

AGREEMENT

SAN FRANCISQUITO CREEK LEVEE PROJECT

Reconstruction and Maintenance of the San Francisquito Creek Levees Downstream of U.S. Highway 101

This AGREEMENT is entered into on _____, 2002, by and between Santa Clara Valley Water District, hereinafter called WATER DISTRICT, the San Mateo County Flood Control District, hereinafter called SAN MATEO, the City of East Palo Alto, hereinafter called EAST PALO ALTO, the City of Palo Alto, hereinafter called PALO ALTO, and the City of Menlo Park, hereinafter called MENLO PARK or collectively as PARTIES or generically as PARTY.

WHEREAS the levees along San Francisquito Creek Downstream of U.S. Highway 101, hereinafter called Levees are intended to provide flood protection for the businesses and residents of EAST PALO ALTO and PALO ALTO,

WHEREAS said levees have subsided and do not provide the level of flood protection that the levees were intended to provide when the levees were built in 1958.

WHEREAS the reconstruction of said levees is in the best interest of PARTIES and will benefit the citizens and businesses within the general area of the levees.

WHEREAS the future maintenance of said levees is in the best interest of PARTIES and will benefit the citizens and businesses within the general area of the levees.

NOW, THEREFORE, PARTIES, for the consideration and upon the terms and conditions hereinafter specified, agree as follows:

RECONSTRUCTION OF LEVEES AND ASSOCIATED WORK

1. Project Description

A. The San Francisquito Creek Levee Project consists in part of reconstruction to raise the levees on both sides of San Francisquito Creek from station 32+00, approximately 62 feet upstream of the pedestrian bridge, to station 77+87 at the downstream face of the U. S. Highway 101 bridge. The levees are to be raised to match the original top of levee elevations as constructed in 1958. Any portion(s) of the PALO ALTO bicycle path that is removed or damaged during the reconstruction of the levees shall be replaced in a manner approved by PALO ALTO. This portion of Project is hereinafter called Levees.

B. The San Francisquito Creek Levee Project includes the replacement of or modifications to the existing flood wall along the south bank of San Francisquito Creek in Palo Alto upstream of the West Bayshore Road bridge from station 80+30 to station 91+00. The

floodwall shall be raised to the elevation needed to preserve the water surface freeboard that existed prior to both the installation of Levee reconstruction described in the preceding paragraph and the construction of the Woodland Creek Apartments development in East Palo Alto. This portion of Project is hereinafter called Floodwall.

C. The San Francisquito Creek Levee Project also includes a modification of the weir in the floodwall at the Woodland Creek Apartments and a new floodwall structure adjacent to the wingwall of the West Bayshore Road bridge upstream of Highway 101 along the north bank of San Francisquito Creek in EAST PALO ALTO. Both the weir modification and new flood control structure adjacent to the wingwall shall not exceed the design elevation of the floodwall on the opposite side of the creek in PALO ALTO. This portion of Project is hereinafter called Weir and Flood Wall Structure.

D. Collectively, the raising of Levees, construction of Floodwall, Weir and Flood Wall Structure described in the preceding three paragraphs shall hereinafter be called A Project.

E. Each PARTY shall grant to all other PARTIES the rights to enter their property or easements along and adjacent to San Francisquito Creek and its levees downstream of U.S. Highway 101 for the purpose of constructing the Project.

2. WATER DISTRICT Project Responsibilities

A. WATER DISTRICT shall prepare construction drawings and specifications for the reconstruction of Levees and construction of Floodwall. WATER DISTRICT shall provide the other PARTIES opportunities to review and comment on the construction drawings before they are completed. WATER DISTRICT shall provide reproducible copies of the construction drawings and an electronic file of the specifications to EAST PALO ALTO.

B. WATER DISTRICT shall acquire, as co-permittee with EAST PALO ALTO the regulatory permits or waivers needed for the construction of Project from the California Department of Transportation, California Department of Fish and Game, California Regional Water Quality Control Board - San Francisco Bay Region, and United States Army Corps of Engineers.

C. WATER DISTRICT shall acquire any temporary construction and permanent rights of way or access needed for the construction of Levees and Floodwall along the south bank San Francisquito Creek in PALO ALTO.

D. WATER DISTRICT shall advertise for bids to select a contractor to construct Levees in PALO ALTO and Floodwall upstream of HWY. 101 in PALO ALTO. WATER DISTRICT shall perform the needed construction administration and inspection for the construction of Levees and Floodwall along the south bank of San Francisquito Creek, in PALO ALTO. Advertising Project, selecting the contractor, construction administration and construction inspection shall be performed in accordance with WATER DISTRICT standard procurement and selection processes including bidding procedures where required or appropriate.

