

COOPERATIVE AGREEMENT

This Cooperative Agreement is entered into this day of January, 2021 by and between the Mission Springs Water District ("MSWD"), a public agency, and the Desert Willow Property Owners' Association ("DWPOA"), a California non-profit mutual benefit corporation, with reference to the following.

RECITALS

- A. MSWD owns and is responsible to maintain and repair the water lines within certain dedicated easements both within and adjacent to the Desert Willows Community ("Desert Willows") south of Pierson Boulevard, east of Atlantic Avenue, west of Via Loreto, and north of Flora Avenue in the City of Desert Hot Springs.
- B. MSWD plans to replace approximately 7,600 LF of aging 8" PVC pipeline with new 8" DIP pipes and appurtenances, including water meter laterals, fire hydrants, and valves along with 45,100 square feet (SF) of related trench repair and AC (Asphalt Concrete) paving within Desert Willows (the "MSWD Project").
- C. The DWPOA is responsible for the maintenance and repair of the paving on the private roads within Desert Willows and desires that MSWD replace such roads in conjunction with the MSWD Project (the "DW Project") as an accommodation to DWPOA. The DW Project consists of the following streets: Desert Willows Drive, Carob Tree Drive, Cahuilla Avenue, Marvyn Drive, Lawrence Drive, Ricardo Avenue, Leonardo Drive, and the entrance and parking area north of the clubhouse.
- D. The DWPOA desires that MSWD complete the DW Project along with the MSWD Project with MSWD being responsible for the cost of the MSWD Project and the DWPOA being responsible for the cost of the DW Project and all other risks and liabilities associated with the DW Project.
- E. Asphalt replacement within Desert Willows will consist of pulverizing the existing AC pavement and construction of a new AC pavement overlay that is anticipated to encompass approximately 184,600 SF of which the DWPOA will be responsible for 150,500 SF (81.5%) and of which MSWD will be responsible for 34,100 SF (18.5%). This 18.5% portion represents that part of the roads that must be excavated and replaced in connection with the replacement of the waterlines pursuant to MSWD policies. The 81.5% portion is the solely the responsibility of the POA which MSWD will cause completion of to avoid liability claims by DWPOA under this Agreement.
- F. MSWD completed a public bidding process for the MSWD Project and the DW Project (the "Overall Project"). Following the bid opening on October 26, 2020, The Van Dyke Corporation ("Contractor") was deemed the lowest responsible and responsive bidder and it is anticipated that Contractor will be awarded the bid upon the execution of this Agreement. The Contractor's Base Bid and Bid Alternative for the Overall Project is \$1,515,899.50, of which \$310,440.00 is for the pavement replacement within Desert Willows. The DWPOA's portion of the cost of pavement replacement for the DW Project is approximately \$253,025.83 (81.5%) and MSWD's portion being \$57,414.17 as part of the MSWD Project.

G. MSWD will incur additional costs for administration, construction management, inspection, survey, and materials testing in connection with the DW Project that shall be the responsibility of DWPOA. Construction management, inspection, survey, and materials testing services, are estimated to be \$42,227.76 for the DW Project which includes a 3% administrative fee.

NOW THEREFORE, the parties agree as follows:

AGREEMENT

A. General. The Contractor will complete the Overall Project at the sole direction of MSWD in accordance with the contract documents executed between the Contractor and MSWD. The DWPOA shall pay MSWD for the costs associated with the DW Project in accordance with the other provisions of this Agreement. The DWPOA shall be responsible for \$295,253.59 (\$253,025.83 + \$42,227.76) for the DW Project and related costs.

B. Obligations of MSWD

1. MSWD shall administer, manage and inspect the Overall Project and maintain records under the contract documents with Contractor as well as approving all change orders and/or stop notices, and all other work necessary to complete the Overall Project. Notwithstanding the forgoing, Contractor shall be solely liable for the construction of the DW Project and MSWD shall have no liability under any theory for construction defects or theories to DWPOA with regards to the DW Project.

