



**OPERATIONS AND MAINTENANCE AGREEMENT
FOR STORMWATER MANAGEMENT PRACTICES**

BACKGROUND

THIS OPERATIONS AND MAINTENANCE AGREEMENT (“**Agreement**”) is made and entered into this ____ day of _____, 201_, (“**Agreement Date**”) and effective as of _____, 201_ (“**Effective Date**”) by and between _____ (together with its successors and assigns in title to the Property “**Property Owner**”), and the City of Philadelphia (together with its successors and assigns “**City**”), acting through the Water Department (“**Department**” or “**PWD**”).

WHEREAS, the Property Owner is the owner in fee of certain real property located at _____, Philadelphia, Pennsylvania, as described more particularly in **Exhibit C1** attached hereto and made a part hereof (“**Property**”);

WHEREAS, The City and the Philadelphia Authority for Industrial Development (“**PAID**”) have established a Stormwater Management Incentives Program (“**SMIP**” or “**Program**”) to provide financial assistance to certain qualified applicants who desire to install stormwater management practices (“**SMP**” or “**SMPs**”);

WHEREAS, the Program provides grants to qualified applicants for design and construction of SMPs (the “**Project**”) where the City determines that the SMP offers the maximum cost savings to the City, achieves the largest reduction of stormwater runoff, and provides the greatest environmental benefit;

WHEREAS, the objective of the Program is to reduce stormwater runoff that would otherwise have been discharged to the City’s wastewater and stormwater system (“**System**”) in order to improve and enhance water quality resources downstream (“**Conservation Objective**”);

WHEREAS, Property Owner applied for and was awarded a SMIP Grant to design, construct, and install the SMPs on a certain portion of the Property (“**SMP Area**”), as described in **Exhibit C2**;

WHEREAS, the SMP is to be constructed in accordance with the Subgrant Agreement, as defined below, and to be operated and maintained by the Property Owner

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in order to protect public health, safety and welfare and maintain and enhance water quality;

WHEREAS, the Conservation Objective of the Program and this Agreement are consistent with the purposes of, and intended to conform with, the requirements of the Pennsylvania Conservation and Preservation Easements Act, Act 29 of 2001, and as amended thereafter;

WHEREAS, pursuant to a Grant Agreement between the City and PAID dated February 23, 2012, and subsequently amended by Amendment Agreement I dated November 30, 2012, Amendment Agreement II dated June 26, 2013, and Amendment Agreement III dated September 23, 2014, the City has granted PAID funding which PAID, or its assignee, will subgrant (“**Project Funding**”) to qualified applicants in accordance with subgrant agreements;

WHEREAS, PIDC-Local Development Corporation (“**PIDC-LDC**”) has contracted with PAID to administer the grant program on PAID’s behalf;

WHEREAS, PIDC-LDC and Property Owner entered into a subgrant agreement dated _____, 201_ (“**Subgrant Agreement**”), pursuant to which Property Owner was awarded \$ _____ in Project Funding to undertake a Project on the Property;

WHEREAS, the City requires that as a condition of receiving the Project Funding, Property Owner must 1) operate and maintain the SMP for 45 years or its useful life, whichever is longer (“**Term of this Agreement**”), unless released from this Agreement pursuant to the provisions within; and 2) grant to the City access over, under, along and in the SMP Area and the SMP for a period of not less than the Term of this Agreement, for the purposes and upon the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the foregoing premises and recitals, which are incorporated herein as if set forth below in full, the mutual covenants contained herein, and the following terms and conditions, the parties hereto, intending to be legally bound hereby, covenant and agree as follows:

AGREEMENT

1. Ownership .

Property Owner agrees that it owns or covenants that it will own the SMP constructed in accordance with the Subgrant Agreement.

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2. Operation and Maintenance Responsibility.

(a) This Agreement shall serve as the signed statement by the Property Owner accepting responsibility for operation and maintenance of the Property's SMPs as set forth in this Agreement until the responsibility is legally transferred to another entity, as provided in 2(b) below.

(b) This Agreement shall serve as notice to all successors and assigns of the title to the Property of the obligations herein set forth. At such time as the Property is transferred, the new owner of the Property shall have the rights and responsibilities of the Property Owner under this Agreement.

