

## AGREEMENT, RELEASE AND HOLD HARMLESS

This Agreement, Release and Hold Harmless (the “Agreement”) is made and entered into by and between the Brush Road Corporation and the owners of certain properties in the County of Santa Clara designated as APN 544-34-074, APN 544-34-075, and APN 544-34-076 in the vicinity of the private road known as Ridge Road (“Ridge Road Owners”) (the Brush Road Corporation and the Ridge Road Owners, individually and collectively, are hereafter referred to as the “Culvert Owners”) and the State of California, Department of Transportation (“the State”). Hereinafter, Culvert Owners and the State who shall from time to time collectively be referred to as the “Parties.”

### RECITALS

This Agreement is based upon the following facts and representations, all of which for the purpose of this Agreement are agreed by the Parties to be true:

- A. WHEREAS, the State constructed and then for many years mistakenly maintained a portion of a private road in Santa Clara County commonly known as “Brush Road” lying outside the boundaries of the State’s property<sup>1</sup> commonly known as State Route 17 and within an easement owned by one or more of the Culvert Owners; and
- B. WHEREAS, the Brush Road Segment includes a substantial corrugated metal pipe storm water drainage culvert;<sup>2</sup> and
- C. WHEREAS, the Brush Road Segment and in particular, the subject drainage culvert are now badly in need of repair; and
- D. WHEREAS, the Culvert Owners agree and acknowledge that the State had no past nor has any present or future duty to maintain the Brush Road Segment and that the State cannot participate in any future maintenance of the Brush Road Segment and in particular, the subject drainage culvert; and
- E. WHEREAS, the Brush Road Corporation acknowledges and agrees that it has ownership of the easement which includes the Brush Road Segment and that said ownership includes ownership and control of, and responsibility for, all of the road facilities associated with and attendant to said easement, including, without limitation, the subject drainage culvert; and
- F. WHEREAS, the Culvert Owners have initiated a project to repair the Brush Road Segment, including the subject drainage culvert; and
- G. WHEREAS, the Parties now desire to reach an agreement with regard to the State’s construction and past mistaken maintenance of the Brush Road Segment including the subject drainage culvert,

THEREFORE:

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<sup>1</sup> The subject portion of Brush Road lying outside the State’s property (State’s property is also known by the term “right of way”) is hereinafter referred to as “the Brush Road Segment.”

<sup>2</sup> The substantial corrugated metal pipe storm water drainage culvert is hereinafter referred to as “the subject drainage culvert.”

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1. Brush Road Corporation, the Ridge Road Owners, and their successors in interest shall take full responsibility for the project to repair the Brush Road Segment and in particular, the subject drainage culvert, including, but not limited to, design, permits, approvals, removal, disposal, repair, construction and reconstruction and will pay all associated fees and costs above and beyond the amount of any payment by the State provided for herein.
2. Brush Road Corporation, the Ridge Road Owners, and their successors in interest shall assume, permanently and in perpetuity, all responsibility for any and all operation, repair, maintenance, and reconstruction of the Brush Road Segment including the subject drainage culvert at their own expense and at no expense to the State.
3. Brush Road Corporation shall have sole authority over the design, implementation and management of said repair project and any future maintenance, repair and/or reconstruction projects of the subject drainage culvert and/or the Brush Road Segment. Brush Road Corporation and the individual Ridge Road Owners shall enter into and execute an agreement providing for an allocation between Brush Road Corporation and the individual Ridge Road Owners and their successors in interest, of all of the costs and expenses of (1) said repair project and (2) any future maintenance, repair and/or reconstruction projects of the subject drainage culvert and/or the Brush Road Segment. Said allocation shall be calculated based on the ratio of number of members of the Brush Road Corporation and number of parcels on Ridge Road. As of the signing of this agreement there are 30 members of the Brush Road Corporation and three (3) Ridge Road Owners, so Brush Road Corporation shall pay 90% of said costs and expenses and each Ridge Road Owner shall pay 3.3% of said costs and expenses.
4. The State will place two signs with the words "Private Road, No Exit" on State's right of way approximately 50 feet northerly (up Brush Road) of the drains adjoining State Route 17; one each on either side of Brush Road.
5. The State will continue to maintain the portion of Brush Road and the drainage facilities within the State's right of way at the same level as used to maintain State Route 17.
6. The State waives and releases the Culvert Owners from any and all claims for reimbursement of the State's costs of repair or maintenance of the Brush Road Segment and/or the subject drainage culvert and/or any related expenses incurred prior to execution of this Agreement.
7. None of the Parties waive or release any claims or causes of action against Los Gatos Real LLC, Sal Giovionato or their successors or assigns.
8. The State will make a one-time-only contribution of \$42,000 to the Brush Road Corporation for Culvert Owners' current project to repair the Brush Road Segment and in particular, the subject drainage culvert in consideration of this release and hold harmless and indemnification by the Culvert Owners of all past, present and future claims against the State regarding the Brush Road Segment and in particular, the subject drainage culvert.
9. The Parties agree to pay their own attorneys' fees and litigation costs, and the parties waive any claim for such costs against each other. However in the event that any legal action is commenced

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between any parties to this Agreement and that arises out of this Agreement, the prevailing party shall be awarded their reasonable attorney fees, costs and expenses of said legal action.