E. WATER DISTRICT shall require the construction contractor to name as additional insured on their Comprehensive/Commercial General Liability coverage The Santa Clara Valley Water District, its directors on the board, officers, employees and agents, the San Mateo County Flood Control District, its supervisors on the board, officers, employees and agents, the City of East Palo Alto its council members, officers, employees and agents, the City of Palo Alto its council members, officers, employees and agents, and the City of Menlo Park its council members, officers, employees and agents.

3. EAST PALO ALTO Project Responsibilities

A. EAST PALO ALTO shall prepare construction drawings and specifications for the construction of Weir and Flood Wall Structure upstream of Highway 101 to an elevation not to exceed the top of the floodwall on the opposite side of the creek in PALO ALTO. EAST PALO ALTO shall provide the other PARTIES opportunities to review and comment on the construction drawings before they are completed.

B. EAST PALO ALTO shall acquire any temporary construction and permanent rights of way or permission to access needed for the construction of Weir and Flood Wall Structure upstream of Highway 101 and Levees downstream of Highway 101 in EAST PALO ALTO.

C. EAST PALO ALTO shall select a contractor and perform the needed construction administration for the construction of Levee in EAST PALO ALTO and Weir and Flood Wall Structure upstream of Highway 101 in EAST PALO ALTO in accordance with EAST PALO ALTO standard procurement and selection processes including bidding procedures where required or appropriate.

D. EAST PALO ALTO shall require the construction contractor to name as additional insured on their Comprehensive/Commercial General Liability coverage The Santa Clara Valley Water District, its directors on the board, officers, employees and agents, the San Mateo County Flood Control District, its supervisors on the board, officers, employees and agents, the City of East Palo Alto its council members, officers, employees and agents, the City of Palo Alto its council members, officers, employees and agents, and the City of Menlo Park its council members, officers, employees and agents.

4. SAN MATEO Project Responsibilities

A. SAN MATEO shall develop and adopt the necessary environmental document that will meet the requirements of the California Environmental Quality Act (CEQA) for Project. This includes all biological or other assessments needed to complete the environmental document.

MAINTENANCE OF PROJECT

5. Maintenance Responsibilities

A. WATER DISTRICT shall be responsible for the maintenance of Floodwall upstream of Highway 101 and Levees downstream of Highway 101 along the south bank of San Francisquito Creek in PALO ALTO. The Levees shall be maintained to an elevation not less than one foot below the 1958 design elevations.

B. EAST PALO ALTO shall be responsible for the maintenance of Weir and Flood Wall Structure upstream of Highway 101 and Levees downstream of Highway 101 along the north bank of San Francisquito Creek in EAST PALO ALTO. The Levees shall be maintained to an elevation not less than one foot below the 1958 design elevations.

C. Each year EAST PALO ALTO and WATER DISTRICT shall inspect the project for deficiencies. Every three years, starting in 2005, EAST PALO ALTO and WATER DISTRICT shall survey the Levee elevations to determine subsidence. Maintenance work needed to maintain the designed level of flood protection or to protect the facility shall be identified during the inspections and surveys.

Maintenance work identified which does not result in a change of alignment, a restriction to stream flow, or an increase in the currently existing elevations, shall be considered routine maintenance. Routine maintenance includes but is not limited to vegetation management, erosion repairs/bank stabilization, repair of rodent or mitten crab holes or reconstruction of a damaged portion of Project to currently existing conditions. The PARTY responsible for that portion of the Project shall independently perform the identified routine maintenance.

Maintenance work identified that will restore the facility to the design conditions of the Project, as designed in 2002, shall be considered restoration maintenance. Restoration maintenance includes, but is not limited to, work that results in a change of alignment, a restriction to stream flow, an increase in the current existing elevations, or sediment removal.

Once restoration maintenance is identified EAST PALO ALTO and WATER DISTRICT shall plan, establish performance standards, budget, review plans, approve each other's plans, and complete the restoration maintenance within the next 18 months. If either PARTY does not perform, within 18 months of the survey or inspection, the identified restoration maintenance on the portion of the project for which they are responsible, the other PARTY shall perform the restoration maintenance and shall invoice the delinquent PARTY. The delinquent PARTY shall pay the invoice for restoration maintenance performed by the other PARTY within 30 days of receipt of the invoice.