(c) Property Owner, at Property Owner's sole expense, shall perform, or shall cause to be performed, the work reasonably necessary to keep the SMPs in good working order and condition so that the SMPs are performing their intended design functions within expected tolerances. This includes, but is not limited to, all pipes and channels built to convey stormwater to the SMPs, as well as all structures, improvements, and vegetation provided to control the quantity and quality of the stormwater.

3. Destruction and Removal; Changes and Alterations.

(a) Property Owner covenants and agrees that for the Term of this Agreement, no change in grades or other alterations within the lines of the SMP Area shall be made and that no buildings and/or other structures either overhead, underground or upon the surface, shall be constructed within the lines of or abutting the SMP Area unless the plans for such changes of grades, alterations or structures shall be first be submitted to and approved in writing by the City.

(b) Property Owner shall not destroy or remove or allow to be destroyed or removed the SMP from the Property or modify the SMP in a manner that materially lessens its effectiveness. It is understood and agreed that none of the following shall constitute a breach of this covenant: (i) destruction, removal or alteration of any such property or improvement as a result of a Force Majeure Event, as defined below, or (ii) the removal and disposal of any SMP, provided that simultaneously with or prior to such removal, any such SMP shall be replaced with another SMP comparable (or better than) in all material respects to the removed SMP and with equal or better effectiveness.

(c) Property Owner shall not be liable for any delay in the performance of its obligations pursuant to this Agreement, to the extent that such delay is caused, directly or indirectly, by an occurrence of fire, flood, earthquake, elements of nature or acts of God, acts of war, terrorism, riots, civil disorders, rebellions or revolutions, power outages, or any other causes beyond the reasonable control of Property Owner (a "**Force Majeure Event**"). Upon the occurrence of a Force Majeure Event, Property Owner shall be

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excused from any further performance of those of its obligations pursuant to this Agreement affected by the Force Majeure Event for as long as such Force Majeure Event continues and up to 72 hours thereafter, provided, however, that Property Owner uses commercially reasonable efforts to promptly recommence performance to the extent possible.

4. Inspection by Property Owner.

Property Owner shall conduct inspections of the SMPs, as needed, but not less than once per year. The purpose of the inspections is to ensure safe and proper functioning of the SMP. The inspection shall cover all SMPs and all SMP-associated structures and areas, including, but not limited to, all berms, outlet structure, ponds, and access roads.

5. Recordkeeping.

Property Owner shall retain a record of maintenance activities and inspections related to SMP for a period of at least four (4) years. Such records shall verify that inspection and maintenance have been conducted pursuant to this Agreement. The City may request at any time that the Property Owner provide copies of any or all maintenance and inspection documentation prepared during the prior four years. Property Owner shall comply with any such requests within ten (10) business days after receipt of such request.

6. Inspection by City.

The Property Owner hereby grants permission to the City and the City's authorized agents and employees to enter upon the Property during normal daylight working hours or at any other reasonable time to inspect the SMPs in order to ensure the SMPs are being adequately maintained and are continuing to perform the designed function. Inspection includes monitoring, sampling, testing and examination to determine proper operation of the SMPs. The City shall have the right to temporarily install and/or place on or near any SMP such devices as are necessary to conduct monitoring, sampling and/or testing of the discharges from the SMPs or the SMP's effects.

7. Failure of Property Owner to Maintain SMP.

(a) **Nuisance.** Property Owner agrees that failure to adequately maintain the SMP may constitute a public nuisance that is a threat to public health and safety and to the environment.

(b) **City may Perform Maintenance.** In addition to any rights the City may have under law or this Agreement, if the City determines that the Property Owner has failed to adequately maintain the SMP as determined by the City, the City may notify the

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Property Owner in writing of any deficiencies. If Property Owner fails to take action to correct those deficiencies within thirty (30) business days of receipt of such notice, the City and its authorized agents and employees may enter upon the Property and take whatever steps reasonably necessary to correct deficiencies identified and charge the reasonable costs (including administrative costs) thereof to the Property Owner. Where deficiencies cause imminent threat to public health, safety or the environment, the City may take immediate steps necessary to protect public health, safety and/or the environment and charge the costs (including administrative costs) thereof to the Property Owner. When the City charges its costs to the Property Owner pursuant to this Section, such charges shall be due within thirty (30) days of the date the bill is received.

