

ORDINANCE NO. 7,017-N.S.

AUTHORIZING AND DIRECTING CITY MANAGER TO CONVEY CONSERVATION
EASEMENT

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. Conveyance of property authorized.

The City Manager is hereby authorized to convey to the City of Albany and the University of California a conservation easement for Codornices Creek, substantially in the form attached hereto as Exhibit A, for the real property described therein.

Section 2. Posting.

Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of Council Chambers, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

At a regular meeting of the Council of the City of Berkeley held on January 29, 2008, this Ordinance was passed to print and ordered published by posting by the following vote:

Ayes: Anderson, Capitelli, Maio, Moore, Olds, Spring, Worthington, Wozniak and Bates.

Noes: None.

Absent: None.

RECORDING REQUESTED BY, AND
WHEN RECORDED RETURN TO:

Attention: _____

THIS SPACE ABOVE FOR RECORDER'S USE

THIS GRANT OF CONSERVATION EASEMENT IS RECORDED AT THE REQUEST OF THE CITY OF ALBANY, A CALIFORNIA MUNICIPAL CORPORATION, AND IS EXEMPT FROM RECORDING FEE PURSUANT TO GOVERNMENT CODE § 6103 AND § 27383 AND FROM THE PAYMENT OF A DOCUMENTARY TRANSFER TAX PURSUANT TO REVENUE AND TAXATION CODE § 11922.

GRANT OF CONSERVATION EASEMENT

This Grant of Conservation Easement is made and entered into as of _____, 2008, by and between the City of Berkeley, a California municipal corporation ("Grantor") and the City of Albany, a California municipal corporation and the Regents of University of California (collectively "Grantees").

RECITALS

A. Grantor is the owner of the real property described on Exhibit A hereto (the "Grantor's Property").

B. Grantor and Grantees entered into a Memorandum of Understanding Between the Cities of Berkeley and Albany and the Regents of University of California (UCB) for the Lower Codornices Creek Restoration and Trail Project Located Between the Union Pacific Railroad and San Pablo Avenue ("MOU Agreement") on or about August 5, 2004. Grantor and Grantees are collectively referred to as "Agencies" in this Public Access Easement.

C. Section 2, Conservation and Maintenance Easements of the MOU Agreement provides that the City of Berkeley shall grant a Conservation Easement within its properties to the Agencies for conservation, high flow channel maintenance and other maintenance within the Codornices Creek Restoration and Trail Project area.

AGREEMENT

In consideration of the foregoing, and for other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Grantor hereby grants to Grantees, its successors and assigns, a Conservation Easement (herein after referred to as the "Conservation Easement" as follows:

1. **Purpose.**

1.1 This easement is to assure that the Conservation Easement Area will be retained in perpetuity to protect the Conservation Values in accordance with the MOU Agreement and the Lower Codórnices Creek Restoration and Trail Project (hereinafter referred to as "Project") to prevent any use of the Conservation Easement Area that will significantly impair or interfere with its Conservation Values. Accordingly, this Conservation Easement restricts the use of the Conservation Easement Area to activities involving flood control; recreation, nature study, enjoyment of views, open space, natural habitat and environmental protection, and related uses which are consistent with this Conservation Easement, which are detailed in the MOU Agreement.

1.2 Grantor agrees that it shall consider and negotiate in good faith any change in use of the Conservation Easement Area if requested by Grantees provided that the Conservation Values are not degraded and the change in use is no inconsistent with the Conservation Values.

2. **Rights of Grantees.** To accomplish the purposes of this Conservation Easement, Grantor conveys to Grantees the right:

2.1 To identify, preserve, and protect the Conservation Values of the Conservation Easement Area in accordance with the MOU Agreement.

2.2 To fulfill the objectives of the MOU Agreement and the Project referred to therein.

3. **Prohibited Uses.** Any activity on or use of the Conservation Easement Area which is inconsistent with the purposes of this Conservation Easement or the MOU Agreement and Project referred to therein is prohibit

Without limiting the generality of the foregoing, the following activities and uses are expressly prohibited on the Conservation Easement Area.

3.1 **Commercial or Industrial Use.** Any commercial, agricultural or industrial development, use of, or activity on the Conservation Easement Area.

3.2 **Tree/Shrub Cutting.** Removing, destroying, or cutting of live trees, shrubs or other vegetation, except as set forth or agreed to by the Agencies pursuant to the MOU Agreement.

3.3 **Dumping.** The dumping or other disposal of wastes, refuse, or debris into creek channels, water bodies or anywhere else on the Conservation Easement Area.

