



Council Agenda Report

From: David Athey, City Engineer

Subject: Encroachment Agreement – Firestone Brewery - Permit Installation of a Private Underground Wastewater Force-Main Line Crossing Vendels Circle

Date: January 16, 2018

Facts

1. Firestone Walker Inc., is the owner of property on either side of Vendels Circle (see Figure 1).
2. Firestone Walker is requesting that the City allow the installation of a private four-inch wastewater force-main crossing Vendels Circle.
3. Firestone Walker recently received permission to cross Vendels Circle with a Pipe Bridge to connect the Brewery with Cold Block 4. Staff requested that Firestone staff investigate using the pipe bridge to transmit wastewater rather than crossing Vendels with a new private force-main.
4. However, upon further investigation, Firestone Walker determined it would be unable to utilize the pipe bridge to transmit wastewater because of underground utility conflicts on the south side of the bridge.
5. The proposed private force-main will be installed underground in Vendels Circle and will not affect City or Public Utilities.
6. The City has prepared a Durable Encroachment Agreement that spells out terms and conditions for the encroachment for the private force main, including insurance coverage, indemnification, removal, and maintenance.
7. Firestone Walker is in agreement with the Encroachment Agreement terms and has provided a signed copy to the City.

Options

1. Take no action.
2. Approve, Resolution 18-xxx, Attachment 1, authorizing the City Manager to enter into a Durable Encroachment Agreement with Firestone Walker Inc., for the installation of four-inch wastewater force-main crossing Vendels Circle.
3. Refer this item back to staff for additional information and refinement.

Analysis and Conclusion

Firestone Walker Inc., has agreed to and signed the Durable Encroachment Agreement (Exhibit A to Attachment 1), which stipulates the terms of the private utility crossing. The terms include requirements for repair, removal, insurance and indemnification. The agreement has similar terms to the recently approved Pipe Bridge Durable Encroachment Agreement. The proposed force main pipeline will be for the transmission of wastewater and will be installed underground. Lastly, this agreement does not give the Landowners any permanent rights, as the City can request the pipeline be removed upon 60 days' notice.

