

AGENDA ITEM NO.

COUNCIL MEETING
APPROVED BY

DEPARTMENT DIRECTOR

CITY MANAGER

March 4, 2008

FROM: PATRICK N. WIEMILLER, Director 
Public Works Department

BY: SCOTT L. MOZIER, PE, City Engineer/Assistant Director 
Public Works Department, Engineering Division

SUBJECT: APPROVE AN ENCROACHMENT AGREEMENT WITH THE FRESNO IRRIGATION DISTRICT TO ALLOW THE INSTALLATION AND MAINTENANCE OF TREES AND SHRUBS AND IRRIGATION SYSTEM WITHIN THE RIGHT OF WAY OF MILL DITCH NO. 36 AND AUTHORIZE THE PUBLIC WORKS DIRECTOR OR HIS DESIGNEE TO SIGN THE AGREEMENT ON BEHALF OF THE CITY OF FRESNO (PROPERTY LOCATED IN COUNCIL DISTRICT 4)

KEY RESULT AREA

One Fresno

RECOMMENDATION

Approve an encroachment agreement with the Fresno Irrigation District (FID) to allow the installation and maintenance of landscape trees and shrubs and irrigation system within the right of way of FID Mill Ditch No. 36, and authorize the Public Works Director or his designee to sign the agreement on behalf of the City of Fresno.

EXECUTIVE SUMMARY

A construction contract for \$1,023,040.00 was awarded to Elite Landscaping Inc. on July 31, 2007, by the Redevelopment Agency. The ongoing contract included the installation of approximately a mile of trees and irrigation system along the south side of McKinley Avenue between Clovis and Peach Avenues adjacent to the FID Mill Ditch No. 36 canal.

FID objected to the installation of trees along the canal, because they would be too close to the canal and would prevent the free movement of FID's maintenance equipment. In response staff from the Redevelopment Agency worked with FID to create a new landscape design to provide for small (4 feet at maturity) shrubs for approximately one-half mile of McKinley which would maintain a clear 15 foot wide maintenance road adjacent to the canal. FID approved the revised landscape plan subject to a new agreement with the City to replace a 1990 agreement which had allowed for the installation of the existing trees

on McKinley Avenue. Staff recommends that the Council approve the encroachment agreement in order that the proposed landscaping project may be completed.

KEY OBJECTIVE BALANCE

The recommendation provides emphasis to Customer Satisfaction. By partnering with the Fresno Irrigation District we are able to beautify a major route for air travelers as they drive to and from the Fresno-Yosemite International Airport. Customer and Employee Satisfaction will be achieved through Council approval and completion of a complex and lengthy project. Financial Management will be achieved by allowing the awarded construction contract to be completed.

BACKGROUND

The RDA Airport Beautification Project was implemented to eliminate blight by enhancing the visual and physical qualities of the intersection of McKinley and Clovis Avenues, thereby increasing the opportunity for future business development within the RDA Airport Project Area.

The project creates landscaped boulevards on McKinley and Clovis Avenues by adding new landscaping to existing deteriorating landscaping; augmenting the existing irrigation system; replacing existing chain link fence with a wrought iron fence; installing a monument sign for the Fresno-Yosemite International Airport, and installing a right turn pocket to the southbound traffic at the corner of Clovis Avenue and McKinley Avenue.

Construction started on September 17, 2007, which included the installation of approximately one mile of trees and an improved irrigation system along the south side of McKinley Avenue between Clovis and Peach Avenues. The trees were designed to be installed adjacent to the FID Mill Ditch No. 36 canal, but within McKinley Avenue right of way.

FID's easement, however, overlapped the street right of way and FID opposed the proposed planting of the trees within 20 feet of the inside edge of the canal. The original 1990 City-FID agreement was executed to allow for some tree planting along McKinley Avenue, but prohibited any tree planting within this 20 foot wide clear area along the bank. FID was concerned that the additional trees would interfere with the maintenance of the canal.

In response the Agency worked with FID to establish a mutually agreeable landscape plan which would provide for the planting of small (4 feet at maturity) shrubs for only one-half mile of McKinley Avenue. This plan, which was subsequently approved by FID, keeps a clear 15 foot road for the maintenance of the canal. Thus, FID required a new agreement with the City which would allow for the new landscaping and the existing trees.

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FISCAL IMPACT

There will be no new fiscal impact to the City's General Fund resulting from execution of this agreement. The City will incur additional maintenance costs for the new landscaping along McKinley Avenue.