(c) **Right to Lien.** In the event the Property Owner fails to reimburse the City within thirty (30) days after receipt of demand under Section 7(b), the City may place a lien on the Property for the entire amount due.

(d) Nothing in this Agreement shall limit the City's rights under the Municipal Claims and Tax Liens Act, 53 P.S. § 7101, *et seq.*

8. No Waiver.

No delay or failure on the part of the City to exercise any rights, powers, or remedies herein provided shall be construed as a waiver thereof or acquiescence of such breach or of any future breach.

9. No Obligation to Maintain by City.

Despite any other provisions of this Agreement, this Agreement does not obligate the City to appropriate or spend money at any time or for any reason. It is expressly understood and agreed that the City is under no obligation to routinely inspect, maintain or repair the SMP, and in no event shall this Agreement be construed to impose any such obligation on the City.

10. Federal Tax Items.

The Property Owner and City confirm that this Agreement is not intended to be a Qualified Conservation Contribution as defined in the Internal Revenue Code and regulations promulgated thereunder.

11. Covenant Running with Land.

The Property Owner agrees whenever the Property is held, sold, conveyed or otherwise transferred during the Term of this Agreement, the Property shall be subject to this Agreement which shall apply to, bind and be obligatory to all then current owner(s) of Property. This Agreement shall constitute a real covenant running with the land for

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the Term of this Agreement, and shall be binding on the Property Owner, its administrators, executors, heirs, assigns, and any other successors in interest during the Term of this Agreement, including, without limitation, any successors in title to the Property or any part thereof, whether or not they have actual notice of this Agreement and whether or not the deed of transfer specifically states that the transfer is under and subject to this Agreement. It is further understood and agreed that subject to the terms of this Agreement, the City shall have peaceful and quiet enjoyment of its rights under this Agreement free and clear of rights or consent of third parties [*optional: , other than those that exist as of the Effective Date of this Agreement, as identified in Exhibit C3*].

12. Reproduction and Release of the Plans and Records.

Property Owner authorizes the City to reproduce and release copies of plans and other records that it previously submitted or in the future submits to PIDC-LDC or the City in connection with the Project or the Project Funding as needed.

13. Agreement to be Recorded.

Property Owner shall record this Agreement with the Philadelphia Department of Records at the Property Owner's expense. The City shall be the sole beneficiary of the agreements, covenants and restrictions set forth herein and such agreements, covenants and restrictions shall run with the land in favor of the City. Failure to record this Agreement shall not diminish the effect of this Agreement.

14. Condominium Owners Association or Homeowners Association Declaration.

This Agreement and its Exhibits shall be attached and/or incorporated into any Declaration of a condominium owners' association or homeowners' association that is responsible for maintenance of the SMPs. Failure to attach and/or incorporate this Agreement shall not diminish the effect of this Agreement.

15. Modifications or Termination.

If the City's rights or privileges under this Agreement are or are about to be modified or terminated by exercise of the power of eminent domain (condemnation) or adjudication of a court of competent jurisdiction sought by a person or entity other than the City, then the City is entitled to recover from the person or entity seeking the modification or termination (i) restitution of amounts paid by the City for Project Funding and any other sums invested by the City in the SMP and/or SMP Area; and (ii) reimbursement of any litigation expenses incurred by the City, including without limitation reasonable attorney and expert witness fees and disbursements. The description of the City's remedies in this Section 15 does not preclude the City from exercising any other right or remedy that at any time be available to the City under this Agreement or federal, state or local laws and regulations.

16. Amendments.

This Agreement may only be amended or modified by a written document signed by the City and Property Owner. The City will only enter into an amendment if it determines, at its sole discretion, that the amendment is consistent with and in furtherance of the Conservation Objective and will not result in any private benefit prohibited under the Internal Revenue Code.

17. Remedies; Enforcement.

The Property Owner understands, acknowledges and agrees as follows:

(a) **Enforcement.** The City is an interested party to this Agreement and the Property Owner consents to enforcement by the City, administratively or at law or equity, of the restrictions, covenants, obligations and agreements contained herein.

