

EQUIPMENT SHARING AGREEMENT
BETWEEN THE CITY OF CUPERTINO, TOWN OF LOS GATOS
AND THE CITY OF CAMPBELL

THIS AGREEMENT is entered into as of _____, 2013, by and between the City of Cupertino ("Cupertino"), the Town of Los Gatos ("Los Gatos"), and the City of Campbell ("Campbell") each a municipal corporation within the State of California (collectively referred to as PARTIES).

RECITALS

- A. The PARTIES are municipal corporations duly organized and validly existing under the laws of the State of California with the power to carry on its business as it is now being conducted under the Constitution and the statutes of the State of California, and their respective Municipal Codes.
- B. Each PARTY has specialized equipment and the PARTIES are interested in occasionally sharing equipment for a variety of public work projects to ensure backup, provide secondary support on large projects, and generally provide an option to ensure efficient and effective operations.
- C. The PARTIES desire to enter into an Agreement to establish procedures for sharing equipment and defining legal relationships and responsibilities;

NOW, THEREFORE, it is mutually agreed by and between the PARTIES as follows:

1. **PURPOSE.**

a. The purpose of this Agreement is to create a system for the occasional sharing of motor vehicles, equipment, and machinery (collectively referred to in this agreement as "Equipment") between the Parties for efficiency and effectiveness of operations.

b. The Parties agree to make available to each other vehicles, equipment, machinery, and related items in the manner and on the terms and conditions provided in this agreement. A Party supplying Equipment shall be designated the "Provider". A Party receiving Equipment shall be designated the "Borrower".

2. TERM.

The term of this Agreement shall be for a period of two (2) years from the date of execution. Upon mutual agreement of all Parties, this Agreement may be extended for three additional one-year periods.

3. SHARING PERIOD AND RATES.

a. Equipment Catalog. Each Provider shall maintain an accurate Equipment Sharing Catalog ("Catalog") that reflects the Equipment that Provider may make available for sharing, the rates and fee schedules for such equipment, high-wear components of those pieces of equipment, and any applicable rules, restrictions, or limitations for sharing the pieces of equipment listed in the Catalog. Amendments to the each Provider's Equipment Sharing Catalog shall occur as necessary and be mailed to each Party or otherwise made electronically available.

b. Equipment Sharing Periods. Equipment shall be provided upon reasonable request at mutually convenient times and locations, for a duration mutually agreed upon by Provider and Borrower (the "Share Period"). Provider retains the right to refuse to any request for Equipment for any reason. Equipment shall be returned immediately at Provider's request.

c. Storage During Sharing Period. During the Sharing Period, Borrower shall be responsible for storing the Equipment in a reasonably safe and secure area.

d. Charges for Equipment. Charges shall be consistent with those listed in the Equipment Catalog or any subsequent amendments, and shall begin accruing at the time Borrower picks up or accepts delivery of the Equipment and shall cease upon return of the Equipment to Provider.

4. INVOICES AND PAYMENTS.

a. On or before the last day of each month, Provider shall provide monthly invoices to Borrower that show Equipment rented, duration of the rental, rental rate, and total payments due for all Equipment shared in the previous month.

b. Borrower shall pay Provider's invoices in full within thirty (30) days of the date of invoice.

5. EQUIPMENT USAGE.

a. Operator Qualifications. The Parties agree to permit Equipment to be used only by properly trained, properly licensed and supervised operators. All drivers shall be licensed and shall have a satisfactory driving record. All equipment operators shall be properly trained and qualified to operate the Equipment shared under this Agreement. Borrower shall make available to Provider upon request proof of training, licensing, and qualifications of operator prior to release of Equipment.

b. Usage Requirements. Equipment shared under this agreement shall be used by Borrower's employees to conduct official business. Borrowers shall use and operate Equipment only for its intended purpose, in a careful manner and in compliance with all requirements for operation and of any governmental authority having jurisdiction, if applicable. Borrower shall not sublease or allow anyone other than Borrower's employees to use Equipment shared under this Agreement.

c. Borrower Responsible for Charges and Fees. Borrower shall maintain responsibility for paying all fines and other liens that might be incurred against equipment shared under this Agreement, and shall hold the Provider harmless from and against any and all fines, assessments, fees, charges, expenses, penalties and forfeitures incurred in connection with the use of shared Equipment.

d. Fuel. Borrower shall be responsible for supplying all fuel used during the period it borrows the Equipment. Provider shall ensure that the fuel tank(s) are full when Borrower picks up the Equipment, and Borrower shall ensure that the fuel tank(s) are full when it returns the Equipment to Provider.

e. Equipment Identification. Each User shall place a magnetic display with the wording: "Equipment provided by Cooperative Agreement with other Public Agencies."

