the Department will strive to cooperate with affected City departments to provide written notice to the Permittee concerning the emergency work.

In the performance of any excavation in the Permit Area by a City Agency or Public Utility, the Permittee will, upon notice from the applicable City Agency or Public Utility, coordinate with the City Agency or Public Utility to facilitate the excavation. The excavator shall implement commercially reasonable precautions to protect the Permit Area and any Improvements located within the Permit Area from injury or damage during the excavation or future work. Following excavation by a City Agency or a Public Utility, (a) in the case where there are non-standard materials the excavator shall only be obligated to backfill and patch the site to a safe condition; (b) in the case where there are only City Standard materials the excavator shall be obligated to backfill the site to a safe condition, and restore the site to City Standards. The City Agency or Public Utility shall not replace non-standard materials or Improvements that the City may remove or damage in connection with such excavation or site access. Permittee shall be responsible and bear all costs for the restoration of all disturbed Improvements to the condition as specified on the Improvement Plans.

In the case where the excavated portion of the Permit Area consists of only City Standard materials, the City Agency or Public Utility shall complete its restoration work within thirty (30) calendar days following the completion of the excavation or temporary encroachment; provided, however, to the extent that such restoration cannot be completed within such thirty (30) calendar day period due to weather or unforeseeable circumstances, then such period shall

be extended provided that the excavator has commenced and is diligently pursuing such restoration.

In the case where the excavated portion of the Permit Area consists partially or fully of non-standard materials, the Permittee shall restore or cause to be restored the Improvements in the excavated portions of the Permit Area to the condition specified on the design for the Improvements within thirty (30) calendar days; provided, however, to the extent that such restoration cannot be completed using commercially reasonable efforts within such thirty (30) calendar day period, then the Department shall extend such period provided that the Permittee has commenced and is diligently pursuing such restoration.

#### **5.8.B Excavation by Private Parties.**

Following any excavation of any portion or portions of the Permit Area by a private party (e.g., contractor, property owner, or resident), it shall be the responsibility of the private party and the Permittee to coordinate the restoration of the site and the private party shall bear all the cost of restoration; provided, however, that in all events the private party shall be required to restore the excavated portion or portions of the Permit Area to the condition specified on the design for Improvements within thirty (30) calendar days after completion of the excavation or temporary encroachment, provided, however, to the extent that such restoration cannot be completed using commercially reasonable efforts within such thirty (30) calendar day period, then the Department shall extend such period provided that the private party has commenced and is diligently pursuing such restoration. If the private party fails to perform such restoration, then the Permittee should notify the Department of such failure in writing and allow any Departmental corrective procedures to conclude prior to pursuing any and all claims against such private party related thereto should the permittee have such third-party rights. The City, through its separate permit process with that private party, shall require that private party to bear all the costs of restoration and cooperate with the Permittee on how the restoration is performed and how any costs that the Permittee assumes for work performed (time and materials) are reimbursed. The Permittee shall only seek or pursue compensation for work performed (time and materials) and shall not seek or request compensation for coordination or the inability to use the Permit Area for the duration of excavation or occupancy, provided that Permittee is provided with access to Permittee's property.

#### **5.8.C Temporary Encroachments for Entities Other Than Permittee.**

In the case of temporary encroachments, which may include the temporary occupancy of portions of the Permit Area or the temporary relocation of Improvements (elements or fixtures) from the Permit Area, Permittee shall work collaboratively with the entity that will be temporarily encroaching the Permit Area ("Temporary Encroacher") to coordinate the temporary removal and storage of the Improvements from the affected portion of the Permit Area, when necessary. It shall be the responsibility of the Temporary Encroacher to protect in-place any undisturbed portion of the Permit Area.

Where the Temporary Encroacher is a private party, the private party shall be responsible for any costs for removal, storage, and maintenance of the Improvements, and

restoration associated with restoration of the Permit Areas. The obligation to coordinate and restore under this section shall be a condition of the City permit issued to the Temporary Encroacher. If the Temporary Encroacher fails to coordinate with Permittee and compensate the Permittee or restore the Permit Area, then the Permittee should notify the Department of such failure in writing.

The Permittee may only seek or pursue compensation for costs incurred (time and materials) to temporarily relocate and replace Improvements, and shall not seek or request compensation for coordination or the inability to use the Permit Area for the duration of the Temporary Encroacher's occupancy.

Where the Temporary Encroacher is a City Agency or a Public Utility, Permittee shall be responsible for any costs for removal, storage, maintenance, and restoration associated with the Improvements and any associated areas within the Permit Area, and the City or Public Utility, as applicable, shall be responsible for restoration of any standard City features or improvements. The City or the Public Utility or its contractors shall not be responsible for Permittee's temporary removal and storage costs.

The Permittee shall be responsible for ensuring the Permit Area has been restored within thirty (30) calendar days following the completion of the temporary encroachment; provided, however, to the extent that such restoration cannot be completed using commercially reasonable efforts within such thirty (30) calendar day period, then such period shall be extended provided that the Permittee has commenced and is diligently pursuing such restoration.

#### **5.8.D Additional Time To Complete Site Restoration Where Future Work Is Anticipated**

Prior to the Permittee's undertaking of any restoration of the applicable portion of the Permit Area to the conditions specified in the Improvement Plans, the Permittee and the City shall confer as to whether any party (e.g., any City Agency, Public Utility, or private party) intends to perform any future work (e.g., any excavation or temporary encroachment) that would be likely to damage, disrupt, disturb or interfere with any restoration of the Permit Area. If such future work is anticipated within six (6) months following completion of any then proposed excavation or temporary encroachment, then the Permittee's deadline for restoring the site shall be automatically extended. The Permittee may submit to the Department a written request for an extension to the restoration deadline if future work is anticipated to commence more than six (6) months from the completion of the prior excavation and temporary encroachment. If the restoration deadline is extended as set forth above, then the Permittee shall be obligated to complete the restoration within the timeframes specified in this Agreement.

### **5.9 Permit Revocation; Termination; Modification of Agreement**

#### **5.9.A Permit Revocation or Termination**

Permittee acknowledges and agrees that the obligations of the Permittee, successor owner(s), or Permittee's successor(s) in interest to perform the Permitted Activities shall

continue for the term of the Permit. The City reserves the right to revoke the Permit under the procedures set forth in the Public Works Code Sections 786 et seq. and, if applicable, as specified in the Board of Supervisors' or the Director's approval of the Permit.

If the Permit is terminated by Permittee or revoked or terminated by City (each an "MEP Termination Event") with respect to a portion or portions of the Permit Area, Permittee shall convert the Improvements therein to a condition specified by City for a standard PROW or as the Director of Public Works deems appropriate under the circumstances at Permittee's sole cost (the "Right-of-Way Conversion ") by (i) applying for, and providing the materials necessary to obtain, a street improvement permit or other authorization from City for the performance of such conversion work; (ii) performing such conversion work pursuant to the terms and conditions of such street improvement permit or other City authorization; and (iii) warranting that the conversion work that meets the standards required by a Public Works street improvement permit for a duration not less than one (1) year from the date Public Works confirms that the work is complete, subject to any extension that the Director may grant in the Director's discretion. A termination or revocation of the Permit under the procedures set forth in Public Works Code Sections 786 et seq. shall result in an automatic termination of this Agreement as to the affected portion of the Permit Area, and all of Permittee's responsibilities and obligations hereunder shall terminate, unless otherwise provided for in this Agreement. The City may partially terminate or revoke the Permit as to those portions of the Permit Area subject to default and the City may elect to allow the Permit to remain effective as to all portions of the Permit Area that are not subject to default.

The obligation of Permittee, successor owner, or Permittee's successor in interest to remove the Improvements and restore the PROW to a condition satisfactory to Director of Public Works shall survive the revocation, expiration, or termination of this Permit. Upon completion of the Right-of-Way Conversion, and subject to Section 5.9B, Permittee shall have no further obligations under the Permit for the portion of the Permit area subject to the Right-of-Way Conversion and to the extent the Director has agreed to terminate the Permittee's obligations in regard to all or a portion of the Right-of-Way Conversion, except as to any applicable warranty.