2. MSWD shall provide the services of a Project/Construction Manager for the purpose of administering the Project and coordinating the activities of the MSWD, consultant(s), contractor(s), and permitting agencies.

3. MSWD shall obtain approval from DWPOA before issuance of any change orders or stop work orders that are the responsibility of DWPOA. MSWD shall not be responsible for the cost of any work associated with the DW Project that was not reasonably foreseeable at the time that the Contractor bid on the Project which shall be at the sole cost and expense of the DWPOA pursuant to change orders approved by DWPOA. DWPOA will be made aware of situations where it's consent is required and where time is of the essence in order to avoid potential delay costs and upon such notice from MSWD, DWPOA's review time will be one (1) business day and if no response is received the request shall be deemed approved.

4. MSWD shall withhold and subsequently release retention funds from the contractor(s) in accordance with the project documents for the Overall Project as determined by MSWD in its sole and absolute discretion.

5. MSWD shall submit to DWPOA, on a monthly basis, a status of the DW Project accompanied by a listing of expenditures, specific to the DW Project, and total spent to date.

6. Within sixty days after the recordation of a Notice of Completion for the Overall Project, MSWD shall provide a final invoice to DWPOA for all remaining costs for the DW Project.

C. *Obligations of DWPOA*

1. At the request of MSWD, DWPOA shall provide proof of funds satisfactory to reimburse MSWD in full for the DW Project. DWPOA shall pass a resolution authorizing the President of the POA to execute this Agreement and disburse the sum of \$295,253.59 for payment of the DW Project without further involvement of the DWPOA Board which must be satisfactory to MSWD in its sole and absolute discretion.

2. Prior to the commencement of construction of the Overall Project, but no later than 30 days following the Effective Date of this AGREEMENT, the DWPOA shall wire transfer the sum of \$147,626.80 in immediately available funds in an account designated by MSWD (50% of DWPOA's share of the DW Project costs) as a good faith deposit against the total cost of the DW Project. If the DWPOA fails to timely make such deposit, this Agreement shall terminate and shall be of no further force or effect. MSWD shall apply the deposit against the costs incurred for the DW Project, as determined by MSWD.

3. The DWPOA shall wire transfer the additional sum of \$73,813.40 to MSWD (25% of the cost for the DW Project) within 30 days following the substantial completion of the DW Project, as determined by MSWD.

4. The DWPOA shall wire transfer the remaining \$73,813.40 to MSWD (25% of the cost for the DW Project) upon completion of the DW Project and submittal of final invoice(s) for actual costs incurred by MSWD and its contractor(s) to complete the improvements.

5. Funds deposited by DWPOA shall be kept in a separate deposit account by MSWD, and shall be restricted to be used only for allowable DW Project costs. MSWD shall release funds from such account without any further notice or consent from DWPOA to the Contractor, MSWD and consultants as the costs are incurred, and as determined by MSWD in its sole and absolute discretion.

6. DWPOA's cost for the DW Project shall not exceed \$295,253.59 without an amendment to this Agreement or a change order in accordance with this Agreement. It is understood that construction and construction administration costs may escalate and that it is difficult to predict what the actual costs may be at this time. Consequently, both Parties agree to periodically review, the estimated costs and adjust the costs for the Project as needed and update said costs in the same fair share percentages prescribed herein.

7. DWPOA represents and warrants that it has received the contract documents between MSWD and the Contractor and the DW Project as shown in such contract documents is satisfactory to DWPOA in all regards. The execution of the Addendum between the Contractor and DWPOA, attached hereto as Exhibit A ("Addendum") the terms of which are hereby incorporated by reference, is a condition precedent to the effectiveness of this Agreement. Additionally, MSWD agrees that as to the DW Project, DWPOA is a third-party beneficiary under the Agreement between Contractor and DWPOA as specifically provided in the Addendum.