(b) **Injunctions.** Monetary damages would not be adequate or sufficient to compensate the City for a breach of any of the restrictions, covenants, obligations and/or agreements of this Agreement. Accordingly, in addition to any other remedies available to the City administratively, at law or equity, under this Agreement or otherwise, the City may obtain a mandatory and/or prohibitory injunction compelling the Property Owner to specifically perform and observe the restrictions, covenants, obligations and agreements contained in this Agreement or to remedy any failure on the part of the Property Owner to perform or observe any such restriction, covenant, obligation or agreement.

(c) **Exclusivity.** No right or remedy conferred upon the City in this Agreement is intended to be exclusive of any other right or remedy contained in this Agreement or at law or equity. Every such right or remedy shall be cumulative and shall be in addition to each other right and remedy contained in this Agreement or now or hereafter available to the City at law, in equity, by statute or otherwise.

(d) **Right of Enforcement.** This Agreement binds and benefits the Property Owner and the City, and their respective successors and assigns. Only the City has the right to enforce the terms of this Agreement and exercise rights of release, transfer, assignment or other discretionary rights of the City. Owners of lots within the Property do not have the right to enforce the terms of this Agreement against owners of other lots within the Property. This Agreement is valid and enforceable even though or if: it is not appurtenant to an interest in real property; it can be or has been assigned; it is not of a character recognized traditionally in common law; it imposes a negative burden or affirmative obligations upon the owner of the Property; the benefit does not touch nor concern real property; there is no privity of estate or contract; or the City becomes the owner in fee of the Property.

(e) **Remedies Cumulative.** The description of City's remedies in this Section 17 does not preclude the City from exercising any other right or remedy that at any time

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be available to the City under federal, state or local laws or regulations . If the City chooses to exercise one remedy, the City may nevertheless choose to exercise one or more of the other rights or remedies available to the City at the same time or at any other time.

18. Representations and Warranties by Property Owner.

(a) Property Owner is the sole owner in fee simple of the SMP Area free and clear of liens, encumbrances, restrictions and other matters of record [*optional: ,other than those that exist as of the Effective Date of this Agreement, as identified in Exhibit C3*].

(b) Property Owner has the power and is duly authorized to execute this Agreement.

19. Indemnity.

The Property Owner shall, at all times, indemnify, hold harmless and defend the City, its agencies, boards, commissions, offices and departments, agents, employees, elected officials or other representatives and their respective successors and assigns against any claims which may result or are claimed to result from the construction, operation, maintenance, inspection, malfunction, repair or replacement of the aforementioned SMP and SMP Area, as well as any and all costs and expenses incurred by indemnified parties to enforce the rights of the City as granted herein.

20. Entire Agreement.

This Agreement sets forth all agreements and understandings between the City and the Property Owner relating to the SMP and there are no agreements or understandings, either oral or written, between them other than as are set forth in this Agreement. Any agreement hereafter made shall be ineffective to change, modify or amend this Agreement in whole or part unless such agreement is in writing and has been executed by both the City and Property Owner. No oral representations, whenever made, by any City or Department official, employee or agent, or by any employee, agent or contractor of Property Owner shall be effective to modify the terms of this Agreement.

21. Notices.

All notices, requests, demands and other communications required or permitted under this Agreement shall be in writing and sent to the party to be notified, at the following addresses:

Property Owner: _____

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City: City of Philadelphia Water Department
Attn: _____

1101 Market Street, 5th Floor
Philadelphia, PA19107

or to such other address as either party may give by notice to the other party. All such communications shall be sent by United States registered or certified mail, return receipt requested, or a nationally-recognized delivery service guarantying next business day delivery, in each case with all delivery and postage charges prepaid, and shall be deemed to have been received three (3) business days after deposit in the United States mail, as aforesaid, or one (1) business day after deposit in a nationally-recognized delivery service guaranteeing next business day delivery, as aforesaid.

22. Miscellaneous.

(a) **Certain Interpretational Rules.** The headings in this Agreement are for convenience only and are not a part of this Agreement. The headings do not in any way define, limit, describe or amplify the provisions of this Agreement or the scope or intent thereof.