The City and any and all City subdivisions or agencies shall be released from the responsibility to maintain the existence of the Improvements and shall not be required to preserve or maintain the Improvements in any capacity following the termination or revocation of the Permit unless the Department, in its discretion and in accordance with this Agreement, agrees to an alternative procedure.

### **5.9.B Modification or Termination of the Agreement**

(a) Following the recordation of a Notice of Annexation in the Official Records with respect to any specific Permit Area, this Agreement shall continue and remain in full force and effect at all times in perpetuity with respect to the applicable Permit Area unless the City elects to terminate Permittee's maintenance obligations pursuant to this Section 5.9B and provides written notice to the address provided in Section 2.7. Under such circumstances, this Agreement shall terminate with respect to the applicable Permit Area at the time specified in such written notice with exception to those terms as specified in this Agreement that apply to any remaining

Permit obligations. City shall record on any affected real property evidence of any such termination in the Official Records.

(b) At any time during the term of the Permit, Permittee may request to amend the scope of such Permitted Activities through a written amendment to this Agreement. The Director, in his or her sole discretion, may approve, approve with conditions, or deny the requested amendment. If the Director approves an amendment, both parties shall execute and record the approved amendment. Further, Permittee and Director may, but are not required to, execute a written modification of this Agreement to provide for the Department's maintenance of a portion or all of the "**Privately-Maintained Public Improvements**" as described in the Permit Area Documentation. In the event of such modification of this Agreement, the Department may require Permittee to pay the Department for the cost of maintaining specified Improvements as described in the Maintenance Plan (defined in Section 2.8). The Director's written modification shall, among other relevant terms, identify the specific portion of the Improvements that the Department shall maintain and the terms of Permittee's payments.

(c) In addition, Permittee and City may mutually elect to modify Permittee's obligation to perform the Right-of-Way Conversion described in Section 5.9.A including any modification necessary to address any Improvements that cannot be modified or replaced with a PROW improvement built according to the City's standard specifications. Any such modification may include, but not be limited to, Permittee's agreement to convert, at its sole cost, specified Improvements to a PROW built according to the City's standard specifications while leaving other specified Improvements in their as-is condition, with Permittee assuming a continuing obligation to pay for City's costs to maintain and replace such remaining Improvements. In addition, any such modification may address any applicable City requirements for maintenance security payment obligations and City's acquisition of specialized equipment needed to perform the maintenance work, however, no such specialized equipment shall be required for Improvements built to City standards. If City and the Permittee mutually agree to any modification to the Right-of-Way Conversion that results in Permittee assuming such a maintenance payment obligation, Permittee shall execute and acknowledge, and City shall have the right to record in the Official Records of San Francisco County, an amendment to this Agreement that details such payment obligation.

## **5.10 Green Maintenance Requirements**

In performing any Permitted Activities that require cleaning materials or tools, Permittee, to the extent commercially reasonable, shall use cleaning materials or tools selected from the Approved Alternatives List created by City under San Francisco Environmental Code, Chapter 2, or any other material or tool approved by the Director. Permittee shall properly dispose of such cleaning materials or tools.

## **6. ANNEXATION OF PROPERTY INTO SCOPE OF PERMIT; ASSIGNMENT OF MAINTENANCE OBLIGATIONS**

### **6.1 Annexation of Property and Improvements into Permit**

Pursuant to the Board of Supervisor's authorization in Resolution No. \_\_\_\_\_, the Permit Area may be expanded or new permit areas may be established according to this Section 6. Real property and associated Improvements (each area an "**Annexation Area**") may be annexed into the Permit or, as delegated by the Board of Supervisors, may constitute separate master encroachment permits or discrete street encroachment permits (each a "**Sub-Permit Area**"), as further described below, upon: i) approval by the Director according to the procedures set forth in this Section 6 and ii) the Department's issuance of a Notice of Completion or Certificate of Conformity (or equivalent determination establishing that improvements are eligible for acceptance or have been completed according to the approved Plans and Specifications) for Improvements completed within the proposed Annexation Area.

(a) **Annexation Application Approval Process.** For each Annexation Area or Sub-Permit Area Permittee proposes for annexation into the Permit ("**Annexation Application**"), Permittee shall provide to the Department the materials described below concurrent with City's approval of 100% Street Improvement Plans for the development phase in the Permit Area. To be eligible for annexation into the Permit, the Annexation Area or Sub-Permit Area (including street segments and/or encroachment areas) must have been generally shown in the approved Global Diagram initially approved with this Permit or described as a category of Improvement that is anticipated to be provided in future phases.

(1) Annexation Application. Permittee must submit a complete Encroachment Permit application requesting the Director's approval of the annexation of the Annexation Area into the Permit or approval of a master encroachment permit or street encroachment permit comprised of the Annexation Area as part of this Permit. The Annexation Application shall reference this Permit and include a plat illustrating the Permit Area and identifying the location of the Improvements to be annexed into the Permit or the Permit Area for which Permittee seeks a discrete master encroachment permit or street encroachment permit. The Annexation Application shall identify and describe any modifications to any Permit Area compared to the real property or Improvements shown in the approved Global Diagram. The Annexation Application shall identify the Permittee proposed to be responsible for the Annexation Area.

(2) Updated Global Diagram. Permittee must update the Global Diagram previously submitted to the Department to depict the Permit Area at the time of the submittal of the Annexation Application, including all administratively approved Annexation Areas and/or discrete master encroachment permits or street encroachment permits. Permittee must refine the Global Diagram, as needed, to include the type of Improvements and their approximate location within the Annexation Area. The updated Global Diagram shall also identify the Permittee for any previously approved Annexation Area.

(3) Updated Permit Area Documentation. Permittee shall submit updated or supplemental Permit Area Documentation showing all Improvements in the Annexation Area that is the subject of the Annexation Application ("**Precise Diagram**").

(4) Phasing Plan. Permittee shall submit a diagram that shows all improvements in the Annexation Area, and generally shows Improvements that are or will be located adjacent to the Permit Area.



(5) Updated Maintenance Plan (if applicable). Permittee shall submit to the Department a Maintenance Plan with each Annexation Application which shall contain a detailed description of means and methods to maintain the Improvements within the Permit Area that is the subject of the Annexation Application. If the Director approved any changes to the Maintenance Plan subsequent to the issuance of the Permit, Permittee shall include the updated Maintenance Matrix reflecting such change.

(6) Engineering and Improvement Plans and diagrams for the Permit Area.

(7) An estimate of annual maintenance cost for the Improvements associated with the Permit Area in the Annexation Application.

(8) Unless a full set of O&M Manuals was previously submitted and approved by the Department, Permittee may be required to submit O&M Manuals for the Improvements in the Annexation Area.

(9) Updated Maintenance Monitoring and Reporting Program (if applicable). If the Permittee proposes any changes to the Maintenance Monitoring and Reporting Program or if there are specific maintenance monitoring and reporting obligations exclusive to the Annexation Area, Permittee shall include the updated or specific Maintenance Monitoring and Reporting Program for Public Works to determine compliance with this Permit.

(10) If the Permittee is not the Fronting Property Owner of the proposed Annexation Area at the time the Annexation Application is submitted, Permittee may obtain, and provide to the Department, a written consent from the Fronting Property Owner indicating that (i) such Fronting Property Owner acknowledges and agrees to the annexation of the proposed Annexation Area into the Permit; (ii) such Fronting Property Owner acknowledges and agrees that Permittee will record this Permit against any affected Fronting Property (i.e. any Fronting Property on or adjacent to which an Improvement will be installed); and (iii) the Fronting Property Owner, to the extent of its rights in the Permit Area, will be subject to the terms of this Agreement. The consent shall also provide documentation demonstrating an agreement between the Fronting Property Owner and the Permittee for the maintenance of Improvements located within the applicable Proposed Annexation Area.