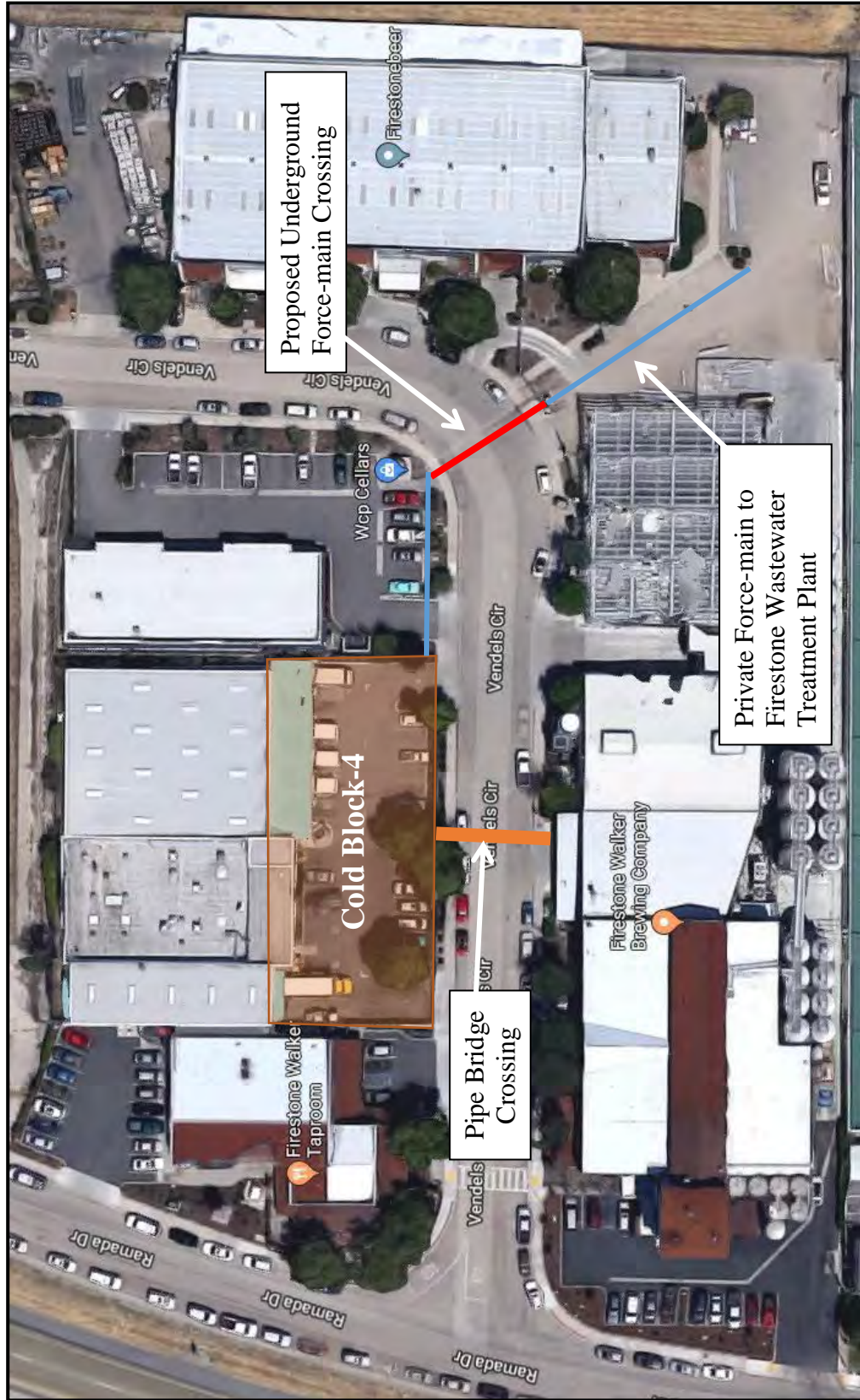


Figure 1 - Location Map

Fiscal Impact

None. This encroachment agreement will not have a fiscal impact on the City as the Applicants will reimburse the City for all permitting costs.

Recommendation

Approve Resolution 18-xxx authorizing the City Manager to enter into a Durable Encroachment Agreement with Firestone Walker Inc., for the installation of a four-inch force-main crossing Vendels Circle.

Attachments

1. Draft Resolution 18-xxx
 - a. Exhibit A - Durable Encroachment Permit Agreement between the City of El Paso de Robles and Firestone Walker Inc.

Attachment 1

Draft Resolution 18-xxx

DRAFT RESOLUTION 18-xxx

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF EL PASO DE ROBLES APPROVING A DURABLE ENCROACHMENT AGREEMENT BETWEEN THE CITY OF EL PASO DE ROBLES AND FIRESTONE WALKER, INC.

WHEREAS, Firestone Walker, Inc. (“Firestone”) owns and operates the Firestone Walker Brewery and related restaurant, visitor’s center, tasting room, store and other facilities located at Vendels Circle; and

WHEREAS, Firestone has requested permission to install a private four-inch force main underneath Vendels Circle for the transmission of brewery process wastewater to Firestone’s Wastewater Pretreatment Plan; and

WHEREAS, the proposed encroachment of the public right of way will not interfere with existing City and public Utilities or right-of-way use; and

WHEREAS, a public hearing was conducted by the City Council on January 16, 2018, to consider facts as presented in the staff report prepared for this project, and to accept public testimony regarding this proposed right of way encroachment.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF EL PASO DE ROBLES DOES HEREBY RESOLVE AS FOLLOWS:

Section 1. All of the above recitals are true and correct and incorporated herein by reference.

Section 2 - Findings: based upon the facts and analysis presented in the staff report, public testimony received and subject to the conditions listed below, the City Council makes the following findings:

1. The proposed encroachment is consistent with the adopted codes, policies, standards and plans of the City; and
2. The proposed encroachment will not be detrimental to the health, safety, morals, comfort, convenience and general welfare of the residents and or businesses in the surrounding area, or be injurious or detrimental to property and improvements in the neighborhood or to the general welfare of the City; and
3. The proposed encroachment accommodates the aesthetic quality of the City as a whole since the four-inch force-main will be installed underground.

Section 3 – Approval: the City Council of the City of El Paso de Robles does hereby approve the Durable Encroachment Agreement for Installation and Maintenance of Underground Pipeline, attached hereto as Exhibit A and incorporated herein by reference, and authorizes the City Manager to execute said agreement.

Attachment 1

Draft Resolution 18-xxx

PASSED AND ADOPTED by the City Council of the City of El Paso de Robles this 7th day of September 2017 by the following vote:

AYES:
NOES:
ABSENT:
ABSTAIN:

Steven W. Martin, Mayor

ATTEST:

Kristen L. Buxkemper, Deputy City Clerk

Exhibits

- A Durable Encroachment Agreement Between the City of El Paso de Robles and Firestone Walker, Inc.

Attachment 1
Draft Resolution 18-xxx

**Exhibit A – Durable Encroachment
Agreement Between the City of El Paso de
Robles and Firestone Walker Inc.**

**RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:**

Exempt from Recording Fee per
Government Code § 6103

(Space above for Recorder's Use)

**DURABLE ENCROACHMENT AGREEMENT FOR
INSTALLATION AND MAINTENANCE OF UNDERGROUND PIPELINE**

This Encroachment Agreement (“AGREEMENT”) is issued by the CITY OF EL PASO DE ROBLES, a California municipal corporation and general law city (“CITY”), to FIRESTONE WALKER INC., a California corporation (“FIRESTONE”). CITY and FIRESTONE are sometimes hereinafter referred to individually as “Party” and collectively as the “Parties.”

RECITALS

A. FIRESTONE has applied for an encroachment permit from CITY in connection with FIRESTONE’s project located on certain real property in the County of San Luis Obispo, State of California, City of Paso Robles, California, and legally described in Exhibit A, attached hereto and incorporated herein by this reference (“REAL PROPERTY”).

B. CITY owns an easement or fee simple right of way (“PUBLIC RIGHT-OF-WAY”) over, across, under, within and along a certain portion of the REAL PROPERTY. The PUBLIC RIGHT-OF-WAY is legally described in Exhibit B, attached hereto and incorporated herein by this reference.