6. EQUIPMENT DELIVERY AND PICKUP

a. Delivery/Pickup. Borrower shall be responsible for picking up and returning any Equipment shared under this Agreement, unless Provider and Borrower mutually agree to other arrangements. Equipment may be picked up and returned between 8 am and 4 pm, Monday through Friday, excluding holidays.

b. Notification. Borrower shall contact Provider at least 7 days/hours in advance of each pick-up and delivery to confirm

c. Condition of Equipment. Provider shall ensure that any Equipment being shared is serviced consistent with recognized industry standards prior to Borrower's pick-up.

d. Timely Return of Equipment. Borrower shall return Equipment to Provider no later than one business day following conclusion of the share period.

e. Inspections. Providers sharing Equipment under this agreement certify that the Equipment is in good repair and ready for the intended use. Equipment shared under this Agreement shall be inspected by representatives of both Provider and Borrower at the time of delivery/pickup and again at the time of turn-in. The inspections shall include an examination of the tires on the Equipment, which the Parties must agree are sound at the time Borrower picks up the Equipment, and which must have adequate tread depth to ensure safe and legal operation during the share period. The results of these inspections shall be documented on an Equipment Inspection Form and on a High Wear Item Inspection Form as identified and provided in each Provider's Equipment Catalog. Digital photographs of the equipment shall also be taken at the time of pickup to ensure that any existing damage is documented appropriately.

f. Operations and Safety Manuals. Provider shall provide a copy of all Equipment operation and safety manuals to Borrower at the time Equipment delivery.

7. CONTACT PERSON.

Each party agrees to appoint a person or persons to act as a liaison to serve as the contact for each rental request, all inspections, and to otherwise facilitate the orderly and efficient distribution of equipment sharing requests and related information. Contacts by agency are as indicated below:

Town of Los Gatos: Steve Regan, Public Works Superintendent
(408) 399-5770

City of Campbell: Alex Mordwinow, Public Works Superintendent
(408) 866-2145

City of Cupertino: Roger Lee, Assistant Director of Public Works
(408) 777-3269

8. MAINTENANCE AND REPAIR OF EQUIPMENT.

a. Borrower shall be responsible for performing all required maintenance during the share period, such as fluid level checks, and daily pre-trip inspections.

b. Borrower shall be responsible for the following items during the share period:

(1) Tire repair and replacement of any damaged tires that cannot be safely repaired;

(2) Replacement of any damaged or worn-out tools such as cutting edges and bits;

(3) Replacement of any windows or windshields that are cracked or damaged;

(4) Minor repairs and adjustments required to keep the Equipment in safe operating condition during the share period, including but not limited to replacement of defective lighting or mirrors, adjustment of hinges or latches, adding fluids to correct levels, and adding air to tires. If it is observed that Equipment requires an excessive amount of minor repairs and adjustments as described above, Borrower is to promptly notify Provider of specific issue prior to utilizing Equipment.

c. Any repairs or replacements made by Borrower pursuant to the requirements of this agreement shall be performed by qualified personnel; specifically, persons or contractors employed by Borrower to maintain and repair Borrower's own fleet equipment.

d. Notwithstanding anything contained herein to the contrary, Provider shall be responsible for latent defects that may occur during the normal operation of Equipment by borrower.

e. In all cases, Borrower shall inform Provider prior to commencing any repairs other than those defined as "minor" pursuant to section 8(b)(4) of this Agreement.

9. EQUIPMENT FAILURE NOT RESULTING FROM MISUSE OR FAILURE TO PERFORM REQUIRED MAINTENANCE

a. Provider shall be responsible for the repair or replacement of Equipment when:

(1) Equipment fails during its normal operation, and;

(2) Equipment, is being used as intended by the manufacturer, and;

(3) Equipment has received all manufacturer required maintenance during its use by the Borrower.