(11) A request for a separate master encroachment permit or discrete encroachment permit (a “**Sub-Permit**”) relating to a specific improvement or group of improvements not otherwise covered by this Agreement, and that is associated with a fronting property that is owned by a public entity, including but not limited to the [*San Francisco Housing Authority, the Office of Community and Investment an Infrastructure, and the Treasure Island Development Authority*] (“**Publicly Owned Lot**”) and Improvements that serve multiple fronting properties (“**Shared Infrastructure**”). In addition to the items described in Sections 6.1(a)(1) - (10), a request for a Sub-Permit shall include a Precise Diagram (as defined above) depicting the improvements and proposed Annexation Area and associated fronting properties to be included within the Sub-Permit, as applicable.

(b) **Review of Annexation Application.** The Department shall review the Annexation Application according to the procedures and requirements of Public Works Code Sections 786 et

seq., as provided herein. The Department shall provide the Permittee written notice indicating whether: (a) the Annexation Application is approved; (b) additional information is required to complete the application; and/or (c) in the Director's reasonable discretion, the Annexation Application proposes one or more entirely new or significantly modified encroachments (each a "New Encroachments") that were not included as part of the Board of Supervisors approval of the Permit. In the event an Annexation Application involves a New Encroachment, the Annexation Application shall be deemed an application for a new major encroachment permit requiring approval by the Board of Supervisors pursuant to Public Works Code Section 786(b). Encroachments consistent with the general categories of improvements described in Section 2.3, above, shall not be considered "significantly modified" if the location or design has changed, unless the location or design presents a public safety hazard.

(c) **Recordation of Notice of Annexation.** After the Director's approval of an Annexation Application and no later than City's acceptance of the infrastructure improvements for the applicable final map phase, the Permittee shall be required to record against any affected Fronting Property (i.e. any Fronting Property on or adjacent to which an Improvement will be installed) a "**Notice of Annexation**" that has been reviewed and approved by the Director. The Notice of Annexation shall describe the real property and/or Improvements annexed into the Permit and identify the Fronting Properties responsible for the completed Improvements in the Permit Area. The Notice of Annexation shall be recorded against each identified Fronting Property within the applicable phase. with the following documents: (1) Updated Global Diagram showing all the phases of work that have been annexed into the Permit, including the Permit Area; (2) a Precise Diagram; (3) a table identifying the party, responsible for maintaining each category of Improvement in the Permit Area (e.g., the Fronting Property, Community Association or Permittee; and (4) a copy of the fully-executed Agreement with updated attachments, including the most current, updated versions of the documents set forth in Section 4(a). Permittee shall record the Notice of Annexation with all required and updated documents, as described herein, against each Fronting Property for the Permit Area identified in the Notice of Annexation. Recordation of the Notice of Annexation shall not require the consent of any owner of property already subject to the Permit pursuant to a previously-recorded Notice of Annexation.

Upon recordation of the Notice of Annexation, the real property and Improvements identified therein shall become subject to the Permit, and the Permittee identified in the Notice of Annexation shall be subject to all terms and provisions set forth in this Agreement.

## 7. USE RESTRICTIONS

Permittee agrees that the following uses of the PROW by Permittee or any other person claiming by or through Permittee are inconsistent with the limited purpose of this Agreement and are strictly prohibited as provided below. The list of prohibited uses includes, but is not limited to, the following uses.

## **7.1 Proposed Alterations**

Other than the approved Improvements, Permittee shall not make, construct, or place any temporary or permanent alterations, installations, additions, or improvements on the PROW, structural or otherwise, nor alter any existing structures or improvements on the PROW (each, a "**Proposed Alteration**"), without the Director's prior written consent in each instance. The in-kind replacement or repair of existing Improvements shall not be deemed a Proposed Alteration.

Permittee may request approval of a Proposed Alteration. The Director shall have a period of thirty (30) days from receipt of request for approval of a Proposed Alteration to review and approve or deny such request for approval. Should the Director fail to respond to such request within said thirty (30) day period, Permittee's Proposed Alteration shall be deemed disapproved. In requesting the Director's approval of a Proposed Alteration, Permittee acknowledges that the Director's approval of such Proposed Alteration may be conditioned on Permittee's compliance with specific installation requirements and Permittee's performance of specific on-going maintenance thereof or other affected PROW. If Permittee does not agree with the Director's installation or maintenance requirements for any Proposed Alteration, Permittee shall not perform the Proposed Alteration. If Permittee agrees with the Director's installation or maintenance requirements for any Proposed Alteration, prior to Permittee's commencement of such Proposed Alteration, Permittee and the Director shall enter into a written amendment to this Agreement that modifies the Permitted Activities to include such requirements. Prior approval from the Director shall not be required for any repairs made pursuant to and in accordance with the Permitted Activities.

If Permittee performs any City-approved Proposed Alteration, Permittee shall comply with all of the applicable terms and conditions of this Agreement, including, but not limited to, any and all conditions of approval of the Proposed Alteration(s).

Permittee shall obtain all necessary permits and authorizations from the Department and other regulatory agencies prior to commencing work for the Proposed Alteration. The Director's decision regarding a Proposed Alteration shall be final and not appealable.

## **7.2 Dumping**

Permittee shall not dump or dispose of refuse or other unsightly materials on, in, under, or about the PROW.

## **7.3 Hazardous Material**

Permittee shall not cause, nor shall Permittee allow any of its agents to cause, any Hazardous Material (as defined below) to be brought upon, kept, used, stored, generated, or disposed of in, on, or about the PROW, or transported to or from the PROW, except in connection with (i) remediation of the Project site and (ii) construction of the Project in the normal course, and in all cases pursuant to applicable law, including all applicable permits. Permittee shall immediately notify City if Permittee learns or has reason to believe that a release of Hazardous Material has occurred in, on, or about the PROW. In the event Permittee or its

agents cause a release of Hazardous Material in, on, or about the PROW, Permittee shall, without cost to City and in accordance with all laws and regulations, (i) comply with all laws requiring notice of such releases or threatened releases to governmental agencies, and shall take all action necessary to mitigate the release or minimize the spread of contamination, and (ii) return the PROW to a condition which complies with applicable law. In connection therewith, Permittee shall afford City a full opportunity to participate in any discussion with governmental agencies regarding any settlement agreement, cleanup or abatement agreement, consent decree or other compromise proceeding involving Hazardous Material. For purposes hereof, "Hazardous Material" means material that, because of its quantity, concentration, or physical or chemical characteristics, is at any time now or hereafter deemed by any federal, state, or local governmental authority to pose a present or potential hazard to public health, welfare, or the environment. Hazardous Material includes, without limitation, any material or substance defined as a "hazardous substance, pollutant or contaminant" pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. Sections 9601 et seq., or pursuant to Section 25316 of the California Health & Safety Code; a "hazardous waste" listed pursuant to Section 25140 of the California Health & Safety Code; any asbestos and asbestos containing materials whether or not such materials are part of the PROW or are naturally occurring substances in the PROW, and any petroleum, including, without limitation, crude oil or any fraction thereof, natural gas or natural gas liquids. The term "release" or "threatened release" when used with respect to Hazardous Material shall include any actual or imminent spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing in, on, under, or about the PROW.

Notwithstanding anything herein to the contrary, if the Director determines that neither Permittee nor its agents caused the release or threatened release of the Hazardous Material, Permittee shall have no liability whatsoever (including, without limitation, the costs of any investigation, any required or necessary repair, replacement, remediation, cleanup or detoxification, or preparation and implementation of any closure, monitoring, or other required plans) with respect to any release or threatened release of any Hazardous Material on, in, under or about the PROW. If the Director finds that neither Permittee nor its agents were the source of and did not cause the release of the Hazardous Material, Permittee shall not be listed or identified as the generator or responsible party of any waste required to be removed from the PROW, and will not sign any manifests or similar environmental documentation, with respect to any Environmental Condition (as hereinafter defined). "Environmental Condition" shall mean any adverse condition relating to the release or discharge of any Hazardous Materials on, in, under, or about the PROW by any party other than Permittee or its agents.

#### **7.4 Nuisances**

Permittee shall not conduct any activities on or about the PROW that constitute waste, nuisance, or unreasonable annoyance (including, without limitation, emission of objectionable odors, noises, or lights) to City, to the owners or occupants of neighboring property, or to the public. The parties hereby acknowledge that customary use of landscaping and similar equipment (such as lawn mowers, clippers, hedge trimmers, leaf blowers, etc.) that would typically be used to perform the Permitted Activities shall not be considered a nuisance under this Section 7.4 if such equipment is used in compliance with all applicable laws.

