



MEETING DATE: 10-01-2007

AGENDA ITEM: 1

COUNCIL AGENDA REPORT

DATE: September 27, 2007

TO: MAYOR AND TOWN COUNCIL

FROM: ORRY P. KORB, TOWN ATTORNEY *OK*

SUBJECT: ADOPT RESOLUTION APPROVING SETTLEMENT AND RELEASE AGREEMENT RESULTING IN A COVENANT RUNNING WITH THE LAND; 15310 KENNEDY ROAD, LOS GATOS, CA; APN 537-13-011

RECOMMENDATION:

Adopt resolution approving Settlement and Release Agreement Resulting in a Covenant Running with the Land; 15310 Kennedy Road, Los Gatos, CA; APN 537-13-011.

BACKGROUND:

In April 2005 James and Nicole Richardson, owners of the property identified as 15310 Kennedy Road (APN 537-13-011) allowed the grading of a path between 6 and 12 feet wide, over 4100 feet in length along a hillside within the area of an open space easement held jointly by the Town and Mid-Peninsula Regional Open Space District (the "District"). The grading occurred without a grading permit issued by the Town.

On June 30, 2005, the Town notified the Richardsons that they must take temporarily stabilize the graded areas. The temporary stabilization measures were to be completed in compliance with criteria established by the Town and approved by the District, and the Richardsons' performance would be monitored by the Town. The Parties agree that the Richardsons completed and maintained temporary stabilization measures in compliance with the mandatory criteria.

On January 17, 2007, Geomatrix, an engineering firm qualified to consult on geological matters including erosion control and remediation measures associated with improper grading work, submitted the "Final Report Evaluation of Trail Grading – Joint Easement" to the Town summarizing its investigations,

PREPARED BY: ORRY P. KORB, TOWN ATTORNEY

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Reviewed by: *OK* Town Manager _____ Assistant Town Manager _____ Clerk _____
OK Finance _____ Community Development _____

Rev: 9/27/07 3:03 pm

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File# 301-05

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MAYOR AND TOWN COUNCIL

SUBJECT: ADOPT RESOLUTION APPROVING SETTLEMENT AND RELEASE
AGREEMENT RESULTING IN A COVENANT RUNNING WITH THE LAND;
15310 KENNEDY ROAD, LOS GATOS, CA; APN 537-13-011

September 27, 2007

findings and conclusions, and recommendations with respect to stabilizing, minimizing erosion and sedimentation and restoring the Path to natural conditions (the "Report"). The Report at section 5.0 makes certain recommendations, all of which have been approved by the Town and District and accepted without qualification or reservations by the Richardsons.

DISCUSSION:

The Parties now wish to settle all disputes arising out of the illegal grading within the Open Space Easement Area by insuring that the graded area is returned to natural conditions pursuant to the recommendations of the Report. The proposed settlement agreement incorporates the specific requirements of the Report, including site work and a five-year monitoring period. The Richardsons are responsible to completing all work at their own expense. Should they fail to do so, the Town reserves all remedies otherwise available to address violations of the Town Code. The Richardsons are also required to bear the cost of the geotechnical monitoring services.

Adoption of the proposed resolution will authorize the Interim Town Manager to execute the Settlement Agreement after its approval and execution by the Richardsons and the District.

ENVIRONMENTAL ANALYSIS:

The project, which consists of the restoration of hillside area damaged by illegal grading activities, is categorically exempt pursuant to sections 15301 and 15304 of the California Environmental Quality Act ("CEQA") Guidelines as adopted by the Town of Los Gatos

FISCAL IMPACT:

Pursuant to the Settlement Agreement, the project will be funded entirely by the property owners responsible for the illegal grading activities. Consequently, there will be no fiscal impact on the Town.

Attachment:

Proposed resolution (Settlement Agreement is Attachment "1" to the Resolution)

Distribution:

1. Duncan Simmons, Assistant General Counsel, Mid Peninsula Regional Open Space District
2. Samuel Chuck, Esq.

RESOLUTION

**RESOLUTION OF THE TOWN COUNCIL OF THE TOWN OF LOS GATOS
APPROVING SETTLEMENT AND RELEASE AGREEMENT RESULTING IN A
COVENANT RUNNING WITH THE LAND**

APN 537-13-011

PROPERTY LOCATIONS: 15310 KENNEDY ROAD, LOS GATOS

WHEREAS:

A. Nichole and James Richardson are the fee owners of real property located in the Town of Los Gatos, California, APN 537-13-011 (the "Property").

B. The Property is subject to an Open Space Easement granted by James Blair and Donna Blair, the Richardsons' predecessors in interest to the Property, to the Town and the Mid Peninsula Regional Open Space District, recorded on November 6, 1986 as document No. 9014185 at book J910, page 2117 (the "Easement").

C. Paragraph 2(c) of the Grant of Open Space Easement excludes the repair or maintenance of any existing roads on the Property or the placing of gravel or other non-impervious material upon any roads existing as of the date of the grant of easement.