- b. Borrower shall be responsible to reimburse Provider for the cost of repair or replacement of Equipment when:
 - (1) Operating Equipment outside of its normal operation, or;
 - (2) Operating Equipment in a manner not intended by the manufacturer, or;
 - (3) Operating Equipment without performing required maintenance.
- c. Except for minor repairs as defined in section 8(b)(4) of the agreement, the Provider shall determine, in keeping with reasonable judgment, whether failed equipment shall be repaired or replaced.
- d. Borrower shall not claim damages from the Provider in the form of monetary, lost efficiency or time or consequential damage as a result of equipment failure.

10. EQUIPMENT DAMAGE DUE TO ACCIDENTS.

a. Borrower Responsibility for Damage. Borrower shall be responsible for the cost of repairing all damage to equipment incurred during the share period that is not considered to be normal wear and tear necessitated by misuse or negligent operation and for the maintenance and/or replacement of high wear items identified in each Provider's Equipment Catalog and as noted on each Provider's Equipment Inspection Form. For purposes of this agreement, the following definitions shall apply:

(1) "Normal wear and tear" is defined as dents, dings, paint chips, or scratches less than three inches in size, and interior wear such as soiled carpets and seats.

(2) "Excess wear and tear" is defined as dents, dings, paint chips or scratches more than three inches in size, cracked or punctured bumpers, chipped or cracked windshields, interior holes, burns, rips, tears or stains requiring heavy cleaning or replacement of fabric, interior damage such as gouged steering wheels or dashboards, missing equipment, and any interior or exterior damage attributable to collision, as well as mechanical repairs resulting from damage or negligence.

(3) "Total loss" is defined as the estimated cost to repair the Equipment is equal to at least eighty percent of the retail market value of the Equipment prior to the damage, as determined by an independent appraisal.

b. Notice to Provider. Borrower shall notify Provider immediately if Provider's Equipment is involved in any accident during the share period. Borrower shall promptly submit to Provider a written report of any accident that occurs in connection with this Agreement, in a form acceptable to Provider, and shall cooperate with any

requests by Provider related to the accident. Borrower's report to provider must include, at a minimum, the following information: (1) name and address of any person injured or deceased, or the owner of any property that suffered damage as the result of the accident; (2) name and address of Borrower's employee(s) involved in the accident; (3) name and address of Borrower's liability insurance carrier, unless self-insured; and (4) a detailed description of the accident. Borrower also agrees to take all reasonable steps to preserve all evidence and information that may be relevant to the circumstances surrounding a potential claim, and to allow Provider to review and inspect such evidence and the scene of the accident.

c. Accident Damage Repair. Except as otherwise provided below, Borrower shall be responsible for the cost of repairing all Equipment damage due to accidents. In cases where equipment damage is caused by a third party and that party assumes responsibility, Borrower shall arrange to have the equipment repaired and shall seek reimbursement from the third party and/or that party's insurance carrier. Borrower shall notify Provider prior to commencing any repairs, and Provider has the right to accept or reject the repairs upon inspection.

d. Damage Due to Equipment Defect. Provider shall be responsible for the cost of repairing all Equipment damage due to accidents caused by equipment defects.

e. Damage Resulting in Total Loss. In cases of equipment damage resulting in a total loss, Borrower shall be responsible for covering the loss. Provider shall submit an invoice to Borrower, equal to eighty percent of the current retail market value of the Equipment prior to the damage as determined by an independent appraisal, for any Equipment determined to be a total loss.

In cases of Equipment damage resulting in a total loss caused by a third party where that party assumes responsibility, Borrower shall seek reimbursement from the other party's insurance carrier. If the reimbursement is greater than eighty percent of the retail market value prior to the damage, Borrower shall give the entire amount of the reimbursement to Provider.

Provider shall not be entitled to consequential damage for the loss of use of the equipment due to accidental damage.

f. Damage from Excess Wear and Tear. At the time Borrower returns the Equipment to Provider, the Parties shall make an assessment of any excess wear and tear as provided in section 6(e) of this Agreement. If excess wear and tear damage exists, the Provider shall submit an invoice to Borrower for the cost of the damage within thirty

(30) days of the Equipment return. The repair amount on the invoice shall be based on actual costs as determined by agency labor rates/contract labor rates and for Equipment parts purchased per each agency's procurement policy.

g. Stolen Equipment. Borrower shall assume responsibility if Provider's Equipment is stolen while in Borrower's control, and shall pay Provider eighty percent of the retail market value of the Equipment as determined by an independent appraisal. If stolen equipment is recovered subsequent to the delivery of replacement equipment to Provider, Provider may choose to give the recovered equipment to Borrower or refund a portion of Borrower's payment, at Provider's discretion.