## **7.5 Damage**

Permittee shall use due care at all times to avoid causing damage to any of the PROW or any of City's property, fixtures, or encroachments thereon. If any of the Permitted Activities or Permittee's other activities at the PROW causes such damage, Permittee shall notify City, and, if directed by City, restore such damaged property or PROW to the condition it was in prior to the commencement of such Permittee activity to the Director's satisfaction; or, if the City chooses to restore the damaged property, Permittee shall reimburse City for its costs of restoration.

## **8. INSURANCE**

**8.1** As described below, Permittee (or the applicable Phase Infrastructure Developer) shall procure and keep insurance in effect at all times during the term of this Agreement, at Permittee's own expense, and cause its contractors and subcontractors to maintain insurance at all times, during Permittee's or its contractor's performance of any of the Permitted Activities on the PROW. If Permittee fails to maintain the insurance in active status, such failure shall be a Permit default subject to the Department's enforcement remedies. The insurance policy shall be maintained and updated annually to comply with the Department's applicable requirements. The following Sections represent the minimum insurance standard as of the Effective Date of this Permit.

**8.1.A** An insurance policy or insurance policies issued by insurers with ratings comparable to A-VIII, or higher that are authorized to do business in the State of California, and that are satisfactory to the City. Approval of the insurance by City shall not relieve or decrease Permittee's liability hereunder;

**8.1.B** Commercial General Liability Insurance written on an Insurance Services Office (ISO) Coverage form CG 00 01 or another form providing equivalent coverage with limits not less than One Million Dollars (\$1,000,000) each occurrence and Two Million Dollars (\$2,000,000) in the aggregate for bodily injury and property damage, including coverages for contractual liability, personal injury, products and completed operations, independent permittees, and broad form property damage;

**8.1.C** Commercial Automobile Liability Insurance with limits not less than One Million Dollars (\$1,000,000) each occurrence, combined single limit for bodily injury and property damage, including coverages for owned, non-owned, and hired automobiles, as applicable for any vehicles brought onto PROW; and

**8.1.D** Workers' Compensation Insurance, in statutory amounts, with Employer's Liability Coverage with limits of not less than One Million Dollars (\$1,000,000) each accident, injury, or illness.

**8.2** All liability policies required hereunder shall provide for the following: (i) name as additional insured the City and County of San Francisco, its officers, agents, and employees, jointly and severally; (ii) specify that such policies are primary insurance to any other insurance

available to the additional insureds, with respect to any claims arising out of this Agreement; and (iii) stipulate that no other insurance policy of the City and County of San Francisco will be called on to contribute to a loss covered hereunder.

**8.3** Limits may be provided through a combination of primary and excess insurance policies. Such policies shall also provide for severability of interests and that an act or omission of one of the named insureds which would void or otherwise reduce coverage shall not reduce or void the coverage as to any insured, and shall afford coverage for all claims based on acts, omissions, injury, or damage which occurred or arose (or the onset of which occurred or arose) in whole or in part during the policy period.

**8.4** All insurance policies shall be endorsed to provide for thirty (30) days' prior written notice of cancellation for any reason, non-renewal or material reduction in coverage, or depletion of insurance limits, except for ten (10) days' notice for cancellation due to non-payment of premium, to both Permittee and City. Permittee shall provide a copy of any notice of intent to cancel or materially reduce, or cancellation, material reduction, or depletion of, its required coverage to Department within one business day of Permittee's receipt. Permittee also shall take prompt action to prevent cancellation, material reduction, or depletion of coverage, reinstate or replenish the cancelled, reduced or depleted coverage, or obtain the full coverage required by this Section from a different insurer meeting the qualifications of this Section. Notices shall be sent to the Department of Public Works, Bureau of Street Use and Mapping, 1155 Market Street, 3rd Floor, San Francisco, CA, 94103, or any future address for the Bureau of Street Use and Mapping. The permission granted by the Permit shall be suspended upon the termination of such insurance. Upon such suspension, the Department and Permittee shall meet and confer to determine the most appropriate way to address the Permit. If the Department and Permittee cannot resolve the matter, the Permittee shall restore the PROW to a condition acceptable to the Department without expense to the Department. As used in this Section, "Personal Injuries" shall include wrongful death.

**8.5** Prior to the Effective Date, Permittee shall deliver to the Department certificates of insurance and additional insured policy endorsements from insurers in a form reasonably satisfactory to Department, evidencing the coverages required hereunder. Permittee shall furnish complete copies of the policies upon written request from City's Risk Manager. In the event Permittee shall fail to procure such insurance, or to deliver such certificates or policies (following written request), Department shall provide notice to Permittee of such failure and if Permittee has not procured such insurance or delivered such certificates within five (5) days following such notice, City may initiate proceedings to revoke the permit and require restoration of the PROW to a condition that the Director deems appropriate.

**8.6** Should any of the required insurance be provided under a form of coverage that includes a general annual aggregate limit or provides that claims investigation or legal defense costs be included in such general annual aggregate limit, such general aggregate limit shall double the occurrence or claims limits specified above.

**8.7** Should any of the required insurance be provided under a claims-made form, Permittee shall maintain such coverage continuously throughout the term of this Agreement and,

without lapse, for a period of three (3) years beyond the expiration of this Agreement, to the effect that, should any occurrences during the term of this Agreement give rise to claims made after expiration of this Agreement, such claims shall be covered by such claims-made policies.

**8.8** Upon City's request, Permittee and City shall periodically review the limits and types of insurance carried pursuant to this Section. If the general commercial practice in the City and County of San Francisco is to carry liability insurance in an amount or coverage materially greater than the amount or coverage then being carried by Permittee for risks comparable to those associated with the PROW, then City in its sole discretion may require Permittee to increase the amounts or coverage carried by Permittee hereunder to conform to such general commercial practice.

**8.9** Permittee's compliance with the provisions of this Section shall in no way relieve or decrease Permittee's indemnification obligations under this Agreement or any of Permittee's other obligations hereunder. Permittee shall be responsible, at its expense, for separately insuring Permittee's personal property.

## **9. VIOLATIONS; CITY ENFORCEMENT OF PERMIT AND AGREEMENT**

Permittee acknowledges that the Department may pursue the remedies described in this Section in order to address a default by Permittee of any obligation under this Permit with respect to any Permit Area for which Permittee is responsible pursuant to the relevant Notice of Assignment, if applicable. In addition to the procedures below and as set forth in Section 5.4B, if Permittee fails to promptly respond to an unsafe or hazardous condition or to restore the site within the time the Department specifies, the Department may perform the temporary repair or restoration in order to protect the public health, safety, and welfare. Permittee shall reimburse the Department for any such temporary repair or restoration.

(a) **Correction Notice (CN).** The Department may issue a written notice informing Permittee that there is an unsafe, hazardous, damaged, or blighted condition within the Permit Area, or stating that the Permittee has otherwise failed to maintain the Permit Area as required by this Permit ("**Correction Notice**"). The Correction Notice shall identify the maintenance obligation that is the subject of the notice with reasonable particularity and specify the time for correction, which shall be no less than thirty (30) days; provided, however, to the extent that such correction cannot be completed using reasonable efforts within the initially specified timeframe, then such period shall be extended provided that the Permittee has commenced and is diligently pursuing such correction. In the event of an emergency or other situation presenting a threat to public health, safety, or welfare, the Director may require correction in less than thirty (30) days.

(b) **Notice of Violation (NOV).**

(i) The Department may issue a written notice of violation to the Permittee for failure to maintain the Permit Area and creating an unsafe, hazardous, damaged, or blighted condition within the Permit Area, failure to comply with the terms of this agreement, or failure to respond to the Correction Notice by abating the identified condition(s) within the time specified therein. The NOV shall identify each violation and any fines imposed per

applicable code(s) or Agreement sections and specify the timeframe in which to cure the violation and pay the referenced fines (“**Notice of Violation**”), which shall be within thirty (30) days if not specified.