8. Notwithstanding anything to the contrary in this Agreement or the Addendum, DWPOA shall have no right to manage, supervise, approve, disapprove or direct the DW Project, approve or disapprove work under the DW Project or take any action that would interfere with the rights and obligations of MSWD under the Cooperative Agreement.

D. Waivers and Disclaimers. DWPOA represents and warrants that it has reviewed the contract documents between MSWD and Contractor and the plans and specifications for the Overall Project as satisfactory to DWPOA. DWPOA acknowledges that MSWD has made no representations or warranties to DWPOA express or implied regarding the Overall Project or the DW Project whatsoever including but not limited to representations of fitness for a particular purpose. DWPOA holds harmless, releases and waives any rights against MSWD with regards to the DW Project including, but not limited to those for construction defects or breach of warranty. DWPOA agrees and acknowledges that it is the sole legal obligation of the DWPOA to maintain the roadways within Desert Willows and that by overseeing the DW Project, MSWD has no legal obligation to perform such work now or at any time in the future. Furthermore, MSWD shall have no obligation to maintain or repair the streets with Desert Willow now or in the future under any circumstances whatsoever.

E. DWPOA's Insurance.

DWPOA shall maintain liability insurance with coverage amounts of no less than one million dollars per occurrence and two million dollars aggregate applicable to the common areas of the project including the roads.

F. Prevailing Wages. The DWPOA acknowledges and agrees that the DW Project constitutes a "public work" under California Prevailing Wage Law, including Labor Code Sections 1720 through 1861, et seq. (as such statutes may be amended from time to time, "PWL"), and the PWL obligates MSWD to cause the DW Project and the MSWD Project to be performed as "public work", including, but not limited to, the payment of applicable prevailing wages to all persons subject to the PWL.

G. Schedule:

1. On or before January 20, 2021, the DWPOA Board shall meet and vote on the approval of this AGREEMENT and the disbursement of funds under this Agreement by the Board President.

2. On or before February 15, 2021, MSWD's Board of Directors shall meet and vote on the approval of this AGREEMENT. Construction cannot proceed until both the Board of Directors of the MSWD and DWPOA have approved this Agreement, DWPOA proof of funds has been confirmed by MSWD and the Overall Project is awarded to the low bidder but in any case no later than February 22, 2021.

3. If the Project is awarded in February, the project construction is expected to begin in March 2021 and conclude in August 2021.

4. MSWD will endeavor to cause Contractor to complete the DW Project in accordance with the timeframes set forth in this Agreement, recognizing certain delays may be unavoidable, and in the event that the timeframes are not met MSWD shall have no liability in that regard.

H. *Additional Provisions:*

1. This AGREEMENT may be modified only by a writing signed by the Parties hereto.

2. All notices, demands, requests, consents, approvals, or communications from one Party to another shall be personally delivered or sent by facsimile or e-mail to the persons set forth below and shall be deemed given one (1) business day after it is sent. Alternatively, it shall be deemed given five (5) calendar days after deposit in the United States mail, certified and postage prepaid, return receipt requested, and addressed as follows, or at such other address as either Party may from time to time specify to the other parties in writing:

To the DWPOA

Karl Baker, President
Desert Willows Property Owners Association
65565 Acoma Ave.
Desert Hot Springs, CA 92240
Telephone: (760) XXX-XXXX
Facsimile: (760) XXX-XXXX
[E-mail: bakerkarljr@icloud.com](mailto:bakerkarljr@icloud.com)

With copy to Guralnick & Gilliland, LLP

Wayne S. Guralnick, Esq.
GURALNICK & GILLILAND, LLP
40-004 Cook Street, Suite 3
Palm Desert, CA 92211
Telephone: (760) 340-1515
Facsimile: (760) 568-3053
[E-mail: wayneg@gghoalaw.com](mailto:wayneg@gghoalaw.com)

To the MSWD

Arden Wallum, General Manager
Mission Springs Water District
66575 Second Street
Desert Hot Springs, CA 92240
Telephone: (760) 329-6448
Facsimile: (760) 329-2482

[E-mail: awallum@mswd.org](mailto:awallum@mswd.org)

3. No Party hereto shall assign any rights or delegate any duties hereunder without the prior written consent of the other Party. Subject to the forgoing, this AGREEMENT shall be binding on and inure to the benefit of the successors and permitted assigns of the Parties.