3.4 **Signs and Billboards.** The placement of any signs or billboards on the Conservation Easement Area, except those signs that serve the purpose of identifying or protecting the Conservation Easement Area, including but not limited to signs displayed to state

the name and address of the Conservation Easement Area, to provide public education, or to control unauthorized entry or use.

3.5 Sale or Transfer of Water Rights. Sale or transfer of any water rights belonging to the Conservation Easement Area to any other property, or use of any water rights appurtenant to the Conservation Easement Area. This Conservation Easement shall not sever or impair any riparian water rights appurtenant to the Property.

3.6 Off Road Vehicles. Use of off-road or all-terrain vehicles or motorcycles is prohibited, except with the written permission of the Grantees.

3.7 Hunting or Shooting. No commercial hunting, trapping or shooting is permitted.

3.8 Archeological Resources. The excavation, removal, destruction, or sale of any archeological artifacts or remains which may be found on the property, except as part of any future archeological investigation approved by Grantees. All excavation plans shall be reviewed by an archaeologist prior to the start of, and during, the excavation.

3.9 Junk Yards or Storage of Materials. Storage or disassembly of inoperable automobiles, trucks or appliances, or other storage of materials.

4. Development Rights. Except as expressly permitted by the terms of this Conservation Easement, all remaining rights in any present or future development rights associated with the Conservation Easement Area are hereby conveyed by Grantor to Grantees.

5. Reserved Rights. Grantor reserves unto itself and to its successors and assigns all rights accruing from its ownership of the Conservation Easement Area which are not transferred, conveyed, or granted to Grantee, or which are not prohibited herein and are not inconsistent with the purposes of this Conservation Easement. Grantor expressly reserves the right to engage in or permit or invite others to engage in all uses of the Conservation Easement Area which are not transferred, conveyed, or granted to Grantees, nor expressly prohibited herein and which

Without limiting the generality of the foregoing, the following rights relating to the Conservation Easement Area are expressly reserved by Grantor and its successors in interest.

5.1 Project. To undertake those obligations or responsibilities as are or may be set forth in the future in the MOU Agreement between the agencies.

5.2 Recreational Uses. To engage in and permit guests and invitees to engage in recreational uses of the Conservation Easement which do not result in degradation of Conservation Values.

5.3 Roads. To install any necessary emergency vehicle access required by the City of Albany, provided that grading is minimized and that adequate drainage is provided to

prevent erosion. Grantor may relocate the emergency access if damage from a natural cause makes a road impassable in its existing right-of-way.

5.4 Fencing. To repair, and maintain fencing and gates, as necessary, along within the Conservation Easement Area. However, the materials, style and location of new fencing and gates to be constructed are subject to the approval of Grantees. Said approval shall not be unreasonably withheld. Grantor will pay all costs of new fencing it requests; however, Grantor shall not pay for fencing requested by Grantees.

5.5 General Maintenance. Grantor may maintain the Conservation Easement Area in accordance with the terms of the Creek Management Plan.

6. Notification or Approval. Where Grantees' approval is required in accordance with this instrument, Grantor shall seek approval in the manner described in Section 6.1 and 6.2.

6.1 Notice of Certain Permitted Actions. Other than the notice provisions for access, as set forth in Section 8.1, whenever notice is required, Grantor shall notify Grantees in writing not less than thirty (30) days prior to the date Grantor intends to undertake the activity in question. The notice shall describe the nature, scope, design, location, timetable, and any other material aspects of the proposed activity in sufficient detail to permit Grantee (or the Resource Agencies, if appropriate) to make an informed judgment of the activity as to its consistency with the purposes of this Conservation Easement.

6.2 Grantees' Approval. Whenever Grantees' approval is required in accordance with this instrument, the authorized representative of the Grantees shall grant or withhold its approval in writing within forty-five (45) days after receipt of the Grantor's written notice therefore. Notification of Grantees shall be as provided in Section 15. The request shall describe the nature, scope, design, location, timetable, and other material aspects of the proposed activity in sufficient detail to permit Grantees to make an informed judgment as to its consistency with the purposes of this Conservation Easement. Approval may be withheld only upon a reasonable determination by Grantees that the action as proposed would be inconsistent with the purposes of this Conservation Easement. If Grantees fail to respond in writing within forty-five (45) days, the request shall automatically be deemed to be granted.

