

ATTACHMENT 1

CALIFORNIA-DEPARTMENT OF TRANSPORTATION RIGHT OF WAY CONTRACT-STATE HIGHWAY-DONATION (Fee Parcels and Permanent Easements)

Costa Mesa California
2004

DISTRICT	COUNTY	ROUTE	POST MILE	R/W E.A.
12	ORA	405	12.00/16.00	0695U9

The City of Costa Mesa
Grantor--

Document Nos. 101370-1,-2; 101372-1; 101373-1; 101375-1, -2, and -4; and 102041-1 in the form of Grant Deeds (Corporation) and Document No. 101372-5 in the form of a Permanent Easement Deed, covering the property particularly described in the above instruments have been executed and delivered to Evangelina Washington, Right of Way Agent for the State of California. This Right of Way Contract ("Agreement") is entered into between **THE CITY OF COSTA MESA**, a municipal corporation as grantor ("City" or "Grantor"), and the **STATE OF CALIFORNIA DEPARTMENT OF TRANSPORTATION**, as grantee ("State" or "Grantee") and is dated as of _____, 2004.

In consideration of the mutual promises made in this Agreement and the other consideration hereinafter set forth, it is mutually agreed between Grantor and Grantee as follows:

1. The parties have herein set forth the whole of their agreement by this Agreement. The performance of this Agreement by the Grantee for the benefit of Grantor constitutes the entire consideration for said deeds, subject to the terms and conditions hereof.

2. The State shall:

(A) Accept from Grantor the property or interest conveyed by the above documents/deeds and record the same when title to said properties can be vested in the State free and clear of all liens, encumbrances assessments, easements and leases (recorded and/or unrecorded) and taxes, except:

(i) Taxes for the tax year in which this escrow closes shall be cleared and paid in the manner required by Section 5086 of the Revenue and Taxation Code, if unpaid at the close of escrow.

(ii) Covenants, conditions, restrictions and reservations of record, or contained herein and in the above-referenced documents.

(iii) Easements or right of way over said land for public or quasi-public utility or public street purposes, if any.

(B) Pay all escrow and recording fees incurred in this transaction and, if title insurance is desired by the State, the premium charged therefor. Said escrow and recording charges shall not, however, include documentary transfer tax.

3. It is agreed that the properties conveyed by Document Nos. 101370-1, 101370-2; 101372-1; 101373-1; 101375-1, -2, -4; and 102041-1 (together herein, "Subject Properties") are being donated to the State by Grantor. Grantor having initiated this donation has been informed of the right to compensation for the Subject Properties donated and hereby waives such right to compensation.

(A) In furtherance of and in clarification of the foregoing, Grantor advises, and State acknowledges, the method Grantor acquired its interests in the Subject Properties and the interests being conveyed by Grantor to State by this Agreement is as follows:

(i) In order for the City to acquire the Subject Properties, (inclusive of the easement referred to in this Agreement,) the City entered into certain agreements with the various property owners as follows:

(a) Dedication Agreement (No. 1) between Fifth Street Properties, LLC and the City of Costa Mesa, dated January 25, 2000.

(b) Dedication Agreement (No. 2) between Fifth Street Properties, LLC and the City of Costa Mesa, dated April 4, 2000.

(c) Dedication Agreement between Sakioka Farms and Roy K. Sakioka & Sons and the City of Costa Mesa, dated January 25, 2000.

(d) Purchase Agreement between Roy K. Sakioka & Sons and the City of Costa Mesa dated April 27, 2000.

(e) Dedication Agreement between AGL Investments No. 5 Limited Partnership and the City of Costa Mesa, dated January 25, 2000.

(f) Dedication Agreement between BRE/South Coast , LLC and the City of Costa Mesa, dated July 27, 1999.

The foregoing agreements are herein referred to collectively as the "Dedication Agreements" and are more fully discussed in Section 8, hereinafter.

