



SAN RAFAEL CITY COUNCIL AGENDA REPORT

Department: Public Works

**Prepared by: April Miller, Director of Public Works
Philip Buckley, Senior Engineer**

City Manager Approval: _____

TOPIC: SOUTHERN HEIGHTS/COURTRIGHT RETAINING WALL PROJECT

SUBJECT: RESOLUTION APPROVING AND AUTHORIZING THE CITY MANAGER TO EXECUTE THE PROPERTY PURCHASE AGREEMENT FOR ACQUISITION OF A ROADWAY AND SLOPE EASEMENT WITH PROPERTY OWNER OF 78 SOUTHERN HEIGHTS BOULEVARD AND ACCEPT THE GRANT DEED FOR SUCH PROPERTY.

RECOMMENDATION:

Adopt a resolution authorizing the City Manager to execute a property purchase agreement for acquisition of a roadway and slope easement with property owner of 78 Southern Heights Boulevard and accept the grant deed for such property.

BACKGROUND: Southern Heights Boulevard is a two-way local street located in the hills above San Rafael. The City intends to install a retaining wall system along the outside edge of Southern Heights Boulevard between 78 Southern Heights Boulevard and the private driveway (i.e., Courtright Road) leading to 82 Southern Heights Boulevard. Additionally, the project will include roadway resurfacing, drainage improvements, tree removal, erosion and sediment control, guardrail and pedestrian safety railing.

The existing right-of-way width on Southern Heights Boulevard varies from 17 feet to 44 feet. Most of the new retaining wall and drainage facilities will be installed within the existing public right-of-way. A property easement acquisition, measuring roughly 200 square feet, will be needed from the property at 78 Southern Heights Boulevard to build a portion of the retaining wall. Below the wall, a slope easement measuring roughly 650 square feet is necessary for the right to construct, replace, remove, maintain or modify slopes below the wall.

ANALYSIS:

Obtaining right of way is necessary to construct the new retaining wall and maintain the existing alignment and grade of the road. A real estate appraisal with comparables was ordered to determine the fair market value of the easement. Factors which may affect the value of the easement include: size, whether the land is deemed "developable," hillside slope, and length/duration of the easement. After extensive negotiations to determine fair and reasonable

FOR CITY CLERK ONLY

Council Meeting:

Disposition:

SAN RAFAEL CITY COUNCIL AGENDA REPORT / Page: 2

compensation, the property owner accepted the City's offer to purchase the easement for \$25,013 and the parties negotiated a purchase and sale agreement, Exhibit 1 to the resolution. The agreement allows the City to acquire the property in lieu of proceeding with eminent domain proceedings.

The City Attorney's Office retained Benjamin Stock, a real estate attorney, to peer review all real estate documents prepared by the design team. Mr. Stock reviewed and approved the offer packages prior to and during negotiations with property owners.

The attached resolution (Attachment 1) would authorize the City Manager to execute the Purchase Agreement with the property owner, accept the grant deed, and take any other actions necessary to effectuate acquisition of the property.

FISCAL IMPACT: The easement purchase price of \$25,013 will be appropriated from the Gas Tax Fund #206 via a transfer from the Liability Internal Services Fund #605.

OPTIONS: The City Council has the following options to consider relating to this matter:

1. Adopt the resolution as presented.
2. The City Council may decline to approve the resolution resulting in a project that cannot be constructed as designed. If the City does not advance the project into construction, legal counsel will need to review terms of a Settlement Agreement entered into with respect to the action encaptioned *Steward Miller, et al. v. City of San Rafael, et al.*, Marin County Superior Court case no. CIV 1703948 signed in January 2021.
3. The City Council may defer action and request staff to provide further information or modifications at a future Council meeting.

RECOMMENDED ACTION: Adopt a resolution authorizing the City Manager to execute a property purchase agreement for acquisition of a roadway and slope easement with property owner of 78 Southern Heights Boulevard and accept the grant deed for such property.

ATTACHMENT:

1. Resolution
2. Exhibit 1 to Resolution: Draft Purchase and Sale Agreement

RESOLUTION NO.