6.3 Grantor's Notification and Approval. Unless otherwise specified herein, where Grantor's approval is required in accordance with this instrument, Grantees shall notify Grantor in writing not less than forty-five (45) days prior to the date Grantees intend to undertake the activity in question. The request shall described the nature, scope, design, location, timetable, and other material aspects of the proposed activity in sufficient detail to permit Grantor to make an informed judgment. Whenever Grantor's approval is required in accordance with this instrument, Grantor shall grant or withhold its approval in writing with forty-five (45) days after receipt of Grantees' written request therefore. Grantor shall not unreasonably withhold approval of activities consistent with the purposes of this Conservation Easement.

7. Disputes and Remedies. If Grantees determine that Grantor or Grantor's successors in interest or any occupant of the Conservation Easement Area is conducting or

allowing a use, activity, or condition on the Conservation Easement Area which is prohibited by the terms of this Easement or that a violation is threatened, Grantees shall give written notice to Grantor of such violation and demand corrective action sufficient to cure the violation. Grantees shall also notify any appropriate federal or state regulatory agency with jurisdiction over the resource at issue. Where the violation involves injury to the Conservation Easement Area resulting from any use or activity inconsistent with the purposes of this Easement, Grantees shall demand corrective action sufficient to restore the portion of the Conservation Easement Area so injured.

7.1 Consultations Regarding Interpretation and Enforcement of Easement.

When any disagreement, conflict, need for interpretation, or need for enforcement arises between the parties to this Easement, each party shall first consult with the other party in good faith about the issue and attempt to resolve the issue without resorting to arbitration or legal action.

7.2 Grantees' Other Remedies. If Grantor fails to cure the violation within thirty (30) days after receipt of notice thereof from Grantees, or under circumstances where the violation cannot be cured within the thirty (30) day period, Grantor fails to continue diligently to cure such violation until finally cured, Grantees may bring an action at law or in equity in court of competent jurisdiction to enforce the terms of this Easement, to enjoin the violation, *ex parte* as necessary, by temporary or permanent injunction, to recover any damages to which it may be entitled for violation of the terms of this Easement, including damages for the loss of scenic, aesthetic, or environmental values, and to require the restoration of the Conservation Easement Area to the condition that existed prior to injury.

Without limiting Grantor's liability therefore, Grantees, in their discretion, may apply any damages recovered to the cost of undertaking any corrective action on the Conservation Easement Area. If Grantees, in their reasonable discretion, determine that circumstances require immediate action to prevent or mitigate significant damage to the Conservation Values of the Conservation Easement Area, Grantees may pursue remedies under this section without waiting for the period provided for cure to expire, however, Grantees shall notify Grantor in the manner set forth in Section 8.1. Grantees' rights under this section apply equally in the event of either actual or threatened violations of the terms of this Easement, and Grantor agrees that Grantees' remedies at law for any violation of the terms of this Easement are inadequate and that Grantees shall be entitled to the injunctive relief described in this section, both prohibitive and mandatory, in addition to such other relief to which Grantees may be entitled, including specific performance of the terms of this Easement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. Grantees' remedies described in this section shall be cumulative and shall be in addition to all remedies now or hereinafter existing at law or in equity.

7.3 Costs of Enforcement. In the event any action or proceeding is brought by either Grantor or Grantees to enforce or to interpret the terms of this Easement, the prevailing party in such action or proceeding shall be entitled to recover its attorneys fees and costs of suit.

7.4 Grantees' Discretion. Enforcement of the terms of this Easement shall be at the discretion of Grantees, and any forbearance by Grantees to exercise its rights under this

Easement in the event of any breach of any term of this Easement by Grantor shall not be deemed or construed to be a waiver of Grantees of such term or of any of Grantees' rights under this Easement. No delay or omission by Grantees in the exercise of any right or remedy upon any breach by Grantor shall impair such right or remedy or be construed as a waiver.

7.5 Waiver of Certain Defenses. Grantor agrees that no statute of limitations shall start to run and no estoppel or similar defense shall arise against any action brought by Grantees to enforce or interpret this Easement, unless and until Grantees are aware of a violation or are aware of a dispute regarding the interpretation of the provisions of the Easement. Grantees waive any right to assert any defense contrary to the provisions of this section.

7.6 Acts Beyond Grantor's Control. Nothing contained in this Easement shall be construed to entitle Grantees to bring any action against Grantor for any injury to or change in the Conservation Easement Area resulting from causes beyond Grantor's control, including without limitation, fire, flood, storm, and earth movement, or from any prudent action taken by Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Conservation Easement Area or to human life or other real or personal property resulting from such causes.