(ii) Each of the Dedication Agreements was approved by Grantor's legislative body, the Costa Mesa City Council, at open and duly noticed public meeting(s) of said City Council, and thereafter duly executed and attested by authorized representatives of Grantor. The method undertaken by Grantor to acquire legal interest in the Subject Properties through the Dedication Agreements was completed in accordance with applicable state and local laws. Grantor warrants it has legal and physical possession and right to enter the Subject Properties through record title obtained through the Dedication Agreements. State obtained and has undertaken and completed construction of the Project on, and as such Project relates to, the Subject Properties pursuant to that certain State of California, Department of Transportation, Right of Entry - Short Form, dated April 3 2000 ("Right of Entry") executed by and between Grantor by William J. Morris, Director of Public Services, City of Costa Mesa, on behalf of Grantor, and by the State as recommended for approval by John C. Brown, III, Senior Right of Way Agent and by Allan Goldstein, R/W Manager, District 12 each on behalf of State, which Right of Entry became effective April 30th, 2000.

(a) In the event any of the Subject Properties are determined to have been acquired by Grantor in violation of, or in non-compliance with, the applicable terms of the applicable Dedication Agreement, then Grantor agrees to indemnify, defend, and hold harmless the State from any and all liability which may result in the event the Subject Properties were not acquired in accordance with the applicable Dedication Agreement(s), subject to the provisions herein.

(b) In furtherance of the foregoing, a condition precedent to the conveyance of Grantor's interests in the Subject Properties to the State by this Agreement is readiness of by Lawyers Title Insurance Company ("Title Company") to issue, and the issuance of, a policy or policies of owner's title insurance, in a form satisfactory to State, evidencing title to the Subject Properties has been conveyed by Grantor to the State and legal title has vested in the State in the form and condition determined by the State prior to closing. The State and Grantor are hereby reciprocally obligated to cooperate with each other in review and approval of the condition of title of the Subject Properties, including without limitation preliminary reports, pro forma policy(ies) of title insurance in the form (including endorsements, if any) requested and ordered by the State to the Title Company prior to the conveyance of title pursuant to this Agreement. Upon issuance of the policy(ies) of title insurance for each of the Subject Properties by Title Company, State hereby expressly releases Grantor from any further responsibility to convey its interests in the Subject Properties to the State and from any other responsibility relating to the condition of title or exceptions to title for each of the Subject Properties.

(B) In connection with Grantee's acceptance of the donations from Grantor hereunder, Grantor provides the following estoppel statements to Grantee regarding each of the Dedication Agreements; provided however Grantee acknowledges that such estoppel statements, and any other statement referring to Grantor's knowledge in this Agreement, are made by Grantor as of the date of this Agreement and are based solely on and limited to the actual knowledge of the following City officers/employees: the City Attorney, the City Manager, the City Clerk, the City's Director of Public Works, and the City's Transportation Manager. Further, Grantor makes the following statements with knowledge that Grantee is relying, and will rely, on the truth of the statements in accepting the donations of the Subject Properties from Grantor.

(i) Each Dedication Agreement has not been modified, changed, altered, assigned, supplemented or amended in any respect.

(ii) Each Dedication Agreement is valid and in full force and effect on the date hereof.

(iii) Grantor is not in default under any of the Dedication Agreements.

(iv) Grantor knows of no event which constitutes, or with the giving of notice or the passage of time, or both, would constitute, a default by Grantor under any of the Dedication Agreements.

(v) Grantor has not assigned, leased, or otherwise conveyed any interest in the donated Subject Properties received pursuant to the Dedication Agreements to any other person or entity and to its knowledge (as defined above,) there is no interest in the donated Subject Properties that substantially restricts the State Operations.

4. The donations of the Subject Properties described in Section 3 above are for the construction and operation of the Project and the State's Operations, as the terms are hereinafter defined in Section 5, and are subject to all terms and conditions of this Agreement.

