

MEMORANDUM OF UNDERSTANDING

BETWEEN

**THE CITIES OF BERKELEY AND ALBANY
AND THE UNIVERSITY OF CALIFORNIA FOR
THE LOWER CODORNICES CREEK RESTORATION AND TRAIL PROJECT
LOCATED BETWEEN THE UNION PACIFIC RAILROAD
AND SAN PABLO AVENUE**

This Memorandum of Understanding (“Agreement”), dated July ____, 2004 is by and among the CITY OF ALBANY (“Albany”), the CITY OF BERKELEY (“Berkeley”) and THE REGENTS OF THE UNIVERSITY OF CALIFORNIA on behalf of the University of California Berkeley (“UCB”) (collectively “Agencies”).

WHEREAS, the Agencies have worked cooperatively since 1999 to develop a project to restore that portion of Codornices Creek between the Union Pacific Railroad (“UPRR”) tracks and San Pablo Avenue (“Lower Codornices Creek” or the “Creek”) to a more natural configuration with improved meanders, high flow channels, creek banks, landscaping and public access trails; and

WHEREAS, Albany has received and will dedicate various grant funds and City Assessment District funds to pay for costs related to the planning, design and construction of the Lower Codornices Creek restoration and trail project (“Project”) , as delineated in Attachment 1-Project Plan; and

WHEREAS, Berkeley has made financial and other contributions to the Project including toward the purchase and development of adjacent property to replace the playing fields that were lost as a result of the Project;

WHEREAS, UCB has made financial, property, planning, engineering, maintenance and other contributions to the Project throughout the process; and

WHEREAS, the Project boundaries (“Project Boundaries”) include areas within both Berkeley and Albany as shown and described in Attachment 1; and

WHEREAS, the property owner on the north side of the Creek is UCB and on the south side is Berkeley and various private owners; and

WHEREAS, UCB’s maintenance staff at University Village has historically maintained, for flood control, that portion of the Creek located between 5th Street and San Pablo Avenue and the Agencies desire to continue and extend this arrangement whereby UCB administers Creek routine flood control maintenance; and

WHEREAS, the Agencies have entered into certain access agreements to permit soils analysis and related testing in order to facilitate the Project, in the forms attached hereto as Attachment 2 – Right to Access Agreement; and

WHEREAS, in order to construct and maintain the Project effectively it is necessary for the three Agencies to develop an Agreement regarding construction of the Project, maintenance of the completed Project, rights of public access, allocation and funding of and reimbursement for ongoing project and maintenance costs, and allocation of liability;

NOW, THEREFORE, THE AGENCIES AGREE AS FOLLOWS:

1. Demolition and Construction License Agreements. Berkeley and UCB will each grant temporary licenses to Albany for access within their respective properties containing or bordering the Creek to allow demolition of the existing Creek and construction of the restored Creek for the period from approximately May 2004 through October 2007. Such licenses are attached hereto as Attachment 3. Berkeley will use best reasonable efforts to obtain similar licenses from the private property owners along the south side of Lower Codornices Creek.

2. Conservation and Maintenance Easements. Berkeley and UCB will grant easements to the Agencies, within ninety (90) days after the date hereof, for conservation, high flow channel maintenance and other maintenance within the Project area, and will extend such easements as each Phase of the project is completed. Such grants of easements shall be in substantially the form attached hereto as Attachment 4 – Conservation and Maintenance Easement Agreement. Berkeley will use best reasonable efforts to obtain similar easements from the private property owners along the south side of Lower Codornices Creek.

3. Public Access Easements. Berkeley and UCB agree to grant easements within their respective properties to the Agencies for: a) public access and maintenance along the multi-use trail extending from Sixth Street to San Pablo Avenue; b) the pedestrian trail extending from Fifth Street to Sixth Street; and c) the two pedestrian bridge crossings at Fourth and Fifth Streets. Such grants of easements shall be substantially in the form attached hereto as Attachment 5 – Public Access Easement. Berkeley will use best reasonable efforts to obtain similar easements from the private property owners along the south side of Lower Codornices Creek.