C. FIRESTONE has requested CITY to enter into this Durable Encroachment Agreement, whereby FIRESTONE would be authorized to install and maintain certain improvements under and across certain portions of the PUBLIC RIGHT-OF-WAY. As used in this Agreement, PUBLIC RIGHT-OF-WAY means the surface, the air space above the surface and the area below the surface of Vendels Circle, as described in Exhibit B.

D. CITY agrees to provide to FIRESTONE the right to encroach upon the PUBLIC RIGHT-OF-WAY for the installation and maintenance of certain improvements on, under and across certain portions of the PUBLIC RIGHT-OF-WAY, subject to the terms and conditions contained herein.

Firestone Encroachment Agt/Wastewater Force
Main
82473.03036\30350121.2

AGREEMENTS

1. **Grant of Encroachment.** CITY hereby grants to FIRESTONE a durable right of encroachment upon the PUBLIC RIGHT-OF-WAY, for the purpose of constructing, installing, maintaining and operating the IMPROVEMENTS (defined below), subject to the limitations set forth herein and FIRESTONE's fulfillment and ongoing compliance with the terms and conditions set forth herein. The installation and maintenance of, and any use of, the IMPROVEMENTS (defined below) shall be subordinate to any use and operations which CITY may conduct during the effective period of this AGREEMENT, and FIRESTONE shall not cause any unreasonable delay or interference with CITY'S access to the PUBLIC RIGHT-OF-WAY. FIRESTONE shall not interfere with the operations of CITY in the PUBLIC RIGHT-OF-WAY, whether or not such interference is considered material.

2. **Authorized Improvements.** The improvements authorized to be constructed, installed, and maintained pursuant to this AGREEMENT are an underground 4-inch wastewater force-main pipeline (the "IMPROVEMENTS") on REAL PROPERTY owned by FIRESTONE on either side of the PUBLIC RIGHT-OF-WAY for the transmission of process wastewater produced by FIRESTONE in the conduct of its business. The right of FIRESTONE to install, operate, maintain, and use the IMPROVEMENTS are subject to the following limitations, and conditioned upon FIRESTONE implementing the following protective measures and physical construction standards in connection with the IMPROVEMENTS:

a. Detailed design drawings prepared by a registered engineer depicting the IMPROVEMENTS within the PUBLIC RIGHT-OF-WAY shall be provided to, reviewed by, and approved by CITY prior to construction. The design drawings shall include an accurate depiction of the horizontal and vertical position of the proposed improvements relative to the PUBLIC RIGHT-OF-WAY and shall be generally consistent as depicted on Exhibit B of this Agreement. The IMPROVEMENTS shall be designed to ensure that the installation and use of the IMPROVEMENTS does not create any additional structural or geotechnical load on the PUBLIC RIGHT-OF-WAY or interfere with or encroach upon any existing public utility or other easements. The design of the IMPROVEMENTS must allow for immediate access to the PUBLIC RIGHT-OF-WAY for purposes of inspecting, cleaning, maintaining, repairing, and replacing CITY's existing improvements located within the PUBLIC RIGHT-OF-WAY and/or installing additional improvements and appurtenances.

b. CITY reserves the right, and FIRESTONE hereby acknowledges, that CITY may reject without liability the design drawings for any proposed IMPROVEMENTS and/or require any changes thereto if CITY determines, in its sole and absolute discretion, that such action is necessary to ensure CITY can adequately inspect, clean, maintain, repair, and replace CITY's existing improvements located within the PUBLIC RIGHT-OF-WAY and/or installing additional improvements and appurtenances within the PUBLIC RIGHT-OF-WAY.

c. Upon CITY's approval of the final design drawings for the IMPROVEMENTS, such design drawings shall be attached hereto as Exhibit "B" and incorporated herein by this reference and considered a material part of this AGREEMENT. FIRESTONE shall design, construct, install, operate and maintain the IMPROVEMENTS in

strict compliance with the approved final design drawings, and no changes or deviations therefrom shall be permitted without FIRESTONE first obtaining the prior written consent of CITY, which may be granted or denied in the CITY's sole reasonable discretion. The issuance of building and encroachment permits by the CITY for any changes and modifications shall be presumed to constitute consent of such changes and modifications under this AGREEMENT..

d. A schedule of construction activities within the easement will be provided to and approved by CITY prior to the commencement of any construction work within the PUBLIC RIGHT-OF-WAY. No heavy equipment shall be operated within or traverse the PUBLIC RIGHT-OF-WAY, when there is less than 24 inches of soil over any existing public improvements. No vibratory compaction will be allowed within the PUBLIC RIGHT-OF-WAY unless approved in writing by CITY. All IMPROVEMENTS shall be open and subject to inspection by CITY, and FIRESTONE shall give notice and allow CITY to inspect any underground improvements prior to backfilling. FIRESTONE shall provide CITY with "as-built" drawings of the IMPROVEMENTS within thirty (30) days of completion of the construction activities.