NW/SLM/CJK/eam
Apprv Encroach Agr FID to Install-Maintain Landscape Mill Ditch #36 3-4-08

Attachment: Encroachment Agreement

RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:

FRESNO IRRIGATION DISTRICT
2907 SOUTH MAPLE AVENUE
FRESNO, CA 93725-2218

ENCROACHMENT AGREEMENT

CANAL: Mill Ditch No. 36 Canal

THIS AGREEMENT is made effective as of _____, 2008, by and between the CITY OF FRESNO, a municipal corporation ("City"), and the FRESNO IRRIGATION DISTRICT, a California irrigation district ("District"), with respect to the following facts:

- A. District is the owner of the easement and right-of-way (the "Easement") for its Mill Ditch No. 36 Canal and associated facilities (the "Canal"), further described on Exhibit "A" to this Agreement.
- B. District and City are parties to that certain Encroachment Agreement dated March 7, 1990 (the "1990 Agreement"), regarding City's planting and maintenance of trees within the Easement.
- C. The parties desire to restate and clarify City's rights and obligations with respect to landscaping within the Easement, and to provide City with certain rights to install, operate and maintain utility lines and water pipelines within the Easement.

NOW THEREFORE, in consideration of the mutual covenants and conditions contained in this Agreement, the parties agree as follows:

1. 1990 Agreement Superseded. The parties agree that the 1990 Agreement is superseded in its entirety by this Agreement.
2. License for Landscaping. District hereby grants to City the right to plant, use, install, and maintain trees, bushes, shrubs and other landscaping and related facilities required to properly care for such trees, etc. (collectively, "Landscaping"), upon and within the Easement, excluding any portion of the Easement located within 15 feet of the top inside edge of the Canal, and subject to the paramount right of District to the full and beneficial use and enjoyment of the Easement. This license and encroachment rights thereunder shall continue until revoked or surrendered following at least 180 days written notice, subject to each party's annually allocated and available funding.
3. Landscaping Site Plan. Prior to installation of any Landscaping, City shall submit to District for District's approval a site plan which clearly indicates the quantity,

spacing, type of trees, etc., to be planted, and any irrigation system details. Landscaping shall be planted and installed in accordance with the approved site plan.

4. Landscaping Maintenance.

(a) City agrees to keep all Landscaping in a well-maintained condition. Without limiting the foregoing, (i) City shall keep all trees, etc., sufficiently pruned at all times so as not interfere with the normal operation and maintenance of District's facilities, and (ii) keep and maintain the Landscaped Area free of undesirable weeds and litter. (The "Landscaped Area" shall consist of the area within the District's Easement where the encroachments have been allowed.)

(b) Should City fail to maintain the Landscaping or keep the Landscaped Area free of undesirable weeds and litter, the District shall have the right (but not the obligation) to perform any maintenance or removal necessary for District's unhindered use of the Easement, following reasonable written notice to City. City shall be responsible to reimburse District on demand for any reasonable cost incurred by District in connection with the City's Landscaping, with interest at the rate of 10% per annum on any unpaid balance of said costs.

5. License for Improvements. District hereby grants to City the right to install, operate, maintain and replace (i) underground utility lines and (ii) underground pipelines for water (collectively, "Improvements") within the Easement, and subject to the paramount right of District to the full and beneficial use and enjoyment of the Easement.

6. Installation of Improvements. City shall comply with all federal, state and local codes and ordinances regarding the installation of any Improvements. City shall locate, construct, and maintain the Improvements in such a manner and of such material as may be required to prevent interference with District's present or future uses of the Easement.

7. Improvement Site Plan.

(a) Prior to installation of any Improvements, City shall submit to District for District's approval a site plan for such Improvements which clearly indicates the nature, size, material, location, and depth from the surface of the Improvements. All Improvements shall be installed in accordance with the approved site plan, on a schedule approved by District to avoid interference with District's water delivery and maintenance schedules. District shall have the right to inspect the installation of the Improvements to confirm conformance with the site plan.

(b) City acknowledges and agrees that District's right to approve the installation and construction of the Improvements as provided in this Agreement (i) is solely for the benefit of the District, (ii) shall not assign to District any

responsibility for the safe and proper construction of the Improvements, and (iii) shall not result in District's assumption of any liability for the Improvements.

(c) Maintenance of Improvements. City shall at all times operate and maintain the Improvements so as not interfere with the normal operation and maintenance of District's facilities. Should City fail to maintain, repair, or replace the Improvements, the District shall have the right (but not the obligation) to perform any maintenance, repair, replacement, or removal necessary for District's unhindered use of the Easement following reasonable written notice to City. City shall be responsible to reimburse District on demand for any reasonable cost incurred by District in connection with the Improvements, with interest at the rate of 10% per annum on any unpaid balance of said costs.

8. Title to Property. All Landscaping and Improvements (collectively, "Encroachments") installed or constructed pursuant to this Agreement shall be the property of City. Except as herein otherwise provided, neither District nor City shall have any right, title, or control over the other's property, except as provided by law.

9. Release. City agrees that District shall not be liable for any damage to the Encroachments, or to any other City property associated with the Encroachments, that may result from District's non-negligent operation, maintenance or repair of any District facilities.