D. Section 12.20.010 of the Los Gatos Town Code requires a permit for any grading work in the Town.

E. On or about April 2005 the Richardsons permitted, directed or otherwise allowed the grading of a path between 6 and 12 feet wide, over 4100 feet in length along a hillside within the area of the easement (the "Path"). The Path was cleared without a grading permit issued by the Town.

F. On or about June 30, 2005, the Town notified the Richardsons that they must take measures to temporarily stabilize the graded areas during the pendency of their dispute with the Town and the District regarding the Path and other issues unrelated thereto. The temporary stabilization measures were to be completed in compliance with criteria established by the Town and approved by the District, and the Richardsons' performance would be monitored by the Town. The Parties agree that the Richardsons completed and maintained temporary stabilization measures in compliance with the mandatory criteria.

G. Temporary stabilization measures were completed to the satisfaction of the Town and District.

H. On or about January 17, 2007, Geomatrix, an engineering firm qualified to consult on geological matters including erosion control and remediation measures associated with improper grading work, submitted the "Final Report Evaluation of Trail Grading – Joint Easement" to the Town summarizing its investigations, findings and conclusions, and recommendations with respect to stabilizing, minimizing erosion and sedimentation and restoring the Path to natural conditions (the "Report").

I. The Report at section 5.0 makes certain recommendations, all of which have been approved by the Town and District and accepted without qualification or reservations by the Richardsons.

J. The parties now wish to settle all disputes among themselves arising out of or otherwise relating to the grading of the Path by insuring that the Path is returned to natural conditions pursuant to the recommendations of the Report.

RESOLVED:

1. That the proposed Settlement and Release Agreement, a copy of which is attached as Attachment "1" hereto and, by this reference, incorporated fully herein, is hereby approved.
2. That the Town Manager is authorized to execute the proposed Settlement and Release Agreement on behalf of the Town.

PASSED AND ADOPTED at a regular meeting of the Town Council of the Town of Los Gatos, California held on the ____ day of _____, 2007 , by the following vote:

COUNCIL MEMBERS:

AYES:

NAYS:

ABSENT:

ABSTAIN:

SIGNED:

MAYOR OF THE TOWN OF LOS GATOS
LOS GATOS, CALIFORNIA

ATTEST:

CLERK ADMINISTRATOR OF THE TOWN OF LOS GATOS
TOWN OF LOS GATOS, CALIFORNIA

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**SETTLEMENT AND RELEASE AGREEMENT RESULTING
IN A COVENANT RUNNING WITH THE LAND
15310 Kennedy Road, Los Gatos, CA
Re. Open Space Easement (Document No. 9014185, Recorded 11/6/86)
APN 537-13-011**

This Settlement and Release Agreement (the "Agreement") is entered effective the ____ day of _____, 2007 by and between the Town of Los Gatos, a California municipal corporation (the "Town"), the Midpeninsula Regional Open Space District (the "District") and James Richardson and Nicole Richardson, as husband and wife, their heirs, executors, administrators, successors in interest to the Property, as defined herein, and assigns and agents (the "Richardsons") (Town, District and Richardsons are collectively referred to hereafter as the "Parties"), with reference to the following facts and purposes.

RECITALS

A. Richardsons are the fee owner of real property located in the Town of Los Gatos, California, APN 537-13-011, more particularly described in Exhibit "A" to this Agreement (the "Property"). The Richardsons, as defined herein, shall include the trusts and/or LLC's holding legal or equitable interest in the Property, including, but not limited to, Green Eyes, LLC.

B. The Property is subject to an Open Space Easement granted by James Blair and Donna Blair, the Richardsons' predecessors in interest to the Property, to the Town and District, recorded on November 6, 1986 as document No. 9014185 at book J910, page 2117 (the "Easement"). A true and correct copy of the Easement is attached as Exhibit "A" hereto and by this reference fully incorporated herein.

C. The Grant of Open Space Easement, at paragraph 2(i) states as follows:

2. GRANTOR covenants and agrees for itself and its successors and assigns that GRANTOR, its successors and assigns singularly or in combination:

* * *

(i) Shall not excavate or grade or grant permission to others for any excavation or grading to be done, or place or grant permission to others for the placement of any sand, soil, rock, gravel or any other such material whatsoever on Subject Property, except as permitted pursuant to Paragraph 2(c).

Paragraph 2(c) of the Grant of Open Space Easement excludes the repair or maintenance of any existing roads on the Property or the placing of gravel or other non-impervious material upon any roads existing as of the date of the grant of easement.

D. Section 12.20.010 of the Los Gatos Town Code requires a permit for any grading work in the Town.

E. On or about April 2005 the Richardsons permitted, directed or otherwise allowed the grading of a path between 6 and 12 feet wide, over 4100 feet in length along a hillside within the area of the easement (the "Path"). The Path was cleared without a grading permit issued by the Town.

F. On or about June 30, 2005, the Town notified the Richardsons that they must take measures to temporarily stabilize the graded areas during the pendency of their dispute with the Town and the District regarding the Path and other issues unrelated thereto. The temporary stabilization measures were to be completed in compliance with criteria established by the Town and approved by the District, and the Richardsons' performance would be monitored by the Town. The Parties agree that the Richardsons completed and maintained temporary stabilization measures in compliance with the mandatory criteria.