(ii) Permittee shall have ten (10) days to submit to the Department, addressed to the Director, via BSM Inspection Manager at 1155 Market St, 3rd Floor, San Francisco, CA 94103, or future Bureau address, a written appeal to the NOV or a written request for administrative review of specific items in the NOV. If Permittee submits said appeal or request for review, the Director shall hold a public hearing on the dispute in front of an administrative hearing officer. The Director shall then issue a final written decision on his or her determination to approve, conditionally approve, modify, or deny the appeal based on the recommendation of the hearing officer and the information presented at the time of the hearing.

(c) **Uncured Default.** If the violation described in the Notice of Violation is not cured within ten (10) days after the latter of (1) the expiration of the Notice of Violation appeal period or (2) the written decision by the Director affirming the following the hearing to uphold the Notice of Violation or sections thereof, said violation shall be deemed an “**Uncured Default.**” In the event of an Uncured Default, the Director may undertake either or both of the following:

(i) Cure the Uncured Default and issue a written demand to Permittee to pay the City’s actual reasonable costs to remedy said default in addition to any fines or penalties described in the Notice of Violation within ten (10) days (each such notice shall be referred to as a “**Payment Demand**”).

(ii) Notify Permittee that it must submit a Security Deposit (as defined in Section 9.2) for the maintenance obligation that is the subject of the Notice of Violation. Alternatively, the Director may initiate the procedures under Public Works Code Section 786 to revoke the Permit with respect to the particular portion of the Permit Area that is the subject of the Notice of Violation and require a Right-of-Way Conversion (as defined in Section 5.9.A) with respect to that area, in the Director’s discretion.

(d) **Security Deposit Required for Uncured Default**

If there is an Uncured Default as defined in Section 9.1(c) of this Agreement, then within thirty (30) business days of the Director's request, Permittee shall deposit with the Department via the Permit Manager of the Bureau of Street Use and Mapping (or successor Bureau) the sum of no less than twice the annual cost of maintenance as set forth in the Maintenance Plan on file with the Director (the “**Security Deposit**”) with respect to the maintenance obligation that is the subject of the Uncured Default, to secure Permittee's faithful performance of all terms and conditions of this Agreement, including, without limitation, its obligation to maintain the PROW in the condition that the Director deems acceptable. When Permittee delivers the Security Deposit to the Department pursuant to the foregoing sentence, the Department shall have the right to require Permittee to proportionately increase the amount of the Security Deposit by an amount that reflects the increase in the Consumer Price Index Urban Wage Earners and Clerical Workers (base years 1982-1984 = 100) for San Francisco-Oakland-San Jose area published by the United States Department of Labor, Bureau of Labor Statistics (“**Index**”) published most



immediately preceding the date the amount of the Security Deposit was established and the Index published most immediately preceding the date the Department delivers written notice of the increase in the Security Deposit. The amount of the Security Deposit shall not limit Permittee's obligations under this Agreement.

Permittee agrees that the Department may, but shall not be required to, apply the Security Deposit in whole or in part to remedy any damage to the PROW caused by Permittee, its agents, or the general public using the Permit Area to the extent that the Director of Public Works required Permittee to perform such remediation under this Agreement and Permittee failed to do so, or Permittee failed to perform any other terms, covenants, or conditions contained herein (including, but not limited to, the payment of any sum due to the Department hereunder either before or after a default). Notwithstanding the preceding, the Department does not waive any of the Department other rights and remedies hereunder or at law or in equity against the Permittee should the Department use all or a portion of the Security Deposit. Upon termination of the Permitted Activities after an MEP Termination Event as described herein, the Department shall return any unapplied portion of the Security Deposit to Permittee, less any administrative processing cost.

Should the Department use any portion of the Security Deposit to cure any Uncured Default, Permittee shall replenish the Security Deposit to the original amount within ten (10) days of the date of a written demand from the Department for reimbursement of the Security Deposit. Subject to the following sentence, the Permittee's obligation to replenish the Security Deposit shall continue for two (2) years from the date of the initial payment of the Security Deposit unless the Director, in his or her sole discretion, agrees to a shorter period; provided, however, that if the Director does not issue a new Notice of Violation related to the issues triggering the MEP Termination Event for a period of one year from the date of the initial payment of the Security Deposit, then, upon Permittee's written request, the Director shall submit a check request to City's Controller's Office to have any remaining Security Deposit, less any administrative processing cost, delivered to Permittee. The Department's obligations with respect to the Security Deposit are solely that of debtor and not trustee. The Department shall not be required to keep the Security Deposit separate from its general funds, and Permittee shall not be entitled to interest on the Security Deposit. The amount of the Security Deposit shall in no way limit the liabilities of Permittee under any provision of the Permit or this Agreement. Upon termination of the Permitted Activities after an MEP Termination Event, the Department shall return any unapplied portion of the Security Deposit to Permittee, less any administrative processing cost.

(e) **Demand for Uncured Default Costs.** Where the Permittee, or the owner of the Fronting Property associated with the Permit Area that is the subject of the Notice of Violation, has failed to timely remit the funds described in a Payment Demand, the Security Deposit, or to pay the City's costs associated with the City's performance of a Right-of-Way Conversion (collectively, "**Uncured Default Costs**"), the Director may initiate lien proceedings against the Fronting Property Owner for the amount of the Uncured Default Costs pursuant to Public Works Code Sections 706.4 through 706.7, Public Works Code Section 706.9, Administrative Code Section 80.8(d), or any other remedy in equity or at law.

## **10.1 Maintenance Fund**

Improvements on Publicly Owned Lots and Shared Infrastructure. For Improvements on Publicly Owned Lots and Shared Infrastructure (described in Section 6.1(a)), Permittee agrees to establish, upon Recordation of the Notice of Annexation for such Improvements, a “**Maintenance Fund**” in an amount of no less than twice the annual cost of maintenance as set forth in the Maintenance Plan for such Improvements. The Maintenance Fund shall be maintained in an interest bearing account, and shall not be used for ongoing maintenance obligations. If Permittee fails to respond to a Correction Notice or Notice of Violation described above, the City may draw down upon the Maintenance Fund in the same manner that it would use a Security Deposit for an Uncured Default associated with Improvements on Privately Owned Lots.

## **10.2 Security Deposit for Restoration Costs Associated with Improvements Having Construction Costs of \$1 Million Or Greater.**

Pursuant to Public Works Code section 786.8(h), for encroachments with a construction cost of \$1 million or greater, Permittee must provide security in the form of a bond, other form of security acceptable to the Department, or payment into the Maintenance Endowment Fund in an amount required to restore the public right-of-way to a condition satisfactory to the Public Works Director based on a cost that the City Engineer determines. Permittee shall provide evidence to the Department, to the Director’s satisfaction, that the bond or other security is available on an annual basis.

## **11. COMPLIANCE WITH LAWS**

Permittee shall, at its expense, conduct and cause to be conducted all activities under its control on the PROW allowed hereunder in a safe and prudent manner and in compliance with all laws, regulations, codes, ordinances, and orders of any governmental or other regulatory entity (including, without limitation, the Americans with Disabilities Act and any other disability access laws), whether presently in effect or subsequently adopted and whether or not in the contemplation of the parties. Permittee shall, at its sole expense, procure and maintain in force at all times during its use of the PROW any and all business and other licenses or approvals necessary to conduct the Permitted Activities. Nothing herein shall limit in any way Permittee's obligation to obtain any required regulatory approvals from City departments, boards, or commissions or other governmental regulatory authorities or limit in any way City's exercise of its police powers. At the Director's written request, Permittee shall deliver written evidence of any such regulatory approvals Permittee is required to obtain for any of the Permitted Activities.

## **12. SIGNS**

Permittee shall not place, erect, or maintain any sign, advertisement, banner, or similar object on or about the PROW without the Director's written prior consent, which the Director may give or withhold in its sole discretion; provided, however, that Permittee may install any temporary sign that is reasonably necessary to protect public health or safety during the

performance of a Permitted Activity. This Section shall not be applicable to any signs approved by the City under the master signage plan or master streetscape plan for the Project.