e. FIRESTONE shall reimburse CITY for any and all expenses incurred by CITY for work to support or protect the PUBLIC RIGHT-OF-WAY within thirty (30) days after receiving written demand and a statement from CITY detailing such costs. In the event FIRESTONE fails to perform work to support or protect the PUBLIC RIGHT-OF-WAY within thirty (30) days after receiving written notice from CITY of such failure, or if CITY must immediately perform such work in the event of an emergency or to perform legally mandated duties, CITY may proceed with such work at the expense of FIRESTONE. FIRESTONE shall reimburse City within thirty (30) days after receiving written demand and a statement from CITY detailing the costs incurred by CITY.

f. FIRESTONE shall be required to obtain all other necessary and required licenses, permits and authorizations from any governmental agency with jurisdiction over the IMPROVEMENTS and to pay all fees and charges associated therewith prior to commencing any work on the IMPROVEMENTS. This AGREEMENT does not constitute, nor grant, permission to use or occupy property not belonging to, or under the control of CITY, and permission to use or occupy such property must be obtained from the owner or controller of such property, separate from and in addition to this AGREEMENT.

g. FIRESTONE shall not alter, replace, or otherwise change the IMPROVEMENTS without complying with the terms of this Section 2.

3. No Grant of Property Interest. This AGREEMENT is not a grant by CITY of any property interest but is made subject and subordinate to the prior and continuing right of CITY to use all the PUBLIC RIGHT OF WAY including, but not limited to, public use as a street and for the purpose of laying, installing, maintaining, repairing, protecting, replacing, and removing sanitary sewers, water mains, storm drains, gas mains, poles, overhead and underground electric and telephone wires, cable television, telecommunications facilities and other utility and municipal uses together with appurtenances thereof and with right of ingress and egress, along, over, across and in said PUBLIC RIGHT OF WAY.

4. Construction and Operation FIRESTONE shall construct, operate, maintain and repair the IMPROVEMENTS so as not to endanger or interfere with improvement City makes or to otherwise interfere in any manner with the PUBLIC RIGHT OF WAY or legal rights of any property owner or to unnecessarily hinder or obstruct pedestrian or vehicular traffic. FIRESTONE shall not place facilities, equipment or fixtures where they will interfere with any gas, electric, telephone, telecommunications, water, sewer or other utility facilities or obstruct or hinder in any manner such entity's use of any PUBLIC RIGHT OF WAY and shall provide the minimum distance or separation for sewer, storm, water, electrical and gas lines.

5. Repair of Damage. Any damage caused directly or indirectly by FIRESTONE to the PUBLIC RIGHT-OF-WAY or to CITY's improvements therein and other property shall be repaired by CITY, at FIRESTONE's sole cost and expense, or if authorized by CITY may be repaired by FIRESTONE at its sole cost and expense. If CITY elects to perform the repair work itself, FIRESTONE shall reimburse CITY for the full costs of the repair work within thirty (30) days after receiving written demand and a statement from CITY detailing such costs. In the event payment is not made within said thirty (30) day period, said payment shall accrue interest at a rate of ten percent (10%) per annum from the end of said thirty (30) day period until paid in full.

6. Relocation or Abandonment of Improvements

a. Temporary Relocation. FIRESTONE shall, upon reasonable notice from CITY and by a time specified by CITY, protect, support, temporarily disconnect, relocate or remove any of its property if required by CITY or any other governmental entity by reason of traffic conditions; public safety; PUBLIC RIGHT-OF-WAY construction, maintenance or repair (including resurfacing or widening); change of PUBLIC RIGHT-OF-WAY grade; construction, installation or repair of sewers, storm drains, water pipes, power lines, gas lines, signal lines, track or any other type of government-owned communication system, public work or improvement or any government-owned utility, PUBLIC RIGHT-OF-WAY vacation; or for any other public purpose where the work involved would be materially aided by the removal or relocation of the IMPROVEMENTS.

b. Emergency Relocation. In the event of an emergency, or where the IMPROVEMENTS create or are contributing to an imminent danger to health, safety or property, CITY may remove, relay or relocate any or all parts of that IMPROVEMENTS without prior notice; however, CITY shall make diligent reasonable efforts to provide prior notice to FIRESTONE. FIRESTONE shall be responsible for all costs reasonably incurred in connection with such emergency relocation. The term "emergency" shall be defined in accordance with California law and in general, shall be considered as an unforeseen circumstance which calls for immediate action.

c. Permanent Relocation. FIRESTONE shall permanently remove or relocate, without cost or expense to CITY, the IMPROVEMENTS or any portion thereof installed, used and maintained under this Agreement if and when made necessary by any lawful change of grade, alignment or width of the PUBLIC RIGHT-OF-WAY, including the construction, maintenance or operation of any other CITY underground or aboveground

facilities. In the event all or any portion of the PUBLIC RIGHT-OF-WAY occupied by the IMPROVEMENTS shall be needed by CITY for governmental purposes or in the event the existence of the IMPROVEMENTS shall be considered detrimental to governmental activities, including but not limited to, interference with CITY construction projects, or is in conflict vertically and/or horizontally with any proposed CITY installation, FIRESTONE shall, following direction from the City Engineer, remove and relocate the IMPROVEMENTS or applicable portion thereof to such other location or locations on said PUBLIC RIGHT-OF-WAY as may be designated by CITY. Said removal or relocation shall be completed within ninety (90) days of written notification by CITY; provided FIRESTONE can timely obtain any needed permits from CITY. In the event the IMPROVEMENTS or applicable portion thereof are not removed or relocated within ninety (90) days after said notification, CITY may cause the same to be done at the sole expense of FIRESTONE.