G. Temporary stabilization measures were completed to the satisfaction of the Town and District.

H. On or about January 17, 2007, Geomatrix, an engineering firm qualified to consult on geological matters including erosion control and remediation measures associated with improper grading work, submitted the "Final Report Evaluation of Trail Grading – Joint Easement" to the Town summarizing its investigations, findings and conclusions, and recommendations with respect to stabilizing, minimizing erosion and sedimentation and restoring the Path to natural conditions (the "Report"). Included as part of the Report are "Figures", "Plates" Appendix "A", "Erosion Control Measures - Typical Details (From the Association of Bay Area Governments)" and photographs of the Path. A true and correct copy of the Report is attached as Exhibit "B" hereto and by this reference fully incorporated herein.

I. The Report at section 5.0 makes certain recommendations, all of which have been approved by the Town and District and accepted without qualification or reservations by the Richardsons.

J. The Parties now wish to settle all disputes among themselves arising out of or otherwise relating to the grading of the Path by insuring that the Path is returned to natural conditions pursuant to the recommendations of the Report.

NOW, THEREFORE, the Parties have agreed to settle the dispute between and among them on the terms and conditions set forth below.

Section 1. Recitals Incorporated.

The Parties acknowledge that the recitals are true and correct and incorporate the Recitals into this Agreement.

Section 2. Adoption of the Recommendations of the Report.

(a) The Richardsons shall take the steps necessary to return the Path to natural conditions pursuant to the recommendations of the Report and may employ their own contractors to perform any work required pursuant to the Report, including work required by the Consultant employed by the Town pursuant to the Report and this Section 2. Any work required to be performed shall be completed by the Richardsons within 45 days after the Town notifies them of the work to be done, unless the Town consents to a longer time period in light of the difficulty of the work to be done or any factors beyond the Richardsons' control, which consent shall not be unreasonably withheld.

(b) Notwithstanding the foregoing, the Richardsons shall begin the work required under the Report no later than 45 days after execution of this Agreement. The parties understand and agree that it will take the Richardsons no more than 180 days to complete the initial work contemplated by the Report. Thereafter, any additional work, including initial work not completed within 225 days after execution of this Agreement, will be performed in accordance with the terms herein.

(c) In the event the Richardsons fail to timely and satisfactorily complete any work to install, maintain and regularly inspect and repair erosion and sedimentation control measures pursuant to the recommendations of the Report, the Town shall engage an independent contractor selected at its discretion, upon consultation with the District, to complete said work.

(d) The Town shall invoice the Richardsons on an annual basis in the amount specified in the contract for the services of any contractor(s) selected by the Town pursuant to recommendations of the Report, and the Richardsons shall pay the Town within thirty (30) days of the date of mailing of the invoice.

(e) The Town shall send the Richardsons such supplemental invoices as are required from time to time to pay additional costs incurred by the independent contractor for services rendered pursuant to the recommendations of the Report, and the Richardsons shall pay the Town within thirty (30) days of the date of mailing of such supplemental invoices.

(f) The Town shall continuously engage an independent contractor (the "Consultant") pursuant to the recommendations of the Report through and including May 31, 2011. Prior to May 31, 2011, the Town shall consult with the Consultant regarding the condition of the Path and may, as the Town, in consultation with the District, determines necessary to maintain and regularly repair erosion and sedimentation control measures pursuant to the recommendations of

the report, extend the contract for additional 12-month periods. The Richardsons shall be invoiced and shall pay for such additional services pursuant to subsection (c) and (d) of this section. Notwithstanding the foregoing, if the Town elects to extend the Consultant's contract for an additional 12-month period beyond May 31, 2013, the Richardsons may contest such election. The Richardsons shall contest such election in writing no later than 30 days after receipt of written notice from the Town of its election to extend the Consultant's contract for a period beyond May 31, 2013. The parties shall act promptly to submit their dispute to resolution by binding arbitration but not later than 30 days after the Richardsons' contesting of election. The binding arbitrator shall be by mutual selection of the parties or, if the parties are unable to agree, the arbitrator shall be from JAMS in Santa Clara County and shall be selected by JAMS in its normal selection process. The arbitrator shall determine whether it is reasonably necessary to continue the Consultant's contract in light of the history of erosion control steps implemented and maintained by the Richardsons and the existing conditions at the Property. The parties shall be entitled to their reasonable attorney's fees and costs including the costs of the arbitration.

Section 3. Right of Entry.

(a) The Richardsons, on behalf of themselves and their heirs, executors, administrators, successors, and assigns and agents, hereby grant the Town, its elected officials, officers, employees, representatives, agents, consultants and contractors, a right to enter the Property consistent with and for the purposes set forth in Section 2 of this Settlement Agreement.

(b) The Town shall endeavor whenever possible to provide a minimum of twenty-four (24) hours telephonic notice of their intent to enter consistent with this Settlement Agreement, but shall not be required to do so where emergency conditions, including, but not limited to meteorologic or seismic incidents, compel entry consistent with this Settlement Agreement.