4. Monitoring and Maintenance: The Agencies shall, respectively, assume the following responsibilities with respect to monitoring and maintaining the restored Lower Codornices Creek and associated improvements:

a) Creek Monitoring and Landscape Maintenance: Albany will be responsible for fulfilling the requirements of the Grant Agreement between the City of Albany, Waterways Restoration Institute (“WRI”) and the California Department of Water Resources (“DWR”). This will include any Creek monitoring activities, such as geomorphic, stream flow, biological monitoring, and/or monitoring of stream discharge measurement gauges which are specifically required by the DWR Grant Agreement, and also includes landscape and vegetation management such as revegetation, removal of invasive species and maintenance of temporary irrigation, as shown in Attachment 6, Creek Management Plan. This does not pertain to regular channel monitoring for

flood control. Albany will provide UCB with a copy of each monitoring field report and note any maintenance issues observed during the monitoring.

b) Creek Maintenance: UCB will provide flood control creek maintenance within the Project Boundaries which UCB owns or for which UCB is granted easements for access or maintenance, including but not limited to, the following activities: removal of debris; periodic clearing of undergrowth; clearance of creek flow obstructions at culverts and bridges, and routine repairs related to flood control. These activities shall be in substantial conformance with the standards and requirements applicable to such activities as shown in Attachment 6 - "Creek Management Plan."

c) Trails Maintenance: The Cities of Albany and Berkeley will equally share the cost and will jointly provide trail maintenance, with the exception that UCB will provide litter control and empty trash cans. Trail maintenance activities shall be in substantial conformance with the standards and requirements applicable to such activities as shown in Attachment 6, and Attachment 7 - Trail Maintenance Activities. Volunteer activities to assist with trail maintenance shall be encouraged and utilized whenever appropriate.

d) Culverts, Bridges and Street Crossings Maintenance: Berkeley will continue its existing maintenance responsibilities to maintain and repair all the culverts, bridges, roadway surfaces and related structures and facilities west of San Pablo Avenue to the western boundary of the Project area. Maintenance of new improvements which are constructed as a part of the Codornices Creek project, such as bridges or culverts, will also be considered to be eligible for reimbursement from the joint Creek account per the provisions of Section 5 of this Agreement.

e) Emergency Expenditures: In addition to the foregoing allocation of responsibility, any Agency may undertake any work that must be done immediately to avoid or mitigate existing or imminent flooding, or other immediate public safety hazards, including, but not limited to damage from unusually heavy rains, fallen trees, lightning, or other naturally occurring events, or vandalism, upon reasonable notice to the other Agencies, to the extent such notice is feasible under the circumstances.

5. Agency Cost Allocations and Reimbursement Procedures: The City of Albany shall establish and administer a "Creek Account" into which funds shall be held and from which funds may be disbursed per the provisions of this Agreement. Responsibilities and cost allocations for Items 4(a) through 4(e) above shall be as follows:

a) Monitoring and Landscape Management: Monitoring shall be reimbursable from the Creek Account established per this Agreement. The City of Albany and the City of Berkeley will administer this task, and share equally in the costs, which will include landscape management, such as removal of invasives, revegetation and other landscaping needs. The use of volunteers will be encouraged as is appropriate.

b) Creek Maintenance:

UCB will provide flood control creek maintenance for the project area, including but not limited to, the following activities: removal of debris; periodic clearing of undergrowth; clearance of creek flow obstructions at culverts and bridges, and routine

repairs related to flood control. These activities are not reimbursable from the Creek Account, and UCB will not be required to put funds into the Creek Account for these items.

- c) Trail Maintenance: Trail maintenance shall be reimbursable from the Creek Account established per this Agreement. The Cities of Albany and Berkeley will share equally in the cost and will jointly provide trail maintenance, with the exception that UCB will provide litter and debris control and empty trash cans. UCB litter and debris control and emptying of trash cans are not reimbursable from the Creek Account, and UCB will not be required to put funds into the Creek Account for these items.
- d) Culverts, Bridges and Street crossings: Maintenance of culverts, bridges and street crossings shall be administered by City of Berkeley. This shall be reimbursable from the Creek Account. All three agencies shall share in costs related to this task.
- e) Emergency Expenditures: This item will be administered by whichever agency responds to the emergency. This shall be reimbursable from the Creek Account. All three agencies shall share in costs related to this task.
- f) Within sixty (60) days after the date of this Agreement, and no later than January 31st of each subsequent year, the Agencies shall confer to estimate the annual costs for carrying out the activities in Items 4(a), (c), (d) and (e), above, as well as Albany's administrative costs. Such annual costs shall be based on the costs related to the creek Project, but shall not include costs related to maintenance of any portion of the project related to ball field modifications or the UC Village project. Albany shall call to order the annual meeting for final Agency approval of the annual estimated budget and scope of work.
- g) Within 30 days thereafter each Agency shall contribute funds into a separately maintained Creek Account, to be established and administered by the City of Albany. Interest that accrues on the funds in the Creek Account shall be restricted to the purposes for which the principal sum is restricted.
 - i. An initial sum shall be deposited by the City of Berkeley, based upon the letter attached to this Agreement as Attachment 8.
 - ii. Once this initial deposit has been drawn down to the sum of \$50,000, the City of Berkeley and the City of Albany shall meet to determine the amounts required to be deposited in the Account for Items (a) and (c) above. The cost of these items shall be shared equally. The intent is not to let the balance of the account drop below \$50,000.
 - iii. The three Agencies shall deposit equal shares of the costs of items (d) and (e) above, based upon costs incurred for those items, as approved by all Agencies. These amounts shall not be used for items (a), (b) or (c) above, and shall be tracked separately.
 - iv. The City of Berkeley and the University of California shall also annually deposit \$1200 each into the Account for City of Albany annual administrative costs. The City of Albany shall then receive reimbursement from this account.