### **RELEASE**

The Ridge Road Owners and the Brush Road Corporation, individually and collectively, on behalf of themselves and their respective successors-in-interest (“Culvert Owners”), release the State of California Department of Transportation, including its officers, directors, agents, and employees, and each of them (referred to hereafter as “The State Parties”) from any and all claims, demands, causes of action, damages, costs, expenses, actual attorneys’ fees, losses or liabilities, in law or in equity, of every kind and nature whatsoever, related to any act(s) or omission(s) of The State Parties on or about the Brush Road Segment which said act(s) or omission(s) occurred prior to the execution of this Agreement or arising out of or in connection with the Culvert Owners’ project to repair the Brush Road Segment and in particular, the subject drainage culvert that are the subject of this Agreement. This is a full and final release applying to all unknown and unanticipated injuries, death or damages arising out of said act(s) or omission(s) of The State Parties on or about the Brush Road Segment and the Culvert Owners’ project to repair the Brush Road Segment and in particular, the subject drainage culvert as well as to those known or disclosed, and the Culvert Owners waive all rights or benefits which the Culvert Owners now have or in the future may have under the terms of Section 1542 of the Civil Code of the State of California which said section reads as follows:

“A general release does not extend to the claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.”

This Release shall be binding upon and inure to the benefit of the Parties, their successors, assigns and personal representatives.

### **HOLD HARMLESS AND INDEMNIFICATION**

ALSO, the Ridge Road Owners and the Brush Road Corporation, individually and collectively, on behalf of themselves and their respective successors-in-interest (“Culvert Owners”), shall indemnify, defend and hold the State and its officers, directors, agents, and employees, and each of them (“The State Parties”), harmless from and against any and all claims, suits, damages, losses, liabilities and costs of every nature arising out of or relating in any manner, directly or indirectly, to any act(s) or omission(s) of the Culvert Owners, their officers, directors, shareholders, employees, members, agents, guests, invitees, licensees, tenants or contractors with regard to this Agreement or the current Brush Road Segment repair project and any injury to any person or property occurring or other circumstances existing on or about the Brush Road Segment at any time subsequent to the execution of this Agreement due to any circumstance whatsoever, provided, however, that the Culvert Owners’ obligation shall not apply to exempt any party (including The State Parties) from responsibility for their own fraud, sole negligence or willful injury to the person or property of another, or violation of criminal law, whether willful or negligent.

This Hold Harmless and Indemnification shall be binding upon and inure to the benefit of the Parties, their successors, assigns and personal representatives.

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This Agreement contains the entire agreement between the parties hereto. The terms of this Agreement are contractual and not a mere recital. This Agreement is executed without reliance upon any representation by any person concerning the nature or extent of injuries or legal liability therefore, and the undersigned have carefully read and understand the contents of this Agreement and sign the same as their own free act.

IN WITNESS WHEREOF, each of the Parties has executed this Agreement on the date written below:

**RIDGE ROAD OWNERS**

**APN 544-34-074**

\_\_\_\_\_  
STIG NILSSON  
Date: February \_\_\_\_\_, 2009

\_\_\_\_\_  
CHRIST'L NILSSON  
Date: February \_\_\_\_\_, 2009

**APN 544-34-075**

\_\_\_\_\_  
WILLIAM J. BARHYDT  
Date: February \_\_\_\_\_, 2009

\_\_\_\_\_  
REGINA BARHYDT  
Date: February \_\_\_\_\_, 2009

**APN 544-34-076**

\_\_\_\_\_  
FRANK BOHOLST  
Date: February \_\_\_\_\_, 2009

\_\_\_\_\_  
YVONNE BOHOLST  
Date: February \_\_\_\_\_, 2009

**BRUSH ROAD CORPORATION**

\_\_\_\_\_  
MICHAEL THOMAS McNAMARA  
President  
Date: February \_\_\_\_\_, 2009

**STATE OF CALIFORNIA  
Department of Transportation**

\_\_\_\_\_  
R. A. MACPHERSON  
Deputy District Director  
Right of Way  
Date: February \_\_\_\_\_, 2009

Approved as to form:

\_\_\_\_\_  
FRANK D. VALENTINI  
Attorney  
State of California  
Department of Transportation  
San Francisco Legal Division  
Date: February \_\_\_\_\_, 2009