(c) The right of entry granted herein shall continue for the entire period set forth in Section 2 of this Settlement Agreement and shall terminate no earlier than the date when the Recommendations of the Report are fully implemented and completed.

(d) Although the District is not granted a right of entry in this Agreement, the right of entry granted herein is in addition to, and not limited by, the right of entry granted in the Easement.

(e) Nothing in this Settlement Agreement is intended to limit the District's right to enter as granted by the Easement.

Section 4. Waiver and Release.

(a) By executing this Agreement, the Richardsons, on behalf of themselves and their heirs, executors, administrators, successors, and assigns and agents, hereby:

(1) Release and forever discharge the Town and the District, their elected officials, officers, employees, representatives, assigns and successors from any and all claims, causes of action, actions, damages, losses, demands, accounts, rights, liens, debts, liabilities, obligations, disputes, controversies, payments, costs and attorneys' fees of every kind and character, known or unknown, existing or contingent, latent or patent, regarding any matter arising from, the grading of the Path or the Town and District's efforts to address the grading of the Path or its return to natural conditions. If any lawsuit has been or is filed by the Richarsons or their heirs, executors, administrators, successors, and assigns and agents arising out of, or which is in any way related to the grading of the Path or this Agreement, the Richardsons shall indemnify, defend and hold the Town and District harmless from any and all damages, including any attorneys' fees and costs that result therefrom.

(2) Release and waives all claims or causes of action, whether known or unknown, which in any way related to the grading of the Path or the Town and District's efforts to address the grading of the Path or its return to natural conditions. To the extent any person or entity should file, subsequent to the execution of this Agreement, any claim or cause of action against Town arising out of, or which is related to the grading of the Path or the Town and District's efforts to address the grading of the Path or its return to natural conditions, such person or entity shall indemnify, defend and hold the Town and the District harmless from any and all damages, including any attorneys' fees and costs that result therefrom.

(b) By executing this Agreement, the Town and the District and their elected officials, officers, employees, representatives, assigns and successors hereby:

(1) Release and forever discharge the Richardsons, their heirs, executors, administrators, successors, and assigns and agents, from any and all claims, causes of action, actions, damages, losses, demands, accounts, rights, liens, debts, liabilities, obligations, disputes, controversies, payments, costs and attorneys' fees of every kind and character, known or unknown, existing or contingent, latent or patent, regarding any matter arising from, or related to the grading of the Path or the Town and District's efforts to address the grading of the Path or its return to natural conditions.

(2) Release and waive all claims or causes of action, whether known or unknown, which in any way related to the grading of the Path or the Town and District's efforts to address the grading of the Path or its return to natural conditions. To the extent any person or entity should file, subsequent to the execution of this Agreement, any claim or cause of action against the Richardson arising out of, or which is related to the grading of the Path or the Town and District's efforts to address the grading of the Path or its return to natural conditions, such person or entity shall indemnify, defend and hold the Richardsons harmless from any and all damages, including any attorneys' fees and costs that result therefrom.

(3) The Parties acknowledge that, notwithstanding the foregoing, the following matters are not subject of this Waiver and Release:

(i) the trail grading and drainage improvements undertaken on the Property outside of the Open Space Easement (APN 537-13-001) in 2005 described in that certain December 12, 2006, Geomatrix report entitled "Evaluation of Trail Grading – 15310 Kennedy Road, Los Gatos, CA" and subject to a separate agreement between Town and the Richardsons; and

(ii) an unrelated disagreement between District and the Richardsons regarding the installation of a fence and drainage improvements purportedly located on a portion of the Kennedy Trail in the Town.

Section 5. Representations and Warranties of the Parties.

The Parties hereby represent and warrant the matters set forth below to be true to the best of their knowledge as of the date hereof.

(a) The Parties have the legal power, right, and authority to enter into this Agreement on their behalf and on behalf of their heirs, assigns, successors in interest and agents.

(b) Neither the execution of this Agreement nor any actions contemplated thereby shall result in a breach of or constitute a default under any agreement, instrument, or other obligation to which either of the Parties is a party or by which they or any property belonging to them may be bound.

(c) Each of the Parties shall have the continuing duty to notify the other of any material facts in their knowledge which would render any of the representations set forth above false.

(d) The Parties have not assigned or transferred, or purported to assign or transfer, and shall not hereafter assign or transfer, any obligations, liabilities, demand, claims, costs, expenses, liens, debts, controversies, damages, actions and causes of action released pursuant to this Agreement.

(e) In this connection and to the extent permitted by law and not otherwise specifically excluded from the Waivers and Releases made herein, the Parties agree, represent, and warrant that each realizes and acknowledges that factual matters now unknown to them may have given or may hereafter give rise to causes of action, claims, demands, debts, controversies, damages, costs, losses, and expenses which are presently unknown, unanticipated, and unsuspected; and further agrees, represents, and warrants that the waiver and release herein made and given was negotiated and agreed upon in light of that realization and that each nevertheless

hereby intends to release, discharge, and acquit the other from any such unknown causes of action, demands, debts, controversies, damages, costs, losses, and expenses. Accordingly, each Party, on behalf of themselves and anyone claiming by, through or under them, hereby assumes the above-mentioned risks and hereby expressly waives any right they and anyone claiming by, through or under them, may have under Section 1542 of the California Civil Code, which reads as follows:

“A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.”