10. Right to Remove Encroachments. Upon reasonable written notice to City, District shall have the right to remove any portion of the Encroachments that interfere with the operation, maintenance, replacement or repair of District facilities, at City's expense and without obligation to City for repair, replacement, or remuneration.

11. Indemnity. To the fullest extent permitted by law, City agrees to be solely responsible for any and all injuries, damages, and claims to persons or property arising out of its use of the Easement, except for any such claims arising out of the willful misconduct of District or its directors, officers, employees or authorized volunteers. City agrees to defend, hold harmless, and indemnify District, its directors, officers, employees or authorized volunteers against any and all such injuries, damages, and claims.

12. Existing Rights Not Affected.

(a) Except as expressly set forth herein, this Agreement shall not in any way modify terminate District's rights with respect to the Easement or the Canal.

(b) Nothing herein shall be construed as (i) a release or waiver of any claim which District may have as of the date of this Agreement arising from the installation, operation or maintenance of any Encroachments, or (ii) a waiver of any right District may have to require the removal or alteration of any Encroachments existing as of the date of this Agreement which do not comply with the terms of this Agreement or which are not otherwise authorized by law or

by agreement between the parties. The District acknowledges and agrees that it is unaware of any such claim or right existing as of the effective date hereof.

13. Termination for Default. Upon City's breach of this Agreement, District shall have the right to terminate this Agreement for any future Encroachments by giving written notice to City, in addition to any other rights District may have at law or in equity. Such termination shall not affect the rights of the parties with respect to any Encroachments existing as of the date of termination, which shall continue to be governed by this Agreement.

14. Existing Agreements and Rights. The parties agree that, except as expressly provided herein, any existing agreements and rights held by the parties regarding the use of the Easement area shall remain in full force and effect. In the event of any conflict between the terms of any existing agreement and this Agreement, the existing agreement shall control. Furthermore, this Agreement shall not restrict City's rights with respect to any encroachment otherwise authorized by law.

15. Reasonable Notice. The parties agree that the number of days constituting "reasonable notice" for purposes of this Agreement shall depend on the nature and consequences of the interference with District's facilities.

16. Further Assurances. From time to time and at any time after the execution and delivery hereof, each of the parties, at its own expense, shall execute, acknowledge and deliver any further instruments, documents and other assurances reasonably requested by the other party, and shall take any other action consistent with the terms of this Agreement that may reasonably be requested by the other party, to evidence or carry out the intent of this Agreement.

17. Entire Agreement. This Agreement constitutes the entire agreement between the parties pertaining to the subject matter contained in it and supersedes all prior and contemporaneous agreements, representations, and understandings of the parties. No supplement, modification, or amendment of this Agreement shall be binding unless executed in writing by all of the parties hereto.

18. Waiver. Waiver of any breach of this Agreement by any party hereto shall not constitute a continuing waiver or a waiver of any breach of the same or another provision of this Agreement.

19. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the assigns and successors of the parties hereto.

20. Legal Fees. Should any legal action or proceeding be commenced between the parties hereto concerning this Agreement, or the rights and duties of either party in relation thereto, the party prevailing in such action or proceeding shall be entitled, in addition to such other relief as may be granted, to recover from the other party its reasonable attorneys' and paralegals' fees and other legal expenses incurred in connection with such action or proceeding.

21. Governing Law. This Agreement shall be governed by the laws of the State of California.

22. Construction. All words used in this Agreement shall be construed to include the plural as well as the singular number and vice versa. Words used herein in the present tense shall include the future as well as the present, and words used in the masculine gender shall include the feminine and neuter genders.

23. Parties in Interest. Nothing in this Agreement, whether expressed or implied, is intended to confer any rights or remedies on any persons other than the parties hereto and their respective successors and assigns, nor is anything in this Agreement intended to relieve or discharge the obligation or liability of any third person to any party to this Agreement, nor shall any provision give any third person any right of subrogation or action over and against any party to this Agreement.

24. Notices. All notices and other communications required under this Agreement shall be in writing and shall be deemed to have been duly given (i) on the date of service, if served personally on the person to whom notice is to be given, (ii) on the date of service if sent by telecopier, provided the original is concurrently sent by first class mail, and provided that notices received by telecopier after 5:00 p.m. shall be deemed given on the next business day, (iii) on the next business day after deposit with a recognized overnight delivery service, or (iv) on the third (3rd) day after mailing, if mailed to the party to whom notice is to be given by first class mail, registered or certified, postage-prepaid, and properly addressed as follows:

To District: Fresno Irrigation District
2907 South Maple Avenue
Fresno, CA 93725-2218
Attn: General Manager
Fax: _____

To City: City of Fresno
Public Works Department
Fresno, CA 93721
Attn: Public Works Director
Fax: (559) 488-1045

A party may change its address for notices by providing notice to the other parties as provided above.

[remainder of page intentionally left blank]