- h) Beginning on the date of completion of the first phase of the Creek construction, each party may seek reimbursement for its eligible expenses under this Section 5 by submitting an invoice to Albany for each calendar quarter, together with such documentation as Albany shall require. Albany shall provide written notice to the other Agencies within 15 days of the completion of the first phase of the Creek construction and their quarterly billing submittal deadline.
- i) To the extent possible, quarterly invoices shall reflect only reimbursable expenditures incurred during that quarter. Eligible reimbursable expenses are defined as costs that (i) are related to the activities per Sections 4 and 5 above within the Project Boundaries, (ii) are out-of-pocket costs to third party vendors, (iii) are supported by appropriate invoices. Eligible reimbursable expenses shall not include Agency administrative overhead on expenses such as contractors, labor, volunteer organizations, general project meeting attendance, and maintenance or implementation of measures outside the limits of the current Project or public safety costs. Construction costs related to construction of new improvements within the Project Boundaries may only be included subject to written agreement by all agencies.
- j) The City of Albany shall receive up to \$600 per quarter from the Creek Account for the administrative costs of administering the Creek Account. This amount may be adjusted on an annual basis, with documentation for review and approval by the other Agencies as a part of the annual meeting.
- k) The City of Albany shall distribute funds due from submitted invoices in a timely manner, but no later than 30 days from the close of each quarter.
- l) Within 45 days of the end of each fiscal year, Albany shall provide to Berkeley and UCB a report that details contributions to and expenditures and reimbursements from the Creek Account, as well as all information submitted by the Agencies on which any expenditure or reimbursement was based (“Creek Account Report”). In the case of emergency expenditures, Albany shall inform the other Agencies of related costs as soon as possible, but no later than 15 days.
- m) Within 30 days after receiving the Creek Account Report, any Agency may require reasonable information justifying any expenditure or reimbursement.
- n) The parties agree that the reimbursement provisions of this Agreement do not create any immediate indebtedness for the aggregate amount of reimbursements that may be required over the term of this Agreement. Rather, each year’s reimbursement obligation is intended solely to reimburse each Agency’s expenditures under this Agreement for services performed during that year. Reimbursements under this Agreement are to be paid out of the ordinary revenue and income of the Agencies, subject to the requirement that the governing entity of each Agency determine that any reimbursement, when coupled with each Agency’s other expenditures, does not exceed its yearly income.

6. Public Safety: This Agreement does not affect the Agencies' respective public safety responsibilities for the Project area, which are determined independently of this Agreement.

7. Construction Phasing: The Agencies will apply those provisions of this Agreement pertaining to access for demolition and construction only during the term of the construction license.

8. Indemnification: Each Agency shall defend, indemnify and hold harmless each other Agency and each other Agency's employees, officers and agents against any claim, suit, damage, cost or liability, including reasonable defense costs (collectively, "Claims"), arising out of, or resulting from, the performance or failure to perform the indemnifying Agency's obligations under this Agreement, but only in proportion to and to the extent that such Claim arose from the negligence, willful misconduct or breach of this Agreement by such Agency, its officers, employees, or agents, provided that an Agency seeking defense and indemnification hereunder shall furnish to the Agency from which indemnification is sought prompt written notice of the Claim and authority, information and assistance reasonably required to defend.