(f) The Parties have received the advice of legal counsel with respect to the advisability of making the release provided for herein and the meaning of Civil Code section 1542. The Parties are aware that they may hereafter discover claims or facts in addition to or different from those the Parties now know or believe to be true with respect to the matters related herein. Nevertheless, it is the intention of the Parties to fully, finally and forever settle and release all such matters, and all claims related to those matters.

(g) The Parties have read this Agreement, which has been explained to them by legal counsel of their choice, are aware of the content and legal effect of this Agreement, are each acting on the advice of legal counsel of their choice, and are not relying on any representations made by the other or any of the employees, agents, representatives, or attorneys of the other. The warranties and representations of this Section are deemed to survive the date of execution hereof.

Section 6. Remedies and Venue.

In the event of an alleged breach of this Agreement by either Town or the Richardsons, the aggrieved party may pursue any and all remedies at law or equity, including specific enforcement of the Agreement. The venue for any action brought to enforce the terms of this Agreement shall be the Superior Court of the State of California, County of Santa Clara.

Section 7. Covenant Running With the Land.

The Parties hereby agree that the provisions contained in Section 2 of this Agreement are intended to and do constitute a covenant running with the land described herein as the Property binding the Richardsons, including their heirs, executors, administrators, successors assigns, agents and in interest to the Property until termination of the Consultant pursuant to Section 2(f).

Section 8. General Provisions.

(a) Headings. The title and headings of the various sections hereof are intended as a means of reference and are not intended to place any construction on the provisions hereof.

(b) Invalidity. If any provision of this Agreement shall be found by a court of competent jurisdiction to be invalid or unenforceable, the remaining provisions shall not be affected thereby, and every provision hereof shall be valid and enforceable to the fullest extent permitted by law.

(c) Attorneys' Fees. The Parties shall each bear their own attorney's fees, if any, arising from the negotiation and execution of this Agreement and from any prior disputes. In the event of any litigation between the Parties hereto to enforce or interpret any of the provisions of this Agreement, the prevailing party therein shall be entitled to recover from the unsuccessful party all costs and expenses, including reasonable attorneys' fees, all of which may be included as part of the judgment rendered in such litigation, provided that such litigation may only be maintained in the Superior Court of the State of California, County of Santa Clara.

(d) Entire Agreement. This Agreement supersedes all prior negotiations and agreements between the Parties, and is intended by the Parties as a final expression of their agreement and may not be contradicted by evidence of any prior or contemporaneous agreement. The Parties further intend that this Agreement constitute the final and exclusive statement of its terms and that no extrinsic evidence whatsoever may be introduced in any judicial proceedings involving this Agreement. No provision of this Agreement may be amended except by an agreement in writing signed by the Parties hereto or their respective successors in interest. This Agreement shall be governed by and construed in accordance with the laws of the State of California. Furthermore, this Agreement shall serve as a complete resolution of the issues related to the Path, and, as such, the Path shall not serve as a basis by which to limit, modify or restrict any applications, permits or work on the Richardsons' properties. Notwithstanding the foregoing, if the Richardsons violate the terms of this Agreement, such violation may serve as a basis by which to limit, modify or restrict applications, permits or other work on the Richardsons' property, to the extent permitted by law.

(e) Successors. This Agreement shall be binding upon and inure to the benefit of the heirs, executors, administrators, successors, assigns and agents of the Parties hereto.

(f) Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same agreement.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the effective date shown above.

TOWN OF LOS GATOS, a California municipal corporation

Pamela Jacobs, Interim Town Manager

APPROVED AS TO FORM:

Orry P. Korb, Town Attorney

ATTEST:

Jackie Rose, Town Clerk Administrator

MIDPENINSULA REGIONAL OPEN SPACE
DISTRICT, a California special district

Craig Britton, General Manager

ATTEST:

Gordon Baille, Interim District Clerk

APPROVED AS TO FORM:

Susan M. Schectman, General Counsel

JAMES RICHARDSON

NICOLE RICHARDSON

APPROVED AS TO FORM:

EXHIBIT A
(The Grant of Open Space Easement)

EXHIBIT B
(The Geomatrix Report)

9014185

RECORDING REQUESTED BY
AND WHEN RECORDED RETURN TO:

✓ Midpeninsula Regional Open
Space District
Old Mill Office Center
Building C, Suite 135
201 San Antonio Circle
Mountain View, CA 94040

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RMF	15
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SMPF	
PCOR	

Recorded at the request of
Valley Title Company

NOV 6 1986 8:00AM

LAURIE KANE, Recorder
Santa Clara County, Official Records

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GRANT OF OPEN-SPACE EASEMENT WITH COVENANTS

RECITALS

WHEREAS,

1. The undersigned, James Blair and Donna Blair, husband and wife, as community property (collectively "GRANTOR"), are the owners of the fee simple estate in and to that real property (the "Subject Property"), situated in the County of Santa Clara, State of California, more particularly described in Exhibit "A" attached hereto and made a part hereof.