### **13. UTILITIES**

The Permittee shall be responsible for locating and protecting in place all above and below grade utilities from damage, when Permittee, or its authorized agent, elects to perform any work in, on, or adjacent to the Permit Area. If necessary prior to or during the Permittee's execution of any work, including Permitted Activities, a utility requires temporary or permanent relocation, the Permittee shall obtain written approval from the utility owner and shall arrange and pay for all costs for relocation. If Permittee damages any utility during execution of its work, the Permittee shall notify the utility owner and arrange and pay for all costs for repair. Permittee shall be solely responsible for arranging and paying directly to the City or utility company for any utilities or services necessary for its activities hereunder.

Permittee shall be responsible for installing, maintaining, and paying for utility services necessary to support any Improvements, such as light fixtures, water fountains, storm drains, etc. in the Permit Area that are included in the Permit.

### **14. NO COSTS TO CITY; NO LIENS**

Permittee shall bear all costs or expenses of any kind or nature in connection with its use of the PROW pursuant to this Agreement, and shall keep the PROW free and clear of any liens or claims of lien arising out of or in any way connected with its (and not others') use of the PROW pursuant to this Agreement.

### **15. "AS IS, WHERE IS, WITH ALL FAULTS" CONDITION OF PROW; DISABILITY ACCESS; DISCLAIMER OF REPRESENTATIONS**

Permittee acknowledges and agrees that Permittee shall install the Improvements contemplated in the permit application for the Improvements and has full knowledge of the condition of the Improvements and the physical condition of the PROW. Permittee agrees to use the PROW in its "AS IS, WHERE IS, WITH ALL FAULTS" condition, without representation or warranty of any kind by City, its officers, agents, or employees, including, without limitation, the suitability, safety, or duration of availability of the PROW or any facilities on the PROW for Permittee's performance of the Permitted Activities. Without limiting the foregoing, this Agreement is made subject to all applicable laws, rules, and ordinances governing the use of the PROW, and to any and all covenants, conditions, restrictions, encroachments, occupancy, permits, and other matters affecting the PROW, whether foreseen or unforeseen, and whether such matters are of record or would be disclosed by an accurate inspection or survey. It is Permittee's sole obligation to conduct an independent investigation of the PROW and all matters relating to its use of the PROW hereunder, including, without limitation, the suitability of the PROW for such uses. Permittee, at its own expense, shall obtain such permission or other approvals from any third parties with existing rights as may be necessary for Permittee to make use of the PROW in the manner contemplated hereby.

Under California Civil Code Section 1938, to the extent applicable to this Agreement, Permittee is hereby advised that the PROW has not undergone inspection by a Certified Access Specialist ("CAS") to determine whether it meets all applicable construction-related accessibility requirements.

## **16. ASSIGNMENT OF MAINTENANCE OBLIGATIONS; ASSIGNMENT OF AGREEMENT; PERMIT BINDING UPON SUCCESSORS AND ASSIGNEES; NOTICE OF ASSIGNMENT**

### **16.1 Assignment of Maintenance Obligations; Notice of Assignment**

Permittee may assign the maintenance obligations with respect to the Permit Area for a given Fronting Property to a homeowners' association (for residential or mixed-use properties) or a commercial owners' master association (for commercial properties) or a master association with jurisdiction over the Fronting Property by submitting a "**Notice of Assignment of Maintenance Obligations**" to the Department. Assignments of this Permit to an entity other than homeowners' association or commercial owner's association shall be subject to Section 16.2 of this Agreement.

The **Notice of Assignment of Maintenance Obligations** shall include:

- (1) identification of the assignee and an acknowledgment of acceptance of the assignment;
- (2) the contact person for the assignee;
- (3) a description of the Permit Area, by reference to the previously-recorded Notice of Annexation, that is being assigned;
- (4) a statement of whether Public Works Code § 706 obligations are assigned;
- (5) a copy of recorded CC&Rs evidencing (A) the homeowners' association's or commercial owners association's obligation to accept maintenance responsibility for the subject Improvements consistent with this Agreement upon assignment; and (B) City's right to enforce maintenance obligations as a third-party beneficiary under such CC&Rs and the San Francisco Municipal Code; and
- (6) a statement of whether Community Facilities District or other Special Tax District funds will be used to satisfy maintenance obligations. Upon submittal of a Notice of Assignment in substantial conformance with Exhibit \_ attached hereto to Public Works and Public Works' written determination that the proposed assignee satisfies the insurance and, if applicable, security requirements set forth in Section 9 of this Agreement, the Permit rights and obligations shall be assigned to the assignee with respect to the Permit Area described therein. Following such assignment to a homeowners association or commercial owners association, such association shall be deemed to be the Permittee for purposes of this Agreement with respect to the applicable Permit Area, and, except as otherwise specifically set forth herein, the obligations of the assigning Permittee shall be deemed released and a

Fronting Property Owner shall have no obligations under this Agreement except for Sections 5.5 and 9.1(e), to which a Fronting Property Owner shall continue to be subject.

## **15.2 ASSIGNMENT OF AGREEMENT**

This Agreement shall be the obligation of Permittee and each future fee owner of all or any of the Permittee's Property, and may not be assigned, conveyed, or otherwise transferred to any other party, including a homeowners' association or commercial owners' association established for the benefit of the Permittee, unless approved in writing by the Director. This Agreement shall bind Permittee, its successors and assignees with each successor or assignee being deemed to have assumed the obligations under this Agreement at the time of such acquisition of fee ownership or assignment. It is intended that this Agreement binds the Permittee and all future fee owners of all or any of the Fronting Property only during their respective successive periods of ownership; and therefore, the rights and obligations of any Permittee or its respective successors and assignees under this Agreement shall terminate upon transfer, expiration, or termination of its interest in the Fronting Property, except that its liability for any violations of the requirements or restrictions of this Agreement, or any acts or omissions during such ownership, shall survive any transfer, expiration, or termination of its interest in the Fronting Property.

Subject to the approval of the Director, which shall not unreasonably be withheld, Permittee may assign this permit to a homeowners' association (for residential or mixed-use properties), a commercial owners' association (for commercial properties) or a master association with jurisdiction over the Fronting Property by submitting a "**Notice of Assignment**" to the Department.

The **Notice of Assignment** shall include:

- (1) Identification of the Assignee and written acknowledgment of the Assignee's acceptance of the responsibilities under this permit;
- (2) The contact person for the Assignee and the contact information as required under Section 2.7;
- (3) If the Assignee is a homeowners' association or commercial owners' association, a copy of recorded CC&Rs, if there are such CC&Rs evidencing (a) the homeowners' association's or commercial owners' association's obligation to accept maintenance responsibility for the subject Improvements consistent with this Agreement upon assignment; and (b) City's right to enforce maintenance obligations as a third-party beneficiary under such CC&Rs and the San Francisco Municipal Code; and
- (4) A statement identifying whether a Community Facilities District or other Special Tax Entity will expend monetary or staff resources on the Permit area for maintenance or other activities;
- (5) A copy of the Assignee's general liability insurance that satisfies Section 7 and payment of the Maintenance Fund or Security under Section 10, if applicable;

(6) For Improvements with a construction cost of \$1 million or greater (on an individual basis), Assignee must provide security in the form of a bond, other form of security acceptable to the Department, or payment into the Maintenance Endowment Fund in an amount required to restore the public right-of-way to a condition satisfactory to the Public Works Director based on a cost that the City Engineer determines; and

(7) Any other considerations necessary to promote the health, safety, welfare, including demonstration to the Director's satisfaction that the Assignee has the monetary and/or staff resources are available and committed to perform the maintenance obligation.

Permittee shall submit to Public Works a Notice of Assignment in a form acceptable to Public Works. Prior to approval from the Director, the Department shall provide a written determination that the proposed assignee satisfies Section 7 (Insurance) and Section 10 (Maintenance Fund; Security), if applicable. Following such assignment, the obligations of the assigning Permittee shall be deemed released and the assigning Permittee shall have no obligations under this Agreement.