4. This AGREEMENT shall be governed by and interpreted in accordance with the laws of the State of California. The Parties agree that the exclusive venue for any action or proceeding arising from this AGREEMENT shall be in the County of Riverside, State of California.

5. Dispute Resolution. In the event of any controversy or dispute related to or arising out of this Agreement, the Parties agree to meet and confer in good faith to attempt to resolve the controversy or dispute without an adversary proceeding. All such negotiations shall be confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence. If the Parties are unable to settle the dispute by negotiation within forty-five (45) days from the date of the initial meeting, the Parties shall submit the dispute to mandatory, binding, confidential arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 et seq., under the auspices and Commercial Rules of the American Arbitration Association. The place of arbitration shall be Desert Hot Springs, California. The decision of the arbitrator shall be final and binding as to each Party. The arbitrator is empowered to award equitable relief, but not empowered to award damages in excess of compensatory damages, and each Party hereby irrevocably waives any right to recover such damages with respect to any dispute within the scope of this clause. Each party shall bear its own attorneys' fees and costs it incurs in connection with the arbitration. This Section shall survive the termination of this Agreement.

6. Force Majeure. Either Party shall be excused for failure or delay in the performance of its obligations hereunder due to any cause beyond the control and without the fault of such Party, including, without limitation, any act of God, epidemic or pandemic or the **worsening thereof (including COVID-19)**, terrorism, war, riot or insurrection, law or regulation, strike, flood, fire, explosion, or inability due to any of the aforementioned causes to obtain necessary labor, materials, or facilities. This provision shall not, however, release such Party from using its best efforts to avoid or remove such cause, and such Party shall continue performance hereunder with the utmost dispatch whenever such causes are removed. Upon claiming any such excuse or delay for non-performance, such Party shall give prompt written notice thereof to the other Party, provided that failure to give such notice shall not in any way limit the operation of this provision.

7. Each person signing this AGREEMENT represents that he or she has the authority to do so on behalf of the Party for whom he or she is signing.

8. This Agreement, the Addendum and the Recitals hereto constitute the entire agreement between the parties and supersede all prior negotiations, correspondence, agreements and understandings between the parties relating to the subject matter hereof. In the event of a conflict or inconsistency between the Addendum and this Cooperative Agreement, this

Cooperative Agreement shall prevail as relates to DWPOA and MSWD, but not as to Contractor and DWPOA.

9. This Agreement may be executed in counterparts each of which when combined with all required signatures shall constitute a completely executed version of this Agreement. Facsimile signature to this Agreement shall be treated the same as original signatures for all purposes.

IN WITNESS WHEREOF, the Parties have caused this AGREEMENT to be executed the day and year first above written.

MISSION SPRINGS WATER DISTRICT

Date: _____ By: _____
Nancy Wright, Board President

Date: _____ ATTEST: _____
Arden Wallum, Board Secretary

DESERT WILLOWS PROPERTY OWNERS ASSOCIATION

Date: 01/18/21 By: _____
Karl Baker, Board President

Date: 01-18-21 ATTEST: _____
XXXXXX, Board Secretary

APPROVED AS TO FORM:

By: _____ Dated: _____
John Pinkney
SBEMP
Attorneys for MSWD

EXHIBIT A

Addendum between the Contractor and DWPOA

**THIRD PARTY BENEFICIARY ADDENDUM FOR
CONSTRUCTION OF THE
DESERT WILLOWS WATERLINE REPLACEMENT PROJECT
("Addendum")**

This Addendum dated January 15, 2021 is made by and between the Desert Willow Property Owners Association's ("DWPOA") and The Van Dyke Corporation, a California corporation ("Contractor"), for the Desert Willows Waterline Replacement Project.