2. It is the desire of GRANTOR to grant to Midpeninsula Regional Open Space District, A Public District (the "District"), and the Town of Los Gatos (the "Town"), an open-space easement on, upon, over, and across the Subject

EXHIBIT A

Property pursuant to Chapter 6.6 (commencing with Section 51070) of Part 1, Division 1, Title 5 of the California Government Code and Section 5540 of California Public Resources Code. The District and the Town shall hereinafter collectively be referred to as "GRANTEE".

3. The GRANTOR and GRANTEE recognize the scenic, aesthetic and special character of the region in which their respective properties are located, and have the common purpose of conserving the natural values of their respective properties by the conveyance of an open-space easement on, over, and across the Subject Property which shall conserve and protect the bird and plant population and prevent the use or development of the Subject Property for any purpose or in any manner which would conflict with the maintenance of the Subject Property in its natural, scenic, open and wooded condition.

4. This Grant of Open-Space Easement with Covenants is referred to herein as the "agreement" or the "easement."

NOW, THEREFORE, for valuable consideration, receipt of which is hereby acknowledged:

Grant of Open-Space Easement

1. GRANTOR hereby grants to GRANTEE an open-space easement on, upon, over, and across the Subject Property and relinquishes to the public in perpetuity the right to construct improvements thereon.

2. GRANTOR covenants and agrees for itself and its successors and assigns that GRANTOR, its successors and assigns singularly or in combination:

(a) Shall not erect, construct, place or maintain or grant permission for the erection, construction, placement or maintenance of any improvement, building or structure or any other man-made thing whatsoever on the Subject Property which would impair the open-space nature of the Subject Property other than such improvements, building, structures, or other things existing on the Subject Property at the time of the granting of this easement.

(b) Shall not use or grant permission to others to use the Subject Property or any portion thereof as a parking lot, storage area or dump site or otherwise deposit or grant permission to others to deposit on the Subject Property or any portion thereof, temporarily or otherwise, anything whatsoever which is not indigenous or natural to the Subject Property.

(c) Shall not cover or cause the Subject Property to be covered in whole or in part with any asphalt, stone, or concrete or other material which does not constitute natural cover for the land, and shall not otherwise disturb the natural cover for the land, specifically excluding the repair or maintenance of any existing roads on the Subject Property or the placing of gravel or other non-impervious material upon any roads existing as of the date of this easement.

(d) Shall not mine, extract, sever or remove nor grant permission to others to mine, extract, sever or remove or cause to be mined, extracted, severed or removed any natural resource found or located on, above or under the Subject Property or otherwise engage in or grant permission to others to engage in any activity on the Subject Property which will or may destroy the natural and scenic open-space characteristics of the Subject Property.

(e) Shall not fish, trap, hunt, capture, kill or destroy or grant permission to other for the fishing, trapping, hunting, capturing or destruction of fish or other marine or aquatic life of the Subject Property, except for health or safety purposes and with the prior written consent of the Town, if required by law.

(f) Shall not hunt trap or grant permission to others for the hunting or trapping of animal life on the Subject Property. Pursuant thereto, GRANTOR, its successors or assigns shall not trap, kill, capture or destroy or grant permission to others for the trapping, killing, capturing or destruction of animal life on the Subject Property, except for health and safety purposes and with the prior written consent of the Town, if required by law.

(g) Shall not divide or subdivide the Subject Property or otherwise convey (other than under threat of condemnation) a portion of such property less than the whole to

one or more parties, or convey the Subject Property to two (2) or more parties each of whom acquires title to less than the whole of the Subject Property. As used herein "party" means and includes any person, corporation, partnership, or other legal entity capable of holding title to real property.

(h) Shall not cut, uproot or remove or grant permission to others for the cutting, uprooting or removal of timber or trees or other natural growth found or located on the Subject Property, except as may be permitted pursuant to Paragraph 3.

(i) Shall not excavate or grade or grant permission to others for any excavation or grading to be done, or place or grant permission to others for the placement of any sand, soil, rock, gravel or any other such material whatsoever on Subject Property, except as permitted pursuant to Paragraph 2(c).

(j) Shall not operate or grant permission to others for the operation on the Subject Property of any motor bike, trail bike, go-cart or other motor-driven or motor-powered vehicles, except those motor vehicles for GRANTOR's use but only if such use does not impair the open-space nature of the Subject Property, or such use is reasonably necessary for the accomplishment of the purpose for which the Subject Property is used pursuant to the terms and conditions, restrictions and covenants set forth herein for the Subject Property. "Grantor's use" as used herein shall be deemed to include use

by Grantor and Grantor's employees, agents, invitees, and independent contractors.

Grantee's Rights

3. Notwithstanding any other provision hereof, this easement agreement shall not restrict, in any manner, GRANTOR's right: (a) to develop any natural springs on the Subject Property, to install underground water lines on the Subject Property, and to remove water from the Subject Property; and (b) to perform such maintenance, repair and removal work on the Subject Property as may be necessary to preserve the vegetation and ground cover in a healthy and safe condition, or to construct and maintain foot trails on the Subject Property. Such maintenance, repair and removal work shall include the pruning of trees, thinning and removal of trees and vegetation for fire safety purposes, elimination of dead or diseased growth, and removal of poison oak and other unsafe or hazardous vegetation, provided a tree removal permit is obtained from the Town, if required by law.