(b) **Governing Law.** This Agreement shall be governed in accordance with the laws of the Commonwealth of Pennsylvania without regard to the conflicts of law doctrines thereof. The parties to this Agreement agree to submit to the jurisdiction of courts, whether federal or state, located in Philadelphia, Pennsylvania.

(c) **No Joint Venture.** Nothing in this Agreement shall be construed as creating a joint venture or partnership between the City and the Property Owner.

(d) **No Third-Party Beneficiaries.** Nothing in this Agreement is intended to confer a third-party beneficiary right upon any person or entity other than the City.

(e) **Waiver of Jury Trial.** IT IS MUTUALLY AGREED BY AND BETWEEN THE CITY AND THE PROPERTY OWNER THAT THEY HEREBY WAIVE TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTER-CLAIM BROUGHT BY EITHER OF THE PARTIES HERETO AGAINST THE OTHER ON ANY MATTER WHATSOEVER ARISING OUT OF OR IN ANY WAY CONNECTED WITH THIS AGREEMENT.

(f) **Severability and Partial Invalidity.** The provisions of this Agreement shall be severable. In the event that one or more provisions of this Agreement or the

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application thereof for any reason or in any circumstance shall to any extent be held to be in invalid, illegal or unenforceable in any respect, such provision shall be severed and shall be inoperative, and the remainder of this Agreement shall remain in force to the fullest extent permitted by law.

(g) **Exhibits Incorporated.** All exhibits attached to this Agreement are hereby incorporated into and made a material part of this Agreement.

(h) **Approval by City.** No review, approval and/or inspection by the City of any plans, designs, specifications, drawings, work or other materials submitted or performed by the Property Owner in connection with the Project shall constitute a representation, warranty or guaranty by the City as to the substance or quality of the matter reviewed or approved. No person or party shall rely in any way on such review or approval, and at all times the Property Owner shall use its own independent judgment as to the accuracy and quality of all such matters. The City's review or approval of any plans, designs, specifications, drawings, work or other materials submitted or performed by the Property Owner in connection with this Agreement shall not constitute or be construed to constitute approval otherwise required by any City departments, boards or commissions in connection with any aspect of the same. Furthermore, no review or approval of any plans, designs, specifications, drawings, work or other materials submitted or performed by Property Owner in connection with this Agreement by any City departments, boards or commissions shall constitute or be construed to constitute approval otherwise required by the City under this Agreement.

[signatures appear on following page]

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IN WITNESS WHEREOF, and intending to be legally bound hereby, the parties hereto have caused the Agreement to be duly executed the day and year first above written.

PROPERTY OWNER

By: _____

By: _____

Approved as to Form:

CITY OF PHILADELPHIA

City of Philadelphia Law Dept.

By: _____

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ACKNOWLEDGEMENT

COMMONWEALTH OF PENNSYLVANIA :
: ss.
COUNTY OF PHILADELPHIA :

On this ____ day of _____ 201_, before me, a Notary Public for the Commonwealth of Pennsylvania, the undersigned Officer, personally appeared _____, who acknowledged himself/herself to be the _____, and that he, as such officer, being authorized so to do, executed the foregoing instrument for the purposes therein contained by executing the same by himself/herself as such officer.

IN WITNESS WHEREOF, I hereunto set my hand and Notarial Seal.

Notary Public

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ACKNOWLEDGEMENT

COMMONWEALTH OF PENNSYLVANIA :
 : ss.
COUNTY OF PHILADELPHIA :

On this ____ day of _____ 201__, before me, a Notary Public for the Commonwealth of Pennsylvania, the undersigned Officer, personally appeared _____, who acknowledged himself/herself to be the _____, and that he, as such officer, being authorized so to do, executed the foregoing instrument for the purposes therein contained by executing the same by himself/herself as such officer.

IN WITNESS WHEREOF, I hereunto set my hand and Notarial Seal.

Notary Public

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EXHIBIT C1
PROPERTY DESCRIPTION

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EXHIBIT C2

SMP AREA DESCRIPTION AND LIST OF SMPs

[Metes and Bounds Description and list]

Project Tracking Number: _____

EXHIBIT C3 *[if applicable]*

EXISTING MORTGAGES

Mortgagee (name and address)	Outstanding Amount	Maturity Date
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