5. The State, in cooperation with the City and the Orange County Transportation Authority, a public entity ("OCTA"), is, and will be, implementing from planning, design, construction contracting through completion of construction a freeway improvement project including a series of local access improvements along Interstate 405, north of the Interstate 405/State Route 55 Interchange and commonly referred to among the parties and OCTA as "MOS-2" (herein, the "Project".) The parties agree the scope and description of the Project (as well as other freeway improvements) are outlined in that certain Cooperative Agreement Number C-0-0634 ("Cooperative Agreement") entered into between the City and OCTA and attached hereto as Exhibit A and fully incorporated by this reference. The donations by Grantor to Grantee of the properties and permanent easement provided under this Agreement are for the Project. All activities of the State and its agents and contractors relating to implementation of any and all phases of construction of the Project from pre-construction through completion of construction and thereafter operation of such Project are herein referred to as "State's Operations"; provided however, Grantor acknowledges Grantor's specific actions taken to obtain title to the fee parcels and permanent easement in the Subject Properties through the Dedication Agreements, which conveyances of title are the donations provided hereunder, were not actions of the State and are not a part of the State's Operations.

As of the time of the execution of this Agreement, as to the portion of the Project affecting and including the Subject Properties the State has completed the construction of the above-described Project pursuant to a construction contract ("Construction Contract"). The State has represented and continues to represent to Grantor that the Construction Contract includes:

(i) the indemnification of the State and all of its "indemnities" [sic] by contractor (and its agents) for all claims arising out of contractor's (and its agents') performance thereunder; (ii) contractor (and subcontractor(s)) provision of all required insurance policies/coverage/endorsements naming the State as an additional insured for all claims arising out of Contractor's (and its agents') performance thereunder; (iii) Contractor shall be required to maintain access to that certain parking structure referred to between the parties as the "Fifth Street parking structure" at all times during construction of the Project; and (iv) to the extent reasonably possible, Contractor shall be required to keep open Avenue of the Arts, a public street, during construction of the Project. The State further agrees as follows: (i) the City of Costa Mesa is one of the State's indemnities [sic] under the Construction Contract due to the indemnification of Grantor provided by Grantee under Section 6 of this Agreement; (ii) any damage to persons or property caused by action or inaction of Contractor (or its agents) in performance of the Construction Contract arising from or related in any manner whatsoever to the Project and the State's Operations as defined in Section 5 will be covered by the insurance provided by Contractor under the Construction Contract; State shall require Contractor to maintain access to the Fifth Street parking structure at all times during construction of the Project; and (iv) State shall require Contractor, to the extent reasonably possible, to keep Avenue of the Arts open as a public street during construction of the Project.

Grantor has reviewed the Construction Contract. Throughout the State's Operations to the date of this Agreement, Grantor knows of no event which constitutes, or with the giving of notice or the passage of time, or both, would constitute, a default of the terms contained in this Paragraph 5 by the State.

6. Except as provided in Section 8, State agrees to indemnify, defend and hold harmless the City of Costa Mesa, including its officers, directors, agents (excluding agents who are design professionals), and employees, and each of them (“City Indemnitees”), from any and all claims, demands, causes of action, damages, costs, expenses, actual attorneys’ fees, losses or liabilities, in law or equity, of every kind and nature whatsoever arising out of or in connection with the Project and/or the State’s Operations as defined in Section 5 (“Claims”). Such indemnification shall include, without limitation, Claims for:

(A) Bodily injury including, but not limited to, bodily injury, sickness or disease, emotional injury or death to persons, including, but not limited to, the public, any employees or agents of the Contractor for the Construction Contract, State, (including the Department of Transportation (“Department”),) or any other contractor; and

(B) Damage to property of anyone including loss of use thereof caused or alleged to be caused in whole or in part by any negligent or otherwise legally actionable act or omission of the State or its Contractor or anyone directly or indirectly employed by the State or its Contractor or anyone for whose acts the State or its Contractor may be liable. Further, State agrees to assume responsibility for any damages proximately caused by reason of the Project and/or State’s Operations as defined in Section 5 and State will, at its option, either repair or pay for such damage.

Except as otherwise provided by law, the indemnification provisions above by the State to the City Indemnitees shall apply regardless of the existence or degree of fault of City Indemnitees. The State, however, shall not be obligated to indemnify City Indemnitees for Claims arising from conduct delineated in Civil Code Section 2782. The State’s indemnity obligation shall extend to Claims arising after the Project and/or the State’s Operations as defined in Section 5 is completed and accepted only if these Claims are directly related to alleged acts or omissions of the State or its Contractor (or its agents) which occurred during the course of the work on the Project and/or the State’s Operations as defined in Section 5. No inspection by the State, Department, or the City or their employees or agents shall be deemed a waiver by the State of full compliance with the indemnification requirements of this section.