Right to Prevent Prohibited Use

4. GRANTOR grants to GRANTEE its successors and assigns for the term of this easement the right, but not the obligation, to enter upon the Subject Property, at its risk, for the following purposes: (a) to conduct regular general inspections of the Subject Property, in no event to exceed more than one (1) such regular general inspection every three (3)

calendar years, unless GRANTEE has reasonable cause to believe that GRANTOR is in material default of the terms of this agreement, in which case GRANTEE shall have the right to an interim general inspection, in no event to exceed more than one (1) interim general inspection of the Subject Property in any calendar year; and (b) to investigate an alleged specific violation of the easement agreement, but only after a bona fide third party complaint or report has been made to GRANTEE of such specific violation; and (c) to investigate and halt activity on or use of the Subject Property contrary to the terms of this easement agreement which, if not immediately acted upon, would result in a material breach of this agreement causing irreparable harm to the open-space nature of the Subject Property ("Emergency Inspection"). With respect to the regular and interim general inspections referred to in subparagraph (a), GRANTEE shall be required to give GRANTOR thirty (30) days prior written notice before conducting such inspections. With respect to GRANTEE's right to enter the Subject Property after a reported violation pursuant to subparagraph (b), GRANTEE shall be required to give GRANTOR prior notice either in writing or by telephone of the claimed violation within two (2) days of receipt of the specific complaint or report of the violation, and a period of five (5) days after receipt by GRANTOR of notice of the violation within which to respond to GRANTEE regarding the existence of the

claimed violation and the need for such an inspection. In the case of an Emergency Inspection referred to in subparagraph (c), no prior telephone or written notice shall be required from GRANTEE to GRANTOR before GRANTEE enters upon the Subject Property, unless reasonable under the circumstances.

Enforcement

5. The stated purposes, terms, conditions, restrictions and covenants set forth herein and each and all of them, including the right of GRANTEE to require GRANTOR to perform any restoration work reasonably required due to a breach of this agreement, may be specifically enforced or enjoined by proceedings in the Superior Court of the State of California.

No Authorization for Public Trespass

6. The granting of this easement and its acceptance by GRANTEE does not authorize and is not to be construed as authorizing the public or any member thereof to trespass upon or use all or any portion of the Subject Property or as granting to the public or any member thereof any dedication or any other tangible rights in or to the Subject Property or the right to go upon or use or utilize the Subject Property in any manner whatsoever. It is understood that the purpose of this easement is solely to restrict construction of buildings, structures, and other above ground level edifices on the Subject Property and to establish the other restrictions expressly set forth herein with respect to the Subject Property

so that the Subject Property may be kept in an open-space condition.

Reservation of Use by GRANTOR

7. GRANTOR reserves the right to use the Subject Property in any manner consistent with the stated purposes, terms, conditions, restrictions and covenants of this easement and with existing zoning and other laws, rules and regulations of the State of California and the Town or other jurisdiction having authority, their successors or assigns, as such laws, rules and regulations may hereafter from time to time be amended.

Condemnation

8. If the Subject Property or any portion thereof during the term of this easement is sought to be condemned for public or quasi-public use, the easement and each and every term, condition, restriction and covenant contained herein shall terminate as of the time of the filing of the complaint in condemnation as to that portion of the Subject Property sought to be taken for public or quasi-public use only, but shall remain in effect relative to all other portions of the Subject Property. GRANTOR shall be entitled to such compensation for the taking as it would have been entitled had the Subject Property not been burdened by this easement and nothing in this agreement shall be construed to give GRANTEE any interest in any award or payment made to GRANTOR in connection with any

exercise of eminent domain or transfer in lieu thereof; provided, however, that each and every stated term, condition, restriction and covenant of this easement shall be observed by GRANTOR, its successors or assigns, during the pendency of such action and provided further that in the event such action is abandoned prior to the recordation of a final judgment of condemnation relative to the Subject Property or any portion thereof is not actually acquired for a public or quasi-public use, the Subject Property shall, at the time of such abandonment, or at the time it is determined that such property shall not be taken for public or quasi-public use, once again be subject to this easement and to each and every stated purpose, term, condition, restriction and covenant of this easement; provided, further, that if the Subject Property is sought to be acquired, appropriated, or condemned for a use incompatible with this open space easement as defined herein, by any other public or quasi-public entity, the presumptions contained in Section 1240.680 of the Code of Civil Procedure and Section 5542.5 of the Public Resources Code may be asserted by the Grantee to protect its interest in the Subject Property and preserve the open-space character thereof.

9. Remedies Upon Default.

(a) If GRANTOR, or any successor in interest of GRANTOR, breaches or violates any of the covenants, conditions, or restrictions contained in this agreement, GRANTEE shall give

GRANTOR or its successor in interest written notice of such breach or violation. Any such notice shall specify with particularity the nature of the breach or violation claimed and shall set forth in detail the action which GRANTEE requests be taken in order to cure the claimed breach or violation.