d. Repair to Public Right of Way. When removal or relocation is required under this Agreement, FIRESTONE shall, after the removal or relocation of the IMPROVEMENTS, at its own cost, repair and return the PUBLIC RIGHT-OF-WAY or public utility or service easements on which the facilities were located to a safe and satisfactory condition in accordance with the construction-related conditions and specifications as established by CITY according to its standard practice. Should FIRESTONE remove the IMPROVEMENTS from the PUBLIC RIGHT-OF-WAY, FIRESTONE shall, within ten (10) days after such removal, give notice thereof to CITY specifying the PUBLIC RIGHT-OF-WAY affected and the location thereof as well as the date of removal. Before proceeding with removal or relocation work, FIRESTONE shall obtain and CITY shall issue a street excavation permit from the CITY.


e. Abandonment of IMPROVEMENTS. If any portions of the IMPROVEMENTS covered under this Agreement are no longer used by FIRESTONE, or are abandoned for a period in excess of one (1) year, FIRESTONE shall notify CITY and shall either promptly vacate and remove the facilities at FIRESTONE'S own expense or, at CITY's sole discretion, may abandon some or all of the IMPROVEMENTS in place.

7. Waiver and Release. FIRESTONE, in perpetuity, expressly waives, releases and relinquishes any and all claims, causes of action, rights and remedies FIRESTONE may now or hereafter have against CITY, and its officials, officers, employees, and agents, whether known or unknown, with respect to liability for any damage to or loss, upon, above, beneath, or across the PUBLIC RIGHT-OF-WAY pursuant to this AGREEMENT unless such damage or loss is caused by the sole active negligence or willful misconduct of CITY. As a material part of CITY's decision to issue this AGREEMENT, FIRESTONE hereby assumes all risk of damage to the IMPROVEMENTS in, upon, or about the PUBLIC RIGHT-OF-WAY arising, from any cause attributable to CITY's exercising its rights hereunder or under the RIGHT OF WAY, and FIRESTONE hereby waives all claims in respect thereto against CITY, except if caused by the sole active negligence or willful misconduct of CITY.

FIRESTONE HEREBY ACKNOWLEDGES THAT IT HAS READ AND IS FAMILIAR WITH THE PROVISIONS OF CALIFORNIA CIVIL CODE SECTION 1542 ("SECTION 1542"), WHICH IS SET FORTH BELOW:

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

BY INITIALING BELOW, FIRESTONE HEREBY WAIVES THE PROVISIONS OF SECTION 1542 SOLELY IN CONNECTION WITH THE MATTERS WHICH ARE THE SUBJECT OF THE FOREGOING WAIVERS AND RELEASES:


FIRESTONE's Initials

The waivers and releases by FIRESTONE contained herein shall survive the term of this AGREEMENT and shall be binding upon the assignees, transferees, and successors in interest of FIRESTONE.

8. Recovery of Costs for Enforcement of Agreement. The terms of this AGREEMENT may be enforced by CITY or its successors or assigns. In the event of any controversy, claim or dispute relating to this AGREEMENT, or the breach thereof, the prevailing party shall be entitled to recover from the other party reasonable expenses, attorneys' fees and costs.

9. Hazardous Materials Use.

a. FIRESTONE covenants that it will not handle or transport Hazardous Materials on the IMPROVEMENTS or the PUBLIC RIGHT-OF-WAY. As used in this AGREEMENT, the term "Hazardous Materials" means: (a) any substance, products, waste, or other material of any nature whatsoever which is or becomes listed, regulated, or addressed pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 United States Code Section 9601 et seq.; the Resources Conservation and Recovery Act, 42 United States Code Section 6901 et seq.; the Hazardous Materials Transportation Conservation and Recovery Act, 42 United States Code Section 1801 et seq.; the Clean Water Act, 33 United States Code Section 1251 et seq.; the Toxic Substances Control Act, 15 United States Code Section 2601 et seq.; the California Hazardous Waste Control Act, Health and Safety Code Section 25100 et seq.; the Hazardous Substance Account Act, Health and Safety Code Section 25330 et seq.; the California Safe Drinking Water and Toxic Enforcement Act, Health and Safety Code Section 25249.5 et seq.; California Health and Safety Code Section 25280 et seq. (Underground Storage of Hazardous Substances); the California Hazardous Waste Management Act, Health and Safety Code Section 25170.1 et seq.; California Health and Safety Code Section 25501 et seq. (Hazardous Materials Release Response Plans and Inventory); or the California Porter-Cologne Water Quality Control Act, Water Code Section 13000 et seq., all as amended (the above cited California state statutes are hereinafter collectively referred to as "the State Toxic Substances Law"); or any other federal, state, or local statute, law, ordinance, resolution, code, rule, regulation, order or decree regulating, relating to, or imposing liability or standards of conduct concerning any Hazardous Substance, now or at any time hereinafter in

effect; (b) any substance, product, waste or other material of any nature whatsoever which may give rise to liability under any of the above statutes or under any statutory or common law theory based on negligence, trespass, intentional tort, nuisance or strict liability or under any reported decisions of a state or federal court; (c) petroleum or crude oil, other than petroleum and petroleum products which are contained within regularly operated motor vehicles; and (d) asbestos.