## **16. TRANSFER AND ACCEPTANCE PROCEDURES**

This Permit and the accompanying benefits and obligations are automatically transferred to any successor property owner(s). If the Permittee is selling the property, the successor owner(s) shall submit contact information to the Department immediately upon closing on the property sale along with an acknowledgement that the successor owner(s) shall accept and assume all Permit responsibilities. The Department may require that such a transfer be evidenced by a new written Agreement with the Director and require evidence of the requisite insurance to be submitted within a specified period of time.

## **17. POSSESSORY INTEREST TAXES**

Permittee recognizes and understands that this Agreement may create a possessory interest subject to property taxation with respect to privately-owned or occupied property in the PROW, and that Permittee may be subject to the payment of property taxes levied on such interest under applicable law. Permittee agrees to pay taxes of any kind, including any possessory interest tax, if any, that may be lawfully assessed on Permittee's interest under this Agreement or use of the PROW pursuant hereto and to pay any other taxes, excises, licenses, permit charges, or assessments based on Permittee's usage of the PROW that may be imposed upon Permittee by applicable law (collectively, a "Possessory Interest Tax"). Permittee shall pay all of such charges when they become due and payable and before delinquency. The parties hereto hereby acknowledge that the PROW will be a public open space during the term of this Agreement and Permittee's use of the PROW pursuant to this Agreement is intended to be non-exclusive and non-possessory.

## **18. PESTICIDE PROHIBITION**

Permittee shall comply with the provisions of Section 308 of Chapter 3 of the San Francisco Environment Code (the "Pesticide Ordinance") which (a) prohibit the use of certain

pesticides on PROW, (b) require the posting of certain notices and the maintenance of certain records regarding pesticide usage and (c) require Permittee to submit to the Director an integrated pest management ("IPM") plan that (i) lists, to the extent reasonably possible, the types and estimated quantities of pesticides that Permittee may need to apply to the PROW during the term of this Agreement, (ii) describes the steps Permittee will take to meet the City's IPM Policy described in Section 300 of the Pesticide Ordinance, and (iii) identifies, by name, title, address and telephone number, an individual to act as the Permittee's primary IPM contact person with the City. In addition, Permittee shall comply with the requirements of Sections 303(a) and 303(b) of the Pesticide Ordinance. Nothing herein shall prevent Permittee, through the Director, from seeking a determination from the Commission on the Environment that it is exempt from complying with certain portions of the Pesticide Ordinance as provided in Section 303 thereof.

## **19. PROHIBITION OF TOBACCO SALES AND ADVERTISING**

Permittee acknowledges and agrees that no sale or advertising of cigarettes or tobacco products is allowed on the PROW. This advertising prohibition includes the placement of the name of a company producing, selling or distributing cigarettes or tobacco products or the name of any cigarette or tobacco product in any promotion of any event or product. This advertising prohibition does not apply to any advertisement sponsored by a state, local, nonprofit, or other entity designed to (a) communicate the health hazards of cigarettes and tobacco products, or (b) encourage people not to smoke or to stop smoking.

## **20. PROHIBITION OF ALCOHOLIC BEVERAGE ADVERTISING**

Permittee acknowledges and agrees that no advertising of alcoholic beverages is allowed on the PROW. For purposes of this Section, "alcoholic beverage" shall be defined as set forth in California Business and Professions Code Section 23004, and shall not include cleaning solutions, medical supplies, and other products and substances not intended for drinking. This advertising prohibition includes the placement of the name of a company producing, selling, or distributing alcoholic beverages or the name of any alcoholic beverage in any promotion of any event or product. This advertising prohibition does not apply to any advertisement sponsored by a state, local, nonprofit, or other entity designed to (a) communicate the health hazards of alcoholic beverages, (b) encourage people not to drink alcohol or to stop drinking alcohol, or (c) provide or publicize drug or alcohol treatment or rehabilitation services.

## **21. CONFLICTS OF INTEREST**

Through its execution of this Agreement, Permittee acknowledges that it is familiar with the provisions of Section 15.103 of the San Francisco Charter, Article III, Chapter 2 of City's Campaign and Governmental Conduct Code, and Sections 87100 et seq. and Sections 1090 et seq. of the Government Code of the State of California, and certifies that it does not know of any facts which would constitute a violation of said provisions, and agrees that if Permittee becomes aware of any such fact during the term of this Agreement, Permittee shall immediately notify the City.

## **22. FOOD SERVICE WASTE REDUCTION**

If there is a City permit or authorization for the Permit Area that will allow food service, Permittee agrees to comply fully with and be bound by all of the provisions of the Food Service Waste Reduction Ordinance, as set forth in the San Francisco Environment Code, Chapter 16, including the remedies provided therein, and implementing guidelines and rules. The provisions of Chapter 16 are incorporated herein by reference and made a part of this Agreement as though fully set forth herein and the Permittee will be treated as a lessee for purposes of compliance with Chapter 16. This provision is a material term of this Agreement. By entering into this Agreement, Permittee agrees that if it breaches this provision, City will suffer actual damages that will be impractical or extremely difficult to determine. Without limiting City's other rights and remedies, Permittee agrees that the sum of One Hundred Dollars (\$100.00) liquidated damages for the first breach, Two Hundred Dollars (\$200.00) liquidated damages for the second breach in the same year, and Five Hundred Dollars (\$500.00) liquidated damages for subsequent breaches in the same year is a reasonable estimate of the damage that City will incur based on the violation, established in light of the circumstances existing at the time this Agreement was made. Such amounts shall not be considered a penalty, but rather as mutually agreed upon monetary damages sustained by City because of Permittee's failure to comply with this provision.

## **23. GENERAL PROVISIONS**

Unless this Agreement provides otherwise: (a) This Agreement may be amended or modified only in writing and signed by both the Director and Permittee; provided that the Director shall have the right to terminate or revoke the Permit in accordance with this Agreement. (b) No waiver by any party of any of the provisions of this Agreement shall be effective unless in writing and signed by an officer or other authorized representative, and only to the extent expressly provided in such written waiver. (c) All approvals and determinations of City requested, required, or permitted hereunder may be made in the sole and absolute discretion of the Director or other authorized City official. (d) This Agreement (including its Attachments and associated documents hereto), the Permit, the Board of Supervisors legislation approving the Permit, and any authorization to proceed, discussions, understandings, and agreements are merged herein. (e) The section and other headings of this Agreement are for convenience of reference only and shall be disregarded in the interpretation of this Agreement. Director shall have the sole discretion to interpret and make decisions regarding any and all discrepancies, conflicting statements, and omissions found in the Permit, Agreement, the Agreement's Attachments and associated documents, and Improvement Plans, if applicable. (f) Time is of the essence. (g) This Agreement shall be governed by California law and the City's Charter. (h) If either party commences an action against the other or a dispute arises under this Agreement, the prevailing party shall be entitled to recover from the other reasonable attorneys' fees and costs. For purposes hereof, reasonable attorneys' fees of City shall be based on the fees regularly charged by private attorneys in San Francisco with comparable experience, notwithstanding the City's use of its own attorneys. (i) If Permittee consists of more than one person then the obligations of each person shall be joint and several. (j) This Agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, representatives, successors, and assigns. (k) City is the sole beneficiary of Permittee's obligations under this Agreement. Nothing contained herein shall be deemed to be a gift or dedication to the general public or for



any public purposes whatsoever, nor shall it give rights to the parties expressly set forth above. Without limiting the foregoing, nothing herein creates a private right of action by any person or entity other than the City. (l) This Agreement does not create a partnership or joint venture between the City and Permittee as to any activity conducted by Permittee in its performance of its obligations under this Agreement. Permittee shall not be deemed a state actor with respect to any activity conducted by Permittee on, in, around, or under the Improvements pursuant to this Agreement.