11. WARRANTY.

Provider is neither a manufacturer nor supplier of the Equipment and therefore makes no warranties, express or implied, including, without limitation, the condition of the equipment, its design, capacity, performance, construction, workmanship, or fitness for any particular use. All Equipment is shared on an "as-is" basis. Provider shall not be responsible or liable to Borrower for any loss, delay, or damage of any kind resulting from defects in or accidental breakage of Equipment shared under this agreement.

12. INDEPENDENT CONTRACTOR.

Borrower is an independent contractor and shall not for any purpose be deemed to be an employee, agent or other representative of Provider.

13. ASSIGNMENT

The Parties shall not assign, sublet, transfer, or otherwise substitute their interests in this Agreement, or any of their rights or obligations under this Agreement, without the prior written consent of all other Parties.

14. INSURANCE.

During the term of this agreement, each party will keep in force, at its own expense, insurance requirements as specified in Attachment A.

15. INDEMNIFICATION.

Each Party shall be solely responsible for its own acts and those of its employees and officers under this Agreement. No Party shall be responsible or liable for

consequential damages to another Party arising out of providing or using equipment, services or labor under this Agreement.

Except as otherwise provided in this section, Borrower shall indemnify, defend, and hold harmless Provider and its agents, officers, attorneys, employees, officials and volunteers, to the fullest extent permitted by law from any and all claims, causes of action, injuries, losses, liabilities, cost (including reasonable defense costs and attorneys' fees) or damages arising out of or related to, or alleged to arise out of or relate to the use of the Equipment by the Borrower, except for any claims, causes of action, injuries, losses, liabilities or damages proximately caused by the sole negligence, or willful misconduct of Provider, or any latent defect in the Equipment.

Except as otherwise provided in this section, Provider shall indemnify, defend, and hold harmless Borrower and its agents, officers, attorneys, employees, officials and volunteers, to the fullest extent permitted by law from any and all claims, causes of action, injuries, losses, liabilities, cost (including reasonable defense costs and attorneys' fees) or damages proximately caused by the sole negligence, or willful misconduct of Provider, or any latent defect in the Equipment.

Providers requiring that their personnel operate or assist in the operation of equipment shall, hold harmless, indemnify and defend the Borrower, its officers, agents and employees from all claims arising solely by reason of any negligent act by persons designated by Provider to operate or assist in the operation of equipment. Notwithstanding the above, the Borrower shall bear sole responsibility for ensuring that it has the authority to request the work and for any representations made to the Provider regarding site conditions or other aspects of the project. The Providers of the equipment shall adequately insure the equipment or provide self-insurance coverage.

The provisions of this section shall survive the termination of this Agreement, and are intended to fully allocate the risk of all liability to third parties arising out of this Agreement. No other rights of indemnity or contribution shall exist between the parties in law or equity.

16. NOTICES.

All written notices under this Agreement shall be mailed to the addresses indicated below:

To City of Cupertino: Timm Borden, Public Works Director
10300 Torre Avenue
Cupertino, CA 95014

To Town of Los Gatos: Robert Kass, Interim Public Works Director
41 Miles Avenue
Los Gatos, CA 95030

To City of Campbell: Todd Capurso, Public Works Director
70 North First Street
Campbell, CA 95008-1436

17. TERMINATION.

Any Party may terminate this Agreement for any reason by giving thirty (30) days prior written notice to all other Parties. In the event of such termination, all costs incurred up to the date of termination shall be the responsibility of the User.