In the event the IMPROVEMENTS are now or in the future used in the handling or transporting of Hazardous Materials, FIRESTONE agrees fully to comply with all applicable federal, state, and local laws, rules, regulations, orders, decisions and ordinances (hereinafter referred to as "Hazardous Materials Standards") concerning Hazardous Materials. FIRESTONE further agrees that at CITY's request it will furnish CITY with proof, satisfactory to CITY, that FIRESTONE is in compliance with all such laws, rules, regulations, orders, decisions and ordinances.

b. Notwithstanding anything else contained in this AGREEMENT and to the fullest extent permitted by law, in case of a breach of the obligations contained in this Section, FIRESTONE agrees to assume liability for and to save, indemnify, defend and hold harmless CITY from and against any and all injuries to any person, including wrongful death, and damage to property, including without limitation, property of CITY and FIRESTONE, and all related expenses, including without limitation reasonable attorneys' fees, investigators' fees, litigation expenses, and mitigation costs resulting in whole or in part from FIRESTONE's failure to comply with any Hazardous Materials Standards issued by any governmental authority concerning Hazardous Materials. FIRESTONE, at its cost, shall assume the defense of all claims, in accordance with Section 13 hereof. FIRESTONE agrees to reimburse CITY for all reasonable costs of any kind incurred as a result of the FIRESTONE's failure to comply with this Section, including, but not limited to, judicial or administrative fines, penalties, clean-up and disposal costs, and reasonable legal costs incurred as a result of FIRESTONE's handling, transporting, or disposing of Hazardous Materials on, over, or across the IMPROVEMENTS and PUBLIC RIGHT-OF-WAY.

10. Standards. FIRESTONE shall comply with all statutes, ordinances, rules, regulations, orders and decisions (hereinafter referred to as "Standards"); issued by any federal, state or local governmental body or agency established thereby relating to FIRESTONE's use of the IMPROVEMENTS and PUBLIC RIGHT-OF-WAY hereunder. In its use of the IMPROVEMENTS and PUBLIC RIGHT-OF-WAY, FIRESTONE shall at all times be in full compliance with all Standards, present or future, including, but not limited to, Standards concerning air quality, water quality, noise, and Hazardous Materials. In the event FIRESTONE fails to be in full compliance with Standards, CITY may, but shall not be obligated to, after giving notice of the failure to FIRESTONE, and if FIRESTONE, within fifteen (15) days of such notice, fails to correct such non-compliance, take whatever action it determines in its sole discretion to be necessary to protect the PUBLIC IMPROVEMENTS, PUBLIC RIGHT-OF-WAY, and other adjacent property. FIRESTONE shall reimburse CITY for all reasonable costs (including but not limited to, consulting, engineering, clean-up and disposal, and reasonable legal costs) incurred by CITY as a result of FIRESTONE's failure to comply with such Standards, and also such reasonable costs incurred by CITY in abating a violation of such Standards, protecting against a threatened violation of such Standards, defending any claim of violation of such

Standards in any proceeding before any agency or court, and paying any fines or penalties imposed for such violations. FIRESTONE shall, to the extent permitted by law, assume liability for and shall save and hold harmless CITY from any claim of a violation of the Standards regardless of the nature thereof or the agency or person asserting such claim, which results from FIRESTONE's use of the IMPROVEMENTS and PUBLIC RIGHT-OF-WAY; provided, however, that the foregoing shall not apply to the extent of CITY's negligence or willful misconduct. FIRESTONE, at its cost, shall assume the defense of all such claims.

11. Tests and Inspections. CITY shall have the right at any time to inspect the IMPROVEMENTS, PUBLIC RIGHT-OF-WAY, and PUBLIC IMPROVEMENTS so as to monitor compliance with this AGREEMENT. If, in CITY's sole judgment, any installation, use, or condition of the IMPROVEMENTS may have an adverse effect on the PUBLIC IMPROVEMENTS, PUBLIC RIGHT-OF-WAY, or CITY's operations, CITY shall be permitted to, at its sole cost and expense, conduct any tests or assessments, including but not limited to environmental assessments, of, on or about the PUBLIC RIGHT-OF-WAY and PUBLIC IMPROVEMENTS, as it determines to be necessary or useful to evaluate the condition of the PUBLIC RIGHT-OF-WAY and PUBLIC IMPROVEMENTS. FIRESTONE shall cooperate with CITY in any tests or inspections deemed necessary by CITY. FIRESTONE shall pay or reimburse CITY, as appropriate, for all reasonable costs and expenses incurred due to any necessary corrective work and inspections thereafter within thirty (30) days of a request for payment and a statement detailing such costs and expenses.