## **24. INDEMNIFICATION**

Pursuant to and except as otherwise limited by the DA, Permittee, on behalf of itself and its successors and assigns (“Indemnitors”), shall indemnify, defend, and hold harmless (“Indemnify”) the City including, but not limited to, all of its boards, commissions, departments, agencies, and other subdivisions, including, without limitation, the Department, and all of the heirs, legal representatives, successors, and assigns (individually and collectively, the “Indemnified Parties”), and each of them, for any damages the Indemnified Parties may be required to pay as satisfaction of any judgment or settlement of any claim or legal or administrative action (collectively, “Claims”), to the extent arising from: (a) any negligent act or omission of the Indemnitor in or about the Permit Area arising from the Permitted Activities, and except to the extent arising from the City’s active negligence, willful misconduct, or failure to maintain one or more Improvements after agreeing to perform such maintenance and accepting funding from Permittee for that purpose; (b) any default by such Indemnitors in the observation or performance of any of the terms, covenants, or conditions of this Permit to be observed or performed on such Indemnitors’ part; and (c) any release or discharge, or threatened release or discharge, of any Hazardous Material caused or allowed by Indemnitors in, under, on, or about the Permit Area arising from the Permitted Activities. Permittee on behalf of the Indemnitors specifically acknowledges and agrees that the Indemnitors have an immediate and independent obligation to defend the City from any claim which actually or potentially falls within this Indemnity even if such allegation is or may be groundless, fraudulent, or false, which obligation arises at the time such Claim is tendered to such Indemnitors by the City and continues at all times thereafter. Permittee agrees that the indemnification obligations assumed under this Permit shall survive expiration of the Permit or completion of work. It is expressly understood and agreed that the applicable Indemnitor shall only be responsible for Claims arising or accruing during its period of ownership of the Fronting Property.

## **25. SEVERABILITY**

If any provision of this Agreement or the application thereof to any person, entity or circumstance shall be invalid or unenforceable, the remainder of this Agreement, or the application of such provision to persons, entities, or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby, and each other provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law, except to the extent that enforcement of this Agreement without the invalidated provision would be unreasonable or inequitable under all the circumstances or would frustrate a fundamental purpose of this Agreement.

## **26. FORCE MAJEURE**

If Permittee is delayed, interrupted, or prevented from performing any of its obligations under this Agreement, excluding all obligations that may be satisfied by the payment of money or provision of materials within the control of Permittee, and such delay, interruption, or prevention is due to fire, natural disaster, act of God, civil insurrection, federal or state governmental act or failure to act, labor dispute, unavailability of materials, or any cause outside such Party's reasonable control, then, provided written notice of such event and the effect on the Party's performance is given to the other Party within thirty (30) days of the occurrence of the event, the time for performance of the affected obligations of that Party shall be extended for a period equivalent to the period of such delay, interruption, or prevention.

*[Signature Page to Follow]*

In witness whereof the undersigned Permittee(s) have executed this agreement this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

PERMITTEE:

CITY AND COUNTY OF SAN FRANCISCO  
DEPARTMENT OF PUBLIC WORKS, a  
municipal corporation

\_\_\_\_\_  
Fronting Property Owner or Official  
authorized to bind Permittee

\_\_\_\_\_  
City Engineer of San Francisco

\_\_\_\_\_  
Secondary Official authorized to bind  
Permittee

\_\_\_\_\_  
Director of Public Works

**Attachment 1: Description/Location of Property**

The land referred to is situated in the County of San Francisco, City of San Francisco, State of California, and is described as follows:

All blocks and lots in Tentative Final Map 9537 as approved by the City and County of San Francisco in May 2018 and subsequent Final Maps approved and recorded including Final Map 9537 Phase 1 (for Lots A, B, C, 1 and 2) recorded October 15, 2019.

## **Attachment 2: Permit Area Documentation**

The Permit Area consists of all Lots A in the Tentative Final Map 9537, representing future public rights of way that will be constructed and dedicated to the City. Please refer to the attached Tentative Final Map 9537 diagram. Encroachments described as “locations to be determined” will be in future public rights of way that will be constructed at each phase.

1. Storm Drain and Combined Sewer laterals and mains
2. CMU wall and fence on the south side of Harmonia (Phase 1A-1 and 1A-2)
3. Future retaining walls and fencing: locations to be determined
4. Irrigation line in the Harmonia Street right of way (Phase 1A-1 and 1A-2)
5. Future temporary irrigation lines: locations to be determined
6. Stairwell handrails: locations to be determined
7. Community Gateway & Perimeter Marker: See Environmental Graphics diagram, typology A
8. Vehicular Directional Sign: See Environmental Graphics diagram, typology B
9. Light Pole Mounted Banner: See Environmental Graphics diagram, typology I

**Attachment 3  
Maintenance Plan**

This Maintenance Plan contains final information for **Phase 1A-1/1A-2**, and preliminary information for the anticipated subsequent phases. As design details are finalized for each subsequent phase, the Permittee (or applicable Phase Infrastructure Developer) will submit an updated Maintenance Plan in connection with a Notice of Annexation for such phase.

**Phase 1A-1 and 1A-2 Maintenance Plan**

<b>Location constructed in Phase 1A-1 and 1A-2</b>	<b>Routine maintenance tasks</b>	<b>Estimated annual cost and funding source</b>
CMU retaining wall and fencing on the south side of Harmonia Street.	Keep free of graffiti and weeds as part of routine landscaping/janitorial maintenance of area	\$600  Source: Sunnydale Infrastructure, LLC maintenance reserve and then Park Heights at Sunnydale Association when it is established.
Irrigation lines are crossing Sunrise Way, Malosi and Harmonia Streets.	Lines are underground.	\$0  Source: Sunnydale Infrastructure, LLC maintenance reserve
Private lateral on Temp Sunrise Way (portion within future Sunrise Way ROW) at Sunrise Way 11+76 to 11+90	Remove debris from private storm drain inlet at beginning of rainy season and as needed. [\$200 each occurrence, assume annually]  If clog develops in pipe, use hydraulic hose truck to clean storm drainpipe. [\$500 each occurrence, rare]	\$200 each year + \$500 to clear clog (if this occurs)  Source: Sunnydale Infrastructure, LLC maintenance reserve
Combined Sewer Temporary Mains connecting into manholes on Malosi Street at Station 11+36 and Station 14+24	Ensure manhole lids remain in place on private manholes. Keep area free of weeds to avoid manholes from becoming obscured as part of routine landscaping/janitorial maintenance of area.	Annual cost: \$600  Source: Sunnydale Infrastructure, LLC Maintenance reserve
<b>Total Annual Maintenance Cost</b>		<b>Approx. \$1400</b>

### **Maintenance Plan for Future Phases**

<b>Major Encroachment</b>	<b>Routine maintenance tasks</b>	<b>Estimated annual cost and funding source</b>
Irrigation lines (temporary to accommodate project phasing)	Lines are underground	\$0  Source: Sunnydale Infrastructure, LLC maintenance reserve
Stairwell handrails (temporary to connect proposed roadway grades to existing residential buildings)	Routine cleaning of galvanized steel handrails to keep free of graffiti. If rusting occurs, refinish/paint to protect steel.	Annual cost: \$500  Refinish/painting if rusting: \$500  Source: Subdivider/Infrastructure developer for the phase
Community Gateway and Perimeter Markers	Per installer, materials are durable and will include anti-graffiti coating, and thus, may be cleaned with standard chemical cleaners and water. Vinyl lettering may be cleaned with standard household cleaner and/or water.  Vinyl lettering is weather resistant for 7-10 years but can be replaced if it is damaged or needs to be updated.	Annual cost: \$500  Replacement cost: Varies depending on replacement needs. Full replacement cost for the most expensive gateway sign is \$17,000.  Source: Park Heights at Sunnydale Association
Vehicular and Pedestrian Directional Signs and Information Kiosks	Per installer, materials are durable and will include anti-graffiti coating, and thus, may be cleaned with standard chemical cleaners and water. Vinyl lettering may be cleaned with standard household cleaner and/or water.  Vinyl lettering is weather resistant for 7 years but can be replaced if it is damaged or needs to be updated.	Annual maintenance cost: \$500  Replacement cost: Varies depending on replacement needs. Full replacement cost for the most expensive sign is \$8,000.  Source: Park Heights at Sunnydale Association
<b>Total Maintenance Cost</b>		<b>Approx. \$1500</b>

## **Attachment 4**

### **Operations Manual**

The are no specialized equipment for continued operation of the Improvements. Thus, operations manuals are not required.