D. Prior to performing routine and/or restoration maintenance on any portion of Project, the PARTY proposing to perform the maintenance shall notify the other responsible PARTY (either EAST PALO ALTO or WATER DISTRICT) of the proposed work. The notification shall include a description of the proposed work, map showing the location of the work, and schedule for performing the work. Notification shall be mailed to the PARTIES at the addresses listed in the Notification paragraph (or such new address subsequently provided for purposes of notification), 30 days before the date of the proposed work. Such advance written notification is not required when emergency maintenance is required. In the case of an emergency, notification will be provided at the earliest possible time.

E. EAST PALO ALTO and WATER DISTRICT hereby grant to each other the right to enter their property or easements along and adjacent to San Francisquito Creek and its levees downstream of U.S. Highway 101 for the purpose to performing the maintenance prescribed in this Agreement or for general inspection of the facilities.

F. By mutual agreement of both EAST PALO ALTO and WATER DISTRICT, the levees may be restored to the 1958 elevations even if the difference is less than one foot. The same process as outlined above applies to the coordination of efforts to restore the levees to the 1958 elevations.

G. EAST PALO ALTO shall defend, indemnify and hold DISTRICT, its officers, employees and agents harmless from and against any and all liability, loss, expense (including reasonable attorneys' fees), or claims for injury or damages arising out of the performance or non-performance by EAST PALO ALTO of the maintenance work required to be performed under this section of the agreement in proportion to and to the extent such liability, loss, expense, attorneys' fees, or claims for injury or damages are caused by or result from the negligent or intentional acts or omissions of EAST PALO ALTO its agents, or employees.

H. DISTRICT shall defend, indemnify and hold EAST PALO ALTO, its officers, employees and agents harmless from and against any and all liability, loss, expense (including reasonable attorneys' fees), or claims for injury or damages arising out of the performance or non-performance by DISTRICT of the maintenance work required to be performed under this section of the agreement in proportion to and to the extent such liability, loss, expense, attorneys' fees, or claims for injury or damages are caused by or result from the negligent or intentional acts or omissions of DISTRICT, its agents, or employees.

FINANCIAL

6. Project Cost Sharing

A. The Project costs shall be divided between the portions of the Project constructed in EAST PALO ALTO and the portions of the Project constructed in PALO ALTO in the following manner:

North Bank Project Costs

1. Final Construction Cost for the portion of the Project along the north bank of San Francisquito Creek (North Bank Construction Costs) consisting of the construction of:
 - A. Weir
 - B. Flood Wall Structure
 - C. Levee along the north bank of San Francisquito Creek
2. Construction Administration in for the portion of the Project along the north bank of San Francisquito Creek
3. Allocated Cost of the preparation work for the development and adoption of the CEQA document.
4. Allocated Cost of the preparation work for the Project planning, design, acquiring permits and developing the plans and specifications.
5. Temporary or permanent rights of way required for the construction of the Project along the north bank of San Francisquito Creek.

The allocated cost shall be based on the proportion of the North Bank Construction Costs to the final construction cost for the entire Project times the cost for the preparation work. The final construction cost is the sum of the North Bank Construction Costs and the South Bank Construction Costs.

South Bank Project Costs

1. Final Construction Cost for the portion of the Project along the south bank of San Francisquito Creek (South Bank Construction Costs) consisting of the construction of:
 - A. Floodwall
 - B. Levee along the south bank of San Francisquito Creek
2. Construction Administration for the portion of the Project along the south bank of San Francisquito Creek.
3. Allocated cost of the preparation work for the development and adoption of the CEQA document.
4. Allocated cost of the preparation work for the Project planning, design, acquiring permits and developing the plans and specifications.
5. Temporary or permanent rights of way required for the construction of the Project along the south bank of San Francisquito Creek.

The allocated cost shall be based on the proportion of the South Bank Construction Costs to the final construction cost for the entire Project times the cost for the preparation work. The final construction cost is the sum of the North Bank Construction Costs and the South Bank Construction Costs.

B. SAN MATEO shall act as the fiscal agent and shall advance all funds necessary for the preparation and adoption of the CEQA document and the construction of the Weir, Flood Wall Structure and Levee along the north bank of San Francisquito Creek.