7.7 State of California and Resource Agency Right of Enforcement. In the event that Grantees or any successor holder of this Easement fails to enforce the terms of this Easement, the State of California and each regulatory agency with jurisdiction over some or all of the Conservation Easement Area shall have the rights to enforce the easement as agent of Grantees or such successor holder.

8. Access

8.1 Grantor acknowledges and agrees that upon 24 hours phone or fax notification to Grantor (or less with the consent of Grantor), Grantees or its respective agents or contractors may enter the Conservation Easement Area as described by Creek Management Plan to take certain actions to protect and enhance the Conservation Values on the Conservation Easement Area attached hereto as Exhibit "B". Where Grantees determine that immediate entry is required to prevent, terminate, or mitigate a violation of this Easement, Grantees may enter with at least concurrent phone or fax notification to Grantor.

8.2 Rights of access to the Conservation Easement Area shall include use of appurtenant easements and rights of way, if any, to enter upon the Conservation Easement Area and rights of access across the Property, including without limitation vehicular access at reasonable times in order to monitor Grantor's compliance with the terms of this Easement and to enforce such terms; provided, that access by Grantees and their respective authorized designees shall not be more than is necessary to monitor this Easement and implement the Creek Management Plan and shall not unreasonably interfere with the use and quiet enjoyment of the Property or Conservation Easement Area by the Grantor or its successors in interest or by any tenants of the Property.

8.3 Nothing herein is intended to set any monitoring standard for Grantees, nor to create any obligation that Grantees access the property more than Grantees deem necessary, in their sole judgment.

8.4 It is intended that the general public will have access to the Conservation Easement Area so long as it is not inconsistent with Conservation Values; although access to the general public may be restricted with the mutual consent of Grantees and Grantor.

9. **Costs and Responsibilities.** The Agencies' responsibilities and costs are set for in the MOU Agreement or in the Creek Management Plan. To the extent cost allocations or responsibilities are not set forth, Grantor retains the responsibilities for ownership, operation, upkeep, and general maintenance of the Conservation Easement Area.

10. **Extinguishment.** It is the intention of the parties that the conservation purposes of this Conservation Easement shall be carried out forever. Liberal construction is expressly required for purposes of effectuating this Conservation Easement in perpetuity, notwithstanding economic hardship or changed conditions of any kind. Notwithstanding the foregoing, if circumstances arise in the future which render the purposes of this Easement impossible to accomplish, this Easement can only be terminated or extinguished, whether in whole or in part, by judicial proceedings in a court of competent jurisdiction, or by agreement of the Agencies.

11. **Amendment.** If circumstances arise under which an amendment to or modification of this Easement would be appropriate, Grantor and Grantees may jointly amend this Easement.

12. **Conveyance.** Grantees may not convey this Easement in whole or in part without the prior written approval of Grantor, which approval shall not be unreasonably withheld.

13. **Notices.** Any notice, demand, request, consent, approval, or communication that either party desires or is required to give to the other shall be in writing and shall be deemed delivered upon receipt and either served personally or sent by first class mail – postage prepaid, certified mail, or overnight delivery by a reputable carrier, addressed as follows:

Grantees

City of Albany Community Development
Director
1000 San Pablo Avenue
Albany, CA 94706

University of California, Berkeley
2610 Channing Way
Berkeley, CA 94720
RSSP, Executive Director, Housing and Dining

Grantor

City of Berkeley

2180 Milvia Street

Berkeley, CA 94704

Director of Parks Recreation and Waterfront

Notice is deemed to be given upon receipt. The addresses and addressees for the purpose of this Section may be changed by giving written notice of such change in a manner provided herein for giving notice. However, until such written notice is actually received, the last address and addressee for such addressee continues in effect for all purposes hereunder.

14. **Recordation**. Grantees shall cause this instrument to be recorded in the Official Records of the County of Alameda, California. Grantees may re-record this Easement whenever re-recording is required to preserve Grantee's rights in this Easement.

15. **Hazardous Materials Liability**. Notwithstanding any other provision herein to the contrary, the parties do not intend this Conservation Easement to be construed such that it creates in or gives to the Grantees:

a. The obligations or liabilities of an "owner" or "operator" as those words are defined and used in environmental laws, as defined below, including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (42 USC Section 9601 et seq. and hereinafter "CERCLA"); the obligations or liabilities of a person described in 42 USC Section 9607(a)(3), except as to Hazardous Materials put on the Conservation Easement Area by Grantees or its successors, assigns, agents, employees, representatives, guests, or invitees or liability for a higher level or standard of clean up for any existing Hazardous Materials than would otherwise be required by Environmental Laws to Grantees related to or necessitated by a use or change in use by the Grantees.

b. The obligations of a responsible person under any applicable Environmental Laws, as defined below, unless the Grantee is applying for authorization pursuant to an Environmental Law to achieve the purposes of the Creek Management Plan or is using or changing the use of the Conservation Easement Area so as to necessitate a higher level or standard of clean up for any existing Hazardous Materials than would otherwise be required by Environmental Laws.

c. The right to investigate and remediate any Hazardous Materials, as defined below, associated with the Property without prior approval of Grantor; or

d. Control Grantor's ability to investigate, remove, remediate, or otherwise clean up any Hazardous Materials associated with the Property.