The State’s obligation to defend and indemnify the City Indemnitees shall not be excused because of the State’s inability to evaluate liability or because the State evaluates liability and determines that the State is not liable to the claimant. The State shall respond within ninety (90) days to the tender of any claim for defense and indemnity by the City, unless this time has been extended by the City.

With respect to third party claims against the State, the State waives any and all rights of any type to express or implied indemnity against the City and City Indemnitees, except as provided below in Section 8.

As of the date of execution of this Agreement, the State has completed the Project. To the date of this Agreement, Grantor knows of no event which constitutes, or with the giving of notice or the passage of time, or both, would constitute, a cause for the invocation of any term contained in this Paragraph 6.

7. The Dedication Agreements described and defined in Section 3 above include specific indemnification clauses by the City to an applicable owner/party to the applicable Dedication

Agreement relating to certain potential issues and liabilities as set forth in such Dedication Agreements.

8. Except as provided in Section 6 above wherein the State indemnifies Grantor as set forth therein, and in furtherance of the Dedication Agreements, Grantor agrees to indemnify, defend and hold harmless, the State, including its officers, directors, agents (excluding agents who are design professionals), and employees, and each of them (“State Indemnitees”), from any and all liability arising out of the following specific provisions of the Dedication Agreements:

(A) **Dedication Agreement (No. 1) between Fifth Street Properties, LLC and the City of Costa Mesa**, dated January 25, 2000, the City acknowledges to the State that it indemnifies the State Indemnitees for the obligations of the following specific sections and subsections thereof as follows:

(i) Section 2 (b). City acknowledges it retains these obligations and the City indemnifies the State Indemnitees for the obligations set forth in Section 2(b).

(ii) Section 2 (c). The third to the last sentence of 2 (c) states: “The City further agrees that it will not require replacement of any parking spaces lost due to the redesign of the parking structure circulation to create the stacking area, or due to other modifications to the Property or its Improvements necessitated by this Agreement, either in connection with the Property’s existing uses and Improvements or in connection with any additional uses, improvements or floor area which may be developed on the Property in the future.” The City acknowledges it retains the obligations of this sentence and the City indemnifies the State Indemnitees for the obligations set forth in this sentence only of Section 2(c).

(iii) Section 2 (d). City acknowledges it retains these obligations and the City indemnifies the State Indemnitees for the obligations set forth in Section 2(d).

(iv) Section 2 (e). City acknowledges it retains these obligations and the City indemnifies the State Indemnitees for the obligations set forth in Section 2(e).

(B) **Dedication Agreement (No. 2) between Fifth Street Properties, LLC and the City of Costa Mesa**, dated April 4, 2000.

(i) Section 2 (a). City acknowledges it retains these obligations and the City indemnifies the State Indemnitees for the obligations set forth in Section 2(a).

(ii) Section 2 (b). The third to the last sentence of 2 (b) states: “The City further agrees that it will not require replacement of any parking spaces lost due to the redesign of the parking structure circulation to create the stacking area, or due to other modifications to the Property or its Improvements necessitated by this Agreement, either in connection with the Property’s existing uses and Improvements or in connection with any additional uses, improvements or floor area which may be developed on the Property in the future.” The City acknowledges it retains the obligations of this sentence and the City indemnifies the State Indemnitees for the obligations set forth in this sentence only of Section 2(b).

(iii) Section 2 (c). City acknowledges it retains these obligations and the City indemnifies the State Indemnitees for the obligations set forth in Section 2 (c).

(iv) Section 2 (d). City acknowledges it retains these obligations and the City indemnifies the State Indemnitees for the obligations set forth in Section 2 (d).