RESOLUTION APPROVING AND AUTHORIZING THE CITY MANAGER TO EXECUTE THE PROPERTY PURCHASE AGREEMENT FOR ACQUISITION OF A ROADWAY AND SLOPE EASEMENT WITH PROPERTY OWNER OF 78 SOUTHERN HEIGHTS BOULEVARD, AND ACCEPT THE GRANT DEED FOR SUCH PROPERTY

WHEREAS, public interest, convenience and welfare require that the property hereinafter mentioned be purchased and used for the benefit of the public of the City of San Rafael, California.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF SAN RAFAEL RESOLVES as follows:

1. The City Manager is authorized to execute the Agreement for Purchase and Sale of Real Property between Daniel M. Humphreys and Katherine F. Humphreys, and the City of San Rafael, a copy of which is attached hereto, marked as Exhibit "1", and incorporated herein by this reference, in a form by the City Attorney; and
2. The City Manager is authorized to accept the Grant Deed for the subject property identified in Exhibit "1" from Daniel M. Humphreys and Katherine F. Humphreys to the City of San Rafael, and to take any other actions necessary to effectuate acquisition of the property.

I, **LINDSAY LARA**, Clerk of the City of San Rafael, hereby certify that the foregoing resolution was duly and regularly introduced and adopted at a regular meeting of the Council of said City on the 1st day of May 2023, by the following vote, to wit:

AYES: COUNCILMEMBERS:
NOES: COUNCILMEMBERS:
ABSENT: COUNCILMEMBERS:

LINDSAY LARA, City Clerk

**AGREEMENT FOR PURCHASE AND SALE OF REAL
PROPERTY (INCLUDING ESCROW INSTRUCTIONS)**

This PURCHASE AND SALE AND SETTLEMENT AGREEMENT (this “**Agreement**”) is made and entered into as of April 24, 2023 (the “**Effective Date**”), by and between the DANIEL M. HUMPHREYS AND KATHERINE F. HUMPHREYS (“**Seller**”), and the CITY OF SAN RAFAEL, a California municipal corporation (“**Purchaser**”). Seller and Purchaser may collectively be referred to as the “**Parties**.”

RECITALS

A. Seller is the owner of the land and improvements located at APN 013-171-04, commonly known as 78 Southern Heights Boulevard, San Rafael, California, 94901 (the “**Property**”).

B. Purchaser desires to purchase from Seller, and Seller desires to convey to Purchaser, a roadway and slope easement over a portion of the Property, as more specifically described on Exhibit A (the “**Subject Easement**”), in order to construct roadway improvements including a retaining wall to improve street safety, as part of the Southern Heights/Courtright Retaining Wall Project (the “**Project**”).

C. On or about January 14, 2021, the Purchaser sent Seller an offer to purchase the Subject Easement pursuant to Government Code section 7267.2.

D. In lieu of proceeding with eminent domain proceedings for the acquisition of the Subject Easement, the Parties desire to enter into this Agreement.

IT IS HEREBY MUTUALLY AGREED BETWEEN THE PARTIES AS FOLLOWS:

1. Sale and Purchase of the Subject Easement. Seller agrees to sell and convey the Subject Easement to Purchaser, and Purchaser agrees to purchase the Subject Easement from Seller, on the terms and conditions set forth herein.

2. Purchase Price. The total purchase price for the Subject Easement shall be \$25,013.00 (“**Purchase Price**”). The parties acknowledge and agree the Purchase Price specifically includes full compensation for any interest in Seller’s business operations, loss of business goodwill, relocation damages or benefits, severance damage, attorneys’ fees or any other compensation of any nature whatsoever.

2.1 Payment of Purchase Price. On or before the Close of Escrow, Purchaser shall deposit with Escrow Agent the Purchase Price, in immediately available funds, which shall be paid to Seller at Close of Escrow.

2.2 Conveyance of Title/Title Policy. Subject to the fulfillment of the Conditions Precedent described below, at the Close of Escrow, Seller shall grant to Purchaser the Subject Easement by easement grant deed in the form attached as Exhibit B and incorporated

herein by reference (“**Easement Deed**”), subject only to (a) nondelinquent taxes and assessments; (b) liens to secure payment of current, unpaid real estate taxes and assessments; (c) all covenants, conditions, and restrictions, reservations, rights, rights of way, easements, encumbrances, liens, and title matters of record; (d) such title matters affecting the Subject Easement created by or with the written consent of Purchaser; (e) all