18. MISCELLANEOUS

a. Compliance with Law. The Parties shall comply with all laws, state or federal and all ordinances, rules and regulations.

b. Governing Law. The laws of the state of California shall govern this Agreement. In the event any legal action is commenced regarding this Lease, venue shall be in Santa Clara County.

c. Attorneys' Fees. If legal action is commenced to enforce or to declare the effect of any provision of this Lease, the prevailing party shall be awarded attorneys' fees and costs incurred by such party in the action.

d. Entire Agreement. This document comprises the entire and integrated agreement of the parties concerning the lease of the Property and supersedes all prior negotiations, representations, or agreements, either written or oral. Any amendments to this document shall be effective only if in writing and signed by the City and Tenant.

e. Severability. If any term, provision, covenant or condition of this Agreement is held by a court to be invalid, void or unenforceable, the rest of this Agreement shall remain in full force and effect and shall in no way be affected, impaired or invalidated.

[Remainder of page intentionally left blank. Signatures appear on following page.]

DRAFT

IN WITNESS WHEREOF, the parties have caused the Agreement to be executed on the day and year first above written.

City of Cupertino

By: _____

Title: _____

Approved as to form:

City Attorney

Town of Los Gatos

By: _____

Title: _____

Town Attorney

City of Campbell

By: _____

Title: _____

City Attorney

Attachment A

INSURANCE REQUIREMENTS FOR EQUIPMENT SHARING AGREEMENT

Each PARTY shall procure and maintain for the duration of the agreement insurance against claims for injuries to persons or damages to property which may arise from or in connection with the Equipment Sharing Agreement.

Minimum Insurance Required:

1. **Commercial General Liability (CGL):** Covering General Liability on an “occurrence” basis, including products-completed operations, personal & advertising injury, with limits no less than **\$2,000,000** per occurrence. If a general aggregate limit applies, the general aggregate limit shall be twice the required occurrence limit (**\$4,000,000**).
2. **Automobile Liability:** Covering all autos (owned, non-owned and hired automobiles), with limit no less than **\$1,000,000** per accident for bodily injury and property damage.
3. **Workers’ Compensation** insurance as required by the State of California, with Statutory Limits, and Employer’s Liability (EL) Coverage with and EL limit of no less than **\$1,000,000** per accident for bodily injury or disease.

Other Insurance Provisions

The insurance policies are to contain, or be endorsed to contain, the following provisions:

Additional Insured Status

The Entity (PARTY), its officers, officials, employees, and volunteers are to be covered as insureds on the General Liability policy with respect to liability arising out of work or operations performed by or on behalf of the Contractor including materials, parts or equipment furnished in connection with such work or operations and for the Automobile liability policy with respect to liability arising for automobiles owned, leased, hired or borrowed by or on behalf of the contractor.

Primary Coverage

For any claims related to this contract, the **insurance coverage provided shall be primary** insurance as respects the Entity (PARTY), its officers, officials, employees, and volunteers. Any insurance or self-insurance maintained by the Entity (PARTY), its officers, officials, employees, or volunteers shall be excess of the Contractor’s insurance and shall not contribute with it.

Notice of Cancellation

Each insurance policy required above shall provide that **coverage shall not be canceled, except after thirty (30) days’ prior written notice** (10 days for non-payment) has been given to the Entity (PARTY).

Waiver of Subrogation

Each Party hereby grants to Entity (PARTY) a waiver of any right to subrogation which any insurer of said Party may acquire against the Entity (PARTY) by virtue of the payment of any loss under such insurance. Each Party agrees to obtain any endorsement that may be necessary to effect this waiver of subrogation, but this provision applies regardless of whether or not the Entity has received a waiver of subrogation endorsement from the insurer.

Deductibles and Self-Insured Retentions

Any deductibles or self-insured retentions must be declared to and approved by the Entity (PARTY). The Entity (PARTY) may require the Party to purchase coverage with a lower deductible or retention or provide proof of ability to pay losses and related investigations, claim administration, and defense expenses within the retention.

Acceptability of Insurers

Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A:VII, unless otherwise acceptable to the Entity.

Verification of Coverage

Party shall furnish the Entity (PARTY) with original certificates and amendatory endorsements or copies of the applicable policy language effecting coverage required by this clause. All certificates and endorsements are to be received and approved by the Entity (PARTY) before work commences. However, failure to obtain the required documents prior to the work beginning shall not waive the party's obligation to provide them. The Entity (PARTY) reserves the right to require complete, certified copies of all required insurance policies, including endorsements required by these specifications, at any time.

Special Risks or Circumstances

Entity (PARTY) reserves the right to modify these requirements, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other special circumstances.