(v) Section 2 (e). This subsection clarifies the obligation of the State, as the holder of the benefited tenement, with regard to the Permanent Easement for the Drainage Facilities referenced herein and as defined in Dedication Agreement (No. 2) between Fifth Street Properties, LLC and the City of Costa Mesa, dated April 4, 2000. The maintenance provisions set forth in Section 2 (e) relate to the obligations imposed on the holder of the drainage easement, which holder will be the State upon the completion of the conveyances under this Agreement. These obligations are set forth in the Drainage Easement Deed appended to Fifth Street Properties Dedication Agreement (No. 2), which provisions the State agrees will be set forth in the Drainage Easement deed accepted by the State from Grantor under this Agreement. In this regard, when the City transfers this Permanent Easement to the State, all provisions of the Drainage Easement Deed shall be transferred and assumed by State, including without limitation the specific maintenance obligations set forth in the form of Drainage Easement Deed recorded in the transaction between the City and Fifth Street Properties. City and State acknowledge and agree the form of the Drainage Easement Deed appended to this Agreement shall conform to the obligations set forth in the Drainage Easement Deed between the City and Fifth Street Properties and shall include the following provisions:

“During construction of the Project and including construction of the Drainage Facilities, State, as the benefited tenement and holder of Permanent Easement, will, to the extent reasonably feasible, keep the area which is the subject of the Drainage Easement Deed open for pedestrian and vehicular traffic and alleviate adverse traffic circulation impacts to the Fifth Street Property (as the burdened tenement.) During the construction of the Project (a) access to the subject Property and its Improvements shall be maintained at all times and (b) in all cases there shall be no interruption of or interference with egress from or ingress to (or the operation or use of) any exit or entrance to the parking structure located on Fifth Street’s Property (or the service access driveway to the buildings on such Property located north and adjacent to such structure) at any time other than during “Off Hours”, as hereinafter defined. State shall take all actions required to assure that no such interference or interruption shall occur (on continue) other than during Off Hours. “Off Hours” means after 8:00 p.m. and before 6:00 a.m. each week day, and includes Saturday, Sunday, and holidays.

State shall not use the Drainage Easement area in a manner that eliminates or interferes with public safety access to the Fifth Street Property and its Improvements as required to be maintained by the City of Costa Mesa Fire Department.

The Drainage Facilities will be constructed and maintained so that upon completion they will not unreasonably interfere with the use of the surface of the easement area for vehicular and pedestrian traffic circulation purposes to serve the Fifth Street Property, taking into consideration necessary maintenance and repair that may be needed of these facilities. Portions of the Fifth Street Property affected by construction of the Drainage Facilities will be restored to the pre-existing condition by State following completion of construction of the Drainage Facilities and any maintenance work thereto.”

(C) Dedication Agreement between Sakioka Farms and Roy K. Sakioka & Sons and the City of Costa Mesa, dated January 25, 2000.

(i) Section 2 (b). City acknowledges it retains these obligations and the City indemnifies the State Indemnitees for the obligations set forth in Section 2 (b).

(ii) Section 2 (e). City acknowledges it retains these obligations and the City indemnifies the State Indemnitees for the obligations set forth in Section 2 (e).

(D) Purchase Agreement between Roy K. Sakioka & Sons and the City of Costa Mesa, dated April 27, 2000.

(i) Section 2 (b). City acknowledges it retains these obligations and the City indemnifies the State Indemnitees for the obligations set forth in Section 2 (b).

(ii) Section 2 (e). City acknowledges it retains these obligations and the City indemnifies the State Indemnitees for the obligations set forth in Section 2 (e).

(E) Dedication Agreement between BRE/South Coast , LLC and the City of Costa Mesa, dated July 27, 1999.

(i) Section 2 (b). City acknowledges it retains these obligations and the City indemnifies the State Indemnitees for the obligations set forth in Section 2 (b).

(ii) Section 2 (d). City acknowledges it retains these obligations and the City indemnifies the State Indemnitees for the obligations set forth in Section 2 (d).

(F) Other general covenants in Dedication Agreements. Separate from the indemnification provisions set forth in subsections (A) through (E) inclusive above, in all of the Dedication Agreements, Section 3 Right of Review and Comment, there are generally similar provisions regarding the reasonable cooperation between the City and each applicable owner in the planning, scheduling, and construction of the Project, including furnishing the owner with copies of design plans and construction drawings. City acknowledges it retains the obligations set forth in Section 3 of the Dedication Agreements and the City indemnifies the State Indemnitees for the obligations set forth in Section 3.