RECITALS

WHEREAS, Mission Springs Water District ("MSWD"), a public agency, and the DWPOA have entered into a Cooperative Agreement, dated January 15, 2021 ("Cooperative Agreement") the terms of which are incorporated herein by this reference in pertinent part of which DWPOA agrees to remit payment of \$295,253.59 ("Funds") to MSWD for the Contractor's performance of the asphalt pulverization and replacement of private streets within the Desert Willows gated community (which streets are DWPOA common areas in which the DWPOA is obligated to maintain and repair)("DW Project");

WHEREAS, the DW Project is part of an overall project known as the Desert Willows Waterline Replacement Project ("Project").which is subject to a construction agreement between Contractor and MSWD ("Construction Agreement");

WHEREAS, in consideration of DWPOA's payment of the Funds to MSWD for the DW Project and the grant of a temporary construction easement to Contractor to facilitate the Project ("Temporary Easement"), the parties wish to enter into this Addendum to identify the terms and conditions relating to Contractor's performance of the DW Project;

NOW, THEREFORE, the parties hereto agree as follows:

- A. The recital paragraphs stated above are hereby incorporated into this Addendum and made a part hereof as though fully set forth;
- B. DWPOA is entitled to the rights and benefits and may enforce the provisions of the Construction Contract as an intended third party beneficiary under Civil Code Section 1559 with respect to only to the following matters:
 - (i). Contractor shall provide DWPOA the same Additional Insured Endorsements as required to be provided to MSWD per Section 2.21 of the General Conditions of the Construction Agreement;
 - (ii) Contractor shall indemnify and hold DWPOA and its officers, directors and managing agent harmless in the same manner as provided to MSWD under Section 13 of the Construction Agreement and sections 2.19.06 Sections 2.24, 2.38.01, 2.34, 2.4.04 of the General Conditions; and

(iii) The rights to Section 2.11 Protection of Work, Property, and Persons, Section 4.15 Protection of Facilities Other than Utilities, and Section 4.19 Access to Adjacent Properties; and

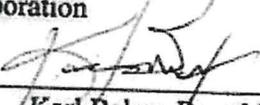
(iv) The obligations of Contractor commencing after the Substantial Completion (as that term is defined in the Construction Contract) of the DW Project to complete the DW Project in a lien free and defect free condition under the Contract including but not limited to Section 4.04 as well as the Warranty provided under Section 1.8 of Procedural Documents provided that any claim under the Performance Bond or Labor and Materials Bond may be made only by MSWD provided that MSWD shall make such claim if requested DW POA and approved by MSWD in its reasonable discretion.

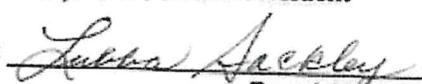
C. DWPOA hereby grants Contractor the Temporary Easement for the period of time needed by Contractor to complete the DW Project and the MSWD Project in accordance with the Construction Contract.

D. This Addendum and the provisions of the Construction Contract referenced herein constitutes the entire agreement between the parties with respect to the subject matter hereof.

IN WITNESS WHEREOF, Association and Contractor have fully executed this Addendum on the day, month and year first above written.

**DWPOA - DESERT WILLOWS
PROPERTY OWNERS ASSOCIATION, A
California Non-Profit Mutual Benefit
Corporation**

By: 
Karl Baker, Board President

Attest: 
Susan Seckley, Board Secretary

**CONTRACTOR - THE VAN DYKE
CORPORATION, A California
Corporation**

By: 
David G. Van Dyke,
Chief Executive Officer

1/17/21