1. EAST PALO ALTO shall pay to SAN MATEO \$50,000.00 (fifty thousand dollars) towards the costs of the facilities constructed along the north bank of San Francisquito Creek.
2. MENLO PARK shall pay SAN MATEO \$50,000.00 (fifty thousand dollars) towards the cost of the facilities constructed along the north bank of San Francisquito Creek.
3. WATER DISTRICT shall pay SAN MATEO for the costs allocated to the portion of the Project along the north bank of San Francisquito Creek for costs incurred by SAN MATEO for the preparation and adoption of the CEQA document.
4. SAN MATEO shall pay EAST PALO ALTO the full amount of the construction administration for the construction of the Weir, Flood Wall Structure and Levee along the north bank of the San Francisquito Creek.
5. EAST PALO ALTO shall pay for any Project-related permanent or temporary construction rights of way required along the north bank of San Francisquito Creek. This cost is not reimbursable and does not count toward the calculation of Final Project Cost.
6. All remaining costs will be paid by SAN MATEO, however, SAN MATEO's total obligation for costs associated with said project shall not to exceed \$500,000 (Five Hundred Thousand Dollars).

C. WATER DISTRICT shall act as the fiscal agent and shall advance all funds necessary for the plans and specifications, acquiring permits and the construction of Floodwall and Levee along the south bank of San Francisquito Creek.

1. PALO ALTO shall pay to WATER DISTRICT \$50,000.00 (fifty thousand dollars) towards the costs of the facilities constructed along the south bank of San Francisquito Creek.
2. PALO ALTO shall, in addition, pay WATER DISTRICT the actual costs for the removal and rebuilding the bicycle trail on the top of the reconstruction Levee along the south bank of San Francisquito Creek.
3. SAN MATEO shall pay WATER DISTRICT for the costs allocated to the portion of the Project along the north bank of San Francisquito Creek for costs incurred by WATER DISTRICT in preparation of the plans and specifications and acquiring permits.
4. WATER DISTRICT shall pay for any Project-related permanent or temporary construction rights of way required along the south bank of San Francisquito Creek.

This cost is not reimbursable and does not count toward the calculation of Final Project Cost.

5. All remaining cost will be incurred by WATER DISTRICT, not to exceed, excluding right of way costs, \$ 2,700,000.00 (two million seven hundred thousand dollars).

D. Each PARTY shall make its obligated payments within 60 (sixty) days after an invoice is sent by the fiscal agent. The fiscal agent will submit the invoice following the final acceptance of the constructed Project from the contractor, and determination of the final construction cost.

7. Maintenance Cost

- A. The cost for maintenance of Floodwall and Levees downstream of Highway 101 along the south bank of San Francisquito Creek, shall be borne entirely by WATER DISTRICT.
- B. The cost for the maintenance of the Weir, Flood Wall Structure and Levees downstream of Highway 101 along the north bank of San Francisquito Creek, shall be borne entirely by EAST PALO ALTO.

GENERAL PROVISIONS

8. Term of the Agreement

Term of the Agreement shall be for a period of 25 years from the date identified above. As the maintenance of Levees, Floodwall Wall Structure, Weir and creek channel will be ongoing as long as the facilities are in existence, it is the intention of the PARTIES to revise this agreement on such terms and conditions as circumstances warrant.

9. Assignability

PARTIES agree that particular work assignments have been made in the interest of dividing the work up to complete the Project. Without the written consent of the other PARTIES, no PARTY shall assign or transfer any interest in this Agreement or any of the obligations hereunder except to contractors or consultants working directly for that PARTY. Any unauthorized attempt by any PARTY to so assign or transfer shall be void and of no effect. Any PARTY hiring a contractor or consultant shall be responsible for the inspection, review, and quality of all work of that contractor or consultant.

10. Structural Strength of Levee

The work on the Levee is for the purpose of returning the Levee to the design elevation as constructed in 1958 for the purposes of retaining flood flows within the San Francisquito Creek. The work on the Levee is not intended to provide any additional structural strength to Levee as it

currently exists nor is it intended to provide flood protection greater than the 1958 levee design elevations provide.

11. Indemnification

Each PARTY shall defend, indemnify, and hold harmless all other PARTIES, its directors, council members, employees, and agents against any claim, loss or liability arising out of or resulting in any way from work performed under this Agreement due to the willful or negligent acts (active or passive) or omissions by that PARTY or its directors, council members, employees, and agents.

12. Nondiscrimination

No PARTY shall discriminate, in any way, against any person in connection with or related to the performance of this Agreement because he/she is a veteran or because of a physical or mental disability (including HIV and AIDS), nor on the basis of race, color, religion, gender, national origin, ancestry, marital status, sexual orientation, age (over 40), medical condition (cancer) parental status, pregnancy, the exercise of family care leave rights, or political affiliation..