(G) Separate from the indemnification provisions of subsections (A) through (F) above, in all of the Dedication Agreements, Section 6, General Provisions, subsection (d) Attorney Fees, the City agrees with each applicable property owner to payment of reasonable attorney fees and expenses of the applicable owner if legal proceedings occur concerning the covenants set forth in Section 2 in which the applicable owner is the prevailing party. City acknowledges it retains the obligations set forth in Section 6(d) of the Dedication Agreements and the City indemnifies the State Indemnitees for the obligations set forth in Section 6 (d) of the Dedication Agreements.

No other or additional indemnification by the City of the State Indemnitees is or shall be intended, construed, or otherwise inferred in any respect whatsoever from the foregoing indemnification provisions.

9. The donation of the Subject Properties by Grantor to the State through this transaction reflects the Parties understanding that such disposition is occurring and the parcels are conveyed with no known contamination thereon. Grantor represents to the State that has no knowledge (as defined in §3(B) above) regarding the presence of hazardous waste on any of the Subject Properties. If the Subject Properties being acquired are found to be contaminated by the presence of hazardous waste, which requires mitigation under Federal or State law, then the State may elect to recover its cleanup costs from those who caused or contributed to the contamination, subject to the terms and provisions regarding contamination or hazardous waste as set forth in the Dedication Agreements.

10. All State Operations shall conform to all applicable building, fire and sanitary laws, ordinances, and regulations relating to such State Operations, and shall be done in a good and workmanlike manner. All structures, improvements, or other facilities, when removed and relocated or reconstructed by the State, shall be left in as good condition as found.

As of the date of execution of this Agreement, as to the portion of the Project affecting and including the Subject Properties the State has completed the Project, and Grantor has inspected the Project. To the date of this Agreement, Grantor knows of no event which constitutes, or with the giving of notice or the passage of time, or both, would constitute, a default of any provision of this Paragraph 10.

11. Grantor warrants that there are no oral or written leases on all or any portion of the Subject Properties (inclusive of the permanent easement area) deeded by this Agreement exceeding a period of one month, that have not been quitclaimed to Grantor, and Grantor further agrees to hold the State harmless and reimburse the State for any and all of its losses and expenses occasioned by reason of any lease of said property held by any tenant of Grantor for a period exceeding one month.

12. If any term, covenant, condition or provision of this Agreement is held by a court of competent jurisdiction to be invalid, void, unenforceable, the remainder of the provisions herein shall remain in full force and effect and shall in no way be affected, impaired or invalidated, except to the extent the obligations between the parties are substantively affected.

13. No alteration or variation of this Agreement shall be valid unless made in writing and signed by the parties hereto, and no oral understanding or agreement not incorporated therein shall be binding on either of the parties.

14. This Agreement, including those items incorporated by reference, constitutes the entire understanding and agreement between the parties concerning the subject matter thereof and supersedes all prior and contemporaneous agreements, understandings, terms, conditions and representations, written or oral, made by any of the parties or their agents, concerning the matters covered by this Agreement, and there are no restrictions, promises, warranties or undertakings to the Agreement other than those set forth herein.

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Signature block for City on next page]**

IN WITNESS WHEREOF, the parties have executed this Agreement the day and year first above written.

GRANTOR

THE CITY OF COSTA MESA,
a municipal corporation

By: _____
Gary Monahan, Mayor

ATTEST

Julie Folcik, Deputy City Clerk

APPROVED AS TO FORM:

Thomas C. Wood, Esq.
Acting City Attorney

[Signature block for State on next page]

Recommended for Approval:

GRANTEE

**STATE OF CALIFORNIA
DEPARTMENT OF TRANSPORTATION**

By: _____
James Staudinger,
Senior Right of Way Agent
Southern R/W Region, Irvine Office

By: _____
Larry S. Stevens,
Right of Way Project Delivery Manager

No Obligation Other Than Those Set Forth Herein Will Be Recognized.

EXHIBIT A

COOPERATIVE AGREEMENT No. C-0-0634

(attached)