12. Insurance.

a. Types; Amounts. FIRESTONE shall obtain, and shall require any subcontractor to obtain, insurance in the amounts described below unless specifically altered or waived by CITY ("Required Insurance"). If any of the Required Insurance contains a general aggregate limit, such insurance shall apply separately to this License or be no less than two times the specified occurrence limit.

(i) *General Liability Insurance.* FIRESTONE shall maintain occurrence version general liability insurance, or equivalent form, with a combined single limit of not less than Two Million Dollars (\$2,000,000) per occurrence. The general liability insurance policy must include coverage for the following:

- (1) Bodily Injury and Property Damage
- (2) Personal Injury/Advertising Injury
- (3) Premises/Operations Liability
- (4) Products/Completed Operations Liability
- (5) Explosion, Collapse and Underground (UCX) exclusion deleted
- (6) Contractual Liability with respect to this AGREEMENT

- (7) Broad Form Property Damage
- (8) Independent Contractor Coverage

- (ii) *Business Automobile Liability Insurance.* FIRESTONE shall maintain business automobile liability insurance with an each accident limit of not less than One Million Dollars (\$1,000,000) for bodily injury and property damage, which shall be at least as broad as Insurance Services Office Form Number CA 00 01 covering automobile liability (Coverage Symbol 1, any auto).
- (iii) *"All Risk" Property Insurance.* FIRESTONE shall maintain a policy of property insurance for perils usual to a standard "all risk" insurance policy on all its improvements or alterations in, on, or about the PUBLIC RIGHT-OF-WAY, with limits equal to the value of all such improvements or alterations.

b. General Provisions. The general liability insurance policy and the business automobile liability insurance policy shall (1) name CITY, its officials, officers, employees and agents as additional insureds; (2) be endorsed to waive subrogation against CITY, its officials, officers, employees and agents as additional insureds; and (3) be primary and non-contributory. All Required Insurance herein shall contain standard separation of insureds provisions, and shall contain no special limitations on the scope of protection provided to CITY, its officials, officers, employees and agents.

c. Certificates; Insurer Rating; Cancellation Notice. Prior to conducting any work in PUBLIC RIGHT-OF-WAY, FIRESTONE shall furnish to CITY properly executed certificates of insurance which evidence all Required Insurance. FIRESTONE shall maintain the Required Insurance at all times while this AGREEMENT is in effect, and shall replace any certificate, policy, or endorsement which will expire prior to that date. All policies shall be endorsed to provide the Required Insurance shall not be suspended, voided, reduced, canceled, or allowed to expire except on thirty (30) days prior written notice to CITY. Unless approved in writing by CITY, FIRESTONE shall place the Required Insurance with insurers licensed to do business in the State of California and with a current A.M. Best rating of at least A:-VII.

d. Waiver of Subrogation. FIRESTONE releases CITY, its officials, officers, employees and agents from any claims for damage or harm to any person, the REAL PROPERTY, the PUBLIC RIGHT-OF-WAY, or the IMPROVEMENTS, caused by, or which result from, risks insured under any insurance policy carried by FIRESTONE at the time of such damage or harm. FIRESTONE shall cause each insurance policy required herein to provide a waiver of subrogation in favor of CITY, its officials, officers, employees and agents.

13. Indemnity. FIRESTONE hereby agrees to defend, indemnify and hold CITY and its officials, officers, agents and employees free and harmless from and against any and all claims, demands, causes of action, costs, liabilities, expenses, losses, damages or injuries of any kind in law or equity, to persons or property, including wrongful death, in any manner arising out

of or incident to any acts, omissions or willful misconduct of FIRESTONE, its partners, affiliates, agents officials, officers or employees in performance of this AGREEMENT, use of the REAL PROPERTY or PUBLIC RIGHT-OF-WAY, or the construction, use, or operation of the IMPROVEMENTS. FIRESTONE shall further defend, indemnify and hold harmless the CITY and its officials, officers, agents and employees from all claims, demands, lawsuits, writs of mandamus, and other actions or proceedings (brought against the CITY or its departments, commissions, agents, officers, officials, or employees to challenge, attack seek to modify, set aside, void or annul any City decision made in connection with this AGREEMENT or FIRESTONE's use of the PUBLIC RIGHT-OF-WAY. FIRESTONE shall defend, with counsel of CITY's choosing and at FIRESTONE's sole expense, any and all aforesaid suits, actions or proceedings, legal or affirmative, that may be brought or instituted against CITY, its officials, officers, agents or employees. FIRESTONE shall pay and satisfy any judgment, award or decree that may be rendered against CITY, its officials, officers, agents or employees. FIRESTONE shall reimburse such parties for any and all legal expenses and costs incurred by one or all of them in connection with this AGREEMENT or the indemnity herein provided. FIRESTONE's obligation shall survive termination or expiration of this AGREEMENT, and shall not be restricted to insurance proceeds, if any, received by CITY or its officials, officers, agents or employees.