13. Termination

- A. A PARTY shall have the right to terminate this Agreement, for cause, by giving not less than a one-year written notice of termination to all of the other PARTIES.
- B. If any PARTY fails to perform any of its material obligations under this Agreement, in addition to all other remedies provided by law, any other PARTY may terminate this Agreement immediately upon written notice.
- C. The City Manager of EAST PALO ALTO, the City Manager of PALO ALTO, the City Manager of Menlo Park, the Chief Executive Officer of WATER DISTRICT, and the County Manager of SAN MATEO, are empowered to terminate this Agreement on behalf of their respective agencies.
- D. In event of termination, each PARTY shall deliver to all of the other PARTIES, upon request, copies of reports, documents, and other work performed by any PARTY under this Agreement. The cost of work performed under this agreement to the date of termination shall be due and payable in accordance with provision 6 (Cost Sharing).

14. Governing Law and Compliance with Laws

PARTIES agree that California law shall govern this Agreement. In the performance of this Agreement each PARTY shall comply with all applicable laws, ordinances, codes and regulations of the federal, state, and local government.

15. Ownership of Materials

All reports, documents, or other materials developed or discovered by any PARTY or any other person engaged directly or indirectly by any PARTY to perform the services required hereunder shall be and remain the mutual property of all PARTIES without restriction or limitation upon their use.

16. Notification

Any and all notices or other communications required to be given hereunder shall be deemed to have been delivered upon deposit in the United States mail, postage prepaid, addressed as specified below or as later amended by the PARTY in writing:

East Palo Alto

City of East Palo Alto
2415 University Avenue
East Palo Alto, California 94303
Attn.: City Manager

Palo Alto

City of Palo Alto
250 Hamilton Avenue
Palo Alto, California 94301
Attn.: City Manager

San Mateo

San Mateo County
555 County Center, 5th Floor
Redwood City, CA 94063
Attn.: Director of Public Works

Water District

Santa Clara Valley Water District
5750 Almaden Expressway
San Jose, California 951183614
Attn.: Chief Executive Officer

Menlo Park

City of Menlo Park
701 Laurel Street
Menlo Park, CA 94025-3483
Attn: City Manager

17. Successors and Assigns

This Agreement, and all the terms, covenants, and conditions hereof, shall apply to and bind the successors and assigns of the respective PARTIES hereto.

18. Signing by Counterpart

This Agreement may be signed in counterpart and each signed document shall constitute the whole as if a single document was signed by all PARTIES.

19. Venue

In the event that suit shall be brought by any PARTY to this contract, the PARTIES agree that venue shall be exclusively vested in the state courts of either the County of Santa Clara, or

the County of San Mateo or where otherwise appropriate, exclusively in the United States Court, Northern District of California, in either Redwood City or San Jose, California.

20. Prior Agreements and Amendments

This Agreement represents the entire understanding of the PARTIES as to those matters contained herein. No prior or written understanding including the September 1958 agreement between San Mateo County and the Santa Clara County Flood Control District shall be of any force or effect with respect to those matters covered hereunder. This Agreement may only be modified by a written amendment duly executed by all PARTIES to this Agreement.

This Agreement supercedes the Agreement dated September 22, 1958 between the County of San Mateo and the Santa Clara County Flood Control and Water Conservation District, which provided for construction and maintenance of channel improvements on San Francisquito Creek from Bayshore Highway Bridge to San Francisco Bay.

CITY OF EAST PALO ALTO

By: _____
Monika Hudson
City Manager

Date: _____

ATTEST:

City Clerk

APPROVED AS TO FORM

Michael Lawson
City Attorney

CITY OF PALO ALTO

By: _____
Victor Ojakian
Mayor

Date: _____

ATTEST:

City Clerk

APPROVED AS TO FORM

City Attorney

CITY OF MENLO PARK

By: _____

David Boesch
City Manager

Date: _____

ATTEST:

City Clerk

APPROVED AS TO FORM

City Attorney

**SAN MATEO COUNTY FLOOD
CONTROL DISTRICT**

By: _____

Jerry Hill
President, Board of Supervisors
County of San Mateo

Date: _____

ATTEST:

Clerk of the Board of Supervisors

APPROVED AS TO FORM

County Counsel

**SANTA CLARA VALLEY WATER
CONTROL DISTRICT**

By: _____
Stanley M. Williams
Chief Executive Officer

Date: _____

APPROVED AS TO FORM

Emily Cote
Assistant General Counsel