The term "Hazardous Materials" includes, without limitation, (a) material that is flammable, explosive, or radioactive; (b) petroleum products; and (c) hazardous materials,

hazardous wastes, hazardous or toxic substances, or related materials defined in this CERCLA (42 USC Section 9601 et seq.), the Hazardous Materials Transportation Act (49 USC Section 6901 et seq.), the Hazardous Waste Control Law (Cal. Health & Safety Code Section 25100 et seq.), the Hazardous Substance Account Act (Cal. Health and Safety Code Section 25300 et seq.), and in the regulations adopted and publications promulgated pursuant to them, or any other applicable federal, state, or local laws, ordinances, rules, or regulations now in effect or enacted after this date.

16. General Provisions.

16.1 Controlling Law. The interpretation and performance of this Easement shall be governed by the laws of the State of California.

16.2 Liberal Construction. Any general rule of construction to the contrary notwithstanding, this Easement shall be liberally construed in favor of Grantees to effect the purposes of this Easement and the policy and purpose of Section 815 et seq. of the California Civil Code. If any provision in this instrument is found to be ambiguous, an interpretation consistent with the purposes of this Easement that would render the provision valid shall be favored over any interpretation that would render it invalid. This instrument shall be construed in accordance with its fair meaning and it shall not be construed against either party on the basis that that party prepared this instrument.

16.3 Severability. If any provision of this Easement, or the application thereof, is found to be invalid to any person or circumstance, the remainder of the provisions of this Easement, or the application of such provision to persons or circumstances other than those as to which it is found to be invalid, as the case may be, shall not be affected thereby so long as the purposes of this Easement can still be carried out.

16.4 Third Party Rights. This instrument is made and entered into for the sole benefit and protection of Grantor and Grantees and their respective successors and assigns. No person or entity other than the parties hereto shall have any right of action under this Easement or the Creek Management Plan, or any right to enforce the terms and provisions thereof.

16.5 No Forfeiture. Nothing contained herein is intended to result in a forfeiture or reversion of Grantor's fee title in any respect. Grantor specifically reserves the right at any time, to convey fee title to the Conservation Easement Area subject to the terms of this Easement.

16.6 Successors. The covenants, terms, conditions, and restrictions of this Easement shall be binding upon, and inure to the benefit of, the parties hereto and their respective successors and assigns, and shall continue as a servitude running in perpetuity with the Conservation Easement Area.

16.7 Termination of Rights and Obligations. Except as expressly provided otherwise in this instrument, a party's rights and obligations under this Easement shall terminate upon the transfer of the party's interest in this Easement or the fee title to the Conservation

Easement Area, as the case may be, except that rights, obligations, and liability relating to acts or omissions occurring prior to transfer shall survive transfer.

16.8 Captions. The captions in this instrument have been inserted solely for convenience of reference and are not a part of this instrument and shall have no effect upon construction or interpretation.

16.9 Counterparts. Grantor may execute this instrument in two or more counterparts. Each counterpart shall be deemed an original instrument. In the event of any disparity between the counterpart produced, the recorded counterpart shall be controlling.

[Remainder of Page Intentionally Left Blank; Signatures on Following Page]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date first written above.

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: _____

STATE OF CALIFORNIA)
) ss.
COUNTY OF _____)

On _____, before me, _____, a Notary Public in and for said County and State, personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) (is/are) subscribed to the within instrument, and acknowledged to me that (he/she/they) executed the same in (his/her/their) authorized capacit(-y/-ies), and that by (his/her/their) signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature of Notary Public

[SEAL]

STATE OF CALIFORNIA)
) ss.
COUNTY OF _____)

On _____, before me, _____, a Notary Public in and for said County and State, personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) (is/are) subscribed to the within instrument, and acknowledged to me that (he/she/they) executed the same in (his/her/their) authorized capacit(-y/-ies), and that by (his/her/their) signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature of Notary Public

[SEAL]