14. Covenant Running With Land. This AGREEMENT shall be deemed a covenant running with the REAL PROPERTY. All of the covenants, obligations, and provisions of this AGREEMENT shall be binding upon and inure to the benefit of successors, legal representatives and assigns of the Parties. Every person who now or hereafter owns or acquires any right, title, or interest in and to any portion of the REAL PROPERTY shall be conclusively deemed to have notice of this AGREEMENT, whether or not reference to this AGREEMENT is contained in the instrument by which such person acquires an interest in the REAL PROPERTY. Therefore, each and every contract, deed or other instrument hereinafter executed, covering or conveying the REAL PROPERTY shall conclusively be deemed to have been executed, delivered and accepted subject to this AGREEMENT.

15. Miscellaneous.

a. Amendments. The provisions of this AGREEMENT may be amended by mutual written consent of both parties.

b. Notices. All notices permitted or required under this AGREEMENT shall be given to the respective parties at the following address, or at such other address as the respective parties may provide in writing for this purpose:

FIRESTONE: Firestone Walker, Inc.
1400 Ramada Drive
Paso Robles, CA 93446
Attn: Darrin McMahon

CITY: City of El Paso de Robles
1000 Spring Street
Paso Robles, CA 93446
Attn: Director of Public Works]

Such notice shall be deemed made when personally delivered or forty-eight (48) hours after deposit in the U.S. Mail, first class postage prepaid and addressed to the party at its applicable address. Actual notice shall be deemed adequate notice on the date actual notice occurred, regardless of the method of service.

c. Entire Understanding. This AGREEMENT constitutes the entire understanding between the Parties, and supersedes all offers, negotiations and other agreements concerning the subject matter contained herein.

d. Invalidity. If any provision of this AGREEMENT is invalid or unenforceable with respect to any Party, the remainder of this AGREEMENT or the application of such provision to persons other than those as to whom it is held invalid or unenforceable, shall not be affected and each provision of this AGREEMENT shall be valid and enforceable to the fullest extent permitted by law.

e. Successors and Assigns. This AGREEMENT shall be binding on and inure to the benefit of the successors and permitted assignees of the respective parties.

f. No Third Party Beneficiaries. This Agreement shall not be construed to create any third party beneficiaries. This Agreement is for the sole benefit of the parties, and their permitted successors, transferees, and assignees, and no other person or entity shall be entitled to rely upon or receive any benefit from this Agreement or any of its terms.

g. Consent to Jurisdiction and Venue. This AGREEMENT shall be construed in accordance with and governed by the laws of the State of California. Any legal action or proceeding brought to interpret or enforce this AGREEMENT, or which in any way arises out of the Parties' activities undertaken pursuant to this AGREEMENT, shall be filed and prosecuted in the appropriate California State Court in the County of San Luis Obispo, California. Each Party waives the benefit of any provision of state or federal law providing for a change of venue to any other court or jurisdiction including, without limitation, a change of venue based on the fact that a governmental entity is a party to the action or proceeding, or that a federal right or question is involved or alleged to be involved in the action or proceeding. Without limiting the generality of the foregoing waiver, FIRESTONE expressly waives any right to have venue transferred pursuant to California Code of Civil Procedure Section 394.

h. Exhibits. All exhibits attached hereto form material parts of this AGREEMENT.

16. Permit Fee. FIRESTONE agrees to compensate CITY in the amount of ONE THOUSAND DOLLARS (\$1,000) to offset legal and related expenses in return for granting an

Exhibit A

Encroachment Permit pursuant to this AGREEMENT, which shall be due and payable to CITY within thirty (30) days of the execution date of this AGREEMENT.

17. Possessory Interest. In accordance with Revenue and Taxation Code Section 107.6, this AGREEMENT may create a possessory interest subject to personal property taxation for which FIRESTONE shall be responsible.

18. Effective Date. The Parties hereby agree that the effective date of this AGREEMENT, and the effective date for all obligations of the Parties hereunder, shall be the date on which this AGREEMENT has been fully executed by both Parties.

[SIGNATURES ON FOLLOWING PAGE]

SIGNATURE PAGE TO
DURABLE ENCROACHMENT AGREEMENT
BETWEEN
CITY OF EL PASO DE ROBLES
AND FIRESTONE WALKER, INC.

IN WITNESS WHEREOF, this AGREEMENT and the Encroachment Permit granted hereby has been duly issued by CITY on the date of execution by CITY below.

CITY OF EL PASO DE ROBLES,
A California municipal corporation and general
law city

By: _____
Thomas Frutchey
City Manager

Date: _____

ACCEPTANCE OF TERMS
AND CONDITIONS OF AGREEMENT:

FIRESTONE
FIRESTONE WALKER, INC.,
a California corporation

By: David Walker
(signature)
DAVID WALKER
(print name and title)

Date: 12/12/17

EXHIBIT "A"

LEGAL DESCRIPTION OF REAL PROPERTY

Assessor's Parcel Nos. 009-633-032 and 009-633-034, located in the City of Paso Robles,
County of San Luis Obispo, California

EXHIBIT "B"

PUBLIC RIGHT-OF-WAY AND FINAL DESIGN DRAWINGS FOR IMPROVEMENTS APPROVED BY CITY