(b) If such breach or violation continues uncured for a period of more than sixty (60) days after the receipt of such notice, GRANTEE shall have the right to prosecute any proceeding at law or in equity against GRANTOR or its successor in interest in order to prevent the violating or breaching party from violating or attempting to violate or breach any of the covenants, conditions or restrictions contained herein; provided, however, that if the nature of the breach or violation is such that more than sixty (60) days is reasonably required for such cure, then GRANTOR shall be allowed such additional necessary time provided GRANTOR diligently prosecutes such cure to completion. The remedies available under this paragraph shall include, by way of illustration but not limitation, ex parte applications for temporary restraining orders, preliminary injunctions, and permanent injunctions enjoining or remedying any such violation or breach or attempted violation or breach.

(c) If either party shall bring an action against any of the other party by reason of the violation or breach of any covenant, condition, or restriction contained herein, or

otherwise arising out of the terms of this easement, the prevailing party in such suit or proceeding (as determined by the Court) shall be entitled to recover reasonable attorneys' fees and costs which shall be payable whether or not such action or proceeding is prosecuted to judgment, provided that no award of attorneys' fees and costs shall be rendered against either party unless the court finds that such party's action or inaction is willful and in bad faith.

Enforceable Restriction

10. This easement and each and every term, condition, restriction and covenant contained herein is intended for the benefit of the public and constitutes an enforceable restriction pursuant to the provisions of Section 8 of Article XIII of the California Constitution and Chapter 6.6 (commencing with Section 51070) of Part 1. Division 1. Title 5 of the Government Code and shall bind GRANTOR and its successors and assigns and each and all of them, and is intended to run with the land.

Notices

11. Any notices required to be given to GRANTOR shall, unless otherwise specifically set forth in this agreement, be in writing and delivered to GRANTOR as follows: Mr. and Mrs. James Blair, 15310 Kennedy Road, Los Gatos, CA 95030.

This easement has been executed on this 11th day of

June, 1986.

GRANTOR:

James Blair

Donna Blair

ACCEPTANCE OF OPEN-SPACE EASEMENT WITH COVENANTS

Pursuant to the provisions of Chapter 6.6 of Part 1, Division 1, Title 5 of the Government Code (commencing with Section 51070) and Section 5540 of the Public Resources Code, MIDPENINSULA REGIONAL OPEN SPACE DISTRICT and THE TOWN OF LOS GATOS hereby accept this grant of easement with the covenants on this 11th day of June, 1986.

GRANTEE:

MIDPENINSULA REGIONAL OPEN
SPACE DISTRICT, A PUBLIC
DISTRICT

By Edward G. Shelley
President, Board of Directors

Attest Jan H. Fiddes
District Clerk

THE TOWN OF LOS GATOS

By Terrence J. Daily
Mayor

Attest Rose E. Alday
Town Clerk

EXHIBIT A

J910 PAGE 2130

LEGAL DESCRIPTION:

All that certain real property situate in the Town of Los Gatos, County of Santa Clara, State of California, described as follows:

The West 1/2 of the West 1/2 of the Northeast 1/4 of Section 26 Township 8 South Range 1 West, M.D.B. & M.

Excepting therefrom the following described real property:

All that real property situate in the Town of Los Gatos, County of Santa Clara, State of California and being a portion of Section 26, Township 8 South, Range 1 West, Mount Diablo Baseline and Meridian and more particularly described as follows:

Beginning at the Southwest corner of the West Quarter of the Northeast Quarter of said Section 26;

Thence northerly along the westerly line of said West Quarter, North $2^{\circ}12'21''$ East, 256.91 feet, to a point that is 256.80 feet distant from the southerly line of said West Quarter measured at right angles;

Thence along a line parallel with and distant 256.80 feet northerly of said southerly line, South $89^{\circ}28'48''$ East, 678.04 feet to a point in the easterly line of said West Quarter;

Thence southerly along the easterly line of said West Quarter, South $1^{\circ}59'04''$ West, 256.88 feet to the southeasterly corner of said West Quarter;

Thence westerly along the southerly line of said West Quarter, North $89^{\circ}28'48''$ West, 679.03 feet to the Point of Beginning.

Said described parcel being the most southerly 4 acres of the West Quarter of the Northeast Quarter of said Section 26.
End of description.

EXHIBIT A

EXHIBIT A

J910 PAGE 2130

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All that certain real property situate in the Town of Los Gatos, County of Santa Clara, State of California, described as follows:

The West 1/2 of the West 1/2 of the Northeast 1/4 of Section 26 Township 8 South Range 1 West, M.D.B. & M.

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Thence westerly along the southerly line of said West Quarter, North $89^{\circ}28'48''$ West, 679.03 feet to the Point of Beginning.

Said described parcel being the most southerly 4 acres of the West Quarter of the Northeast Quarter of said Section 26.
End of description.

EXHIBIT A

EXHIBIT B
(The Geomatrix Report)

IS AVAILABLE AT THE CLERK'S DEPARTMENT FOR REVIEW