9. Cooperation. The Agencies acknowledge that the planning, funding, construction and operation of the Project is a complex matter that will require ongoing cooperation and good faith on the part of each Agency. Accordingly, the Agencies agree to cooperate with one another in good faith in the timely performance of this Agreement.

10. Remedies: If an Agency defaults in the performance of any of its obligations under this Agreement, the remedies of the other Agencies shall be either: (a) to seek specific performance against the defaulting Agency or (b) to obtain money damages. This Agreement shall not be terminated without the written consent of all Agencies.

11. Term; Termination: This Agreement becomes effective as of the date first above written upon execution by the Agencies to the Agreement and shall continue in effect until terminated in writing by the mutual consent of the Agencies.

12. Amendment: This Agreement may only be amended in writing executed by all of the Agencies to this Agreement.

13. Severability: If any part of this Agreement is determined to be invalid or in violation of the law, all other parts not so determined shall remain in full force and effect.

14. Force Majeure: No Agency shall be responsible for delays or failure of performance resulting from acts beyond the reasonable control of such Agency. Such acts shall include, but not be limited to, acts of God, strikes, walkouts, riots, acts of war, epidemics, failure of suppliers to perform, governmental regulations, power failure(s), earthquakes or other disasters.

15. Notices: Any notice permitted or required by this Agreement shall be in writing and shall be addressed as follows:

Albany: City of Albany
1000 San Pablo Avenue

Albany, CA 94706

Attention: Community Development Director

Berkeley: City of Berkeley

2180 Milvia Street

Berkeley, CA 94704

Attention: Director of Parks Recreation and Waterfront

UC: University of California, Berkeley

2610 Channing Way

Berkeley, CA 94720

Attention: RSSP, Executive Director, Housing and Dining

An Agency, by written notice to the others may change its address.

IN WITNESS WHEREOF, the Agencies have executed this Agreement in duplicate originals on the date first above written.

CITY OF ALBANY:

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA:

By: _____

By: _____

Print Name: _____

Print Name: _____

Title: _____

Title: _____

CITY OF BERKELEY:

By: _____

Print Name: _____

Title: _____

ATTACHMENTS

Attachment 1: Project Plan and Project Survey.

Attachment 2: Right to Access Agreements to permit soils analysis and related testing.

Attachment 3: Agreements for Access Rights from University of California (Exhibit A) and City of Berkeley (Exhibit B) to City of Albany for construction

Attachment 4: Draft Conservation and Maintenance Easement

Attachment 5: Draft Public Access Easement

Attachment 6: Creek Management Plan

Attachment 7: Trail Maintenance Activities

Attachment 8: Letter between City of Berkeley and University regarding use of funds for Creek Account.

ATTACHMENT 6 CREEK MANAGEMENT PLAN

This project occurs on publicly-owned property which the Agencies have agreed to protect and maintain. The Agencies have agreed to share in the management of these activities, per the responsibilities and cost allocations in this Memorandum of Understanding. The project includes a three-phase management plan, as follows:

Phase 1:

The first one to two years after installation of each reach, management practices will include, as necessary:

- a. the replacement of any losses in plant material,
- b. the manual removal of invasive species, and
- c. the addition of shade-requiring understory species.

Regular maintenance activities shall include:

- a. repairing site improvements,
- b. removing graffiti,
- c. monitoring for erosion control,
- d. removing debris from creek,
- e. repair of damage to the creek bed or bank.
- f. clearance of creek flow obstructions at culverts and bridges.

Part of the Project also involves installing stream discharge measurement gauges to monitor the performance of the flood damage reduction measures.

Phase 2:

The second phase will occur during the period from three to five years after the installation of each reach. The maintenance shall include all items noted in Phase 1, as well as increasing the species diversity by planting container plants that require the shade created by the first phase planting.

Phase 3:

The third phase of management shall include ongoing maintenance, as noted in Phase 1.

ATTACHMENT 7
TRAIL MAINTENANCE ACTIVITIES

The following are typical trail maintenance activities which shall be provided on an on-going, periodic, or as needed basis.

1. Sign replacement and repair
2. Maintain trail pavement marking
3. Tree, shrub or grass trimming
4. Pavement sealing/potholes
5. Trash disposal (University)
6. Graffiti removal
7. Maintain and repair any furnishings.
8. Pruning for vertical clearance along trail
9. Remove fallen trees or branches on trail
10. Invasive species control
11. Maintain temporary irrigation lines for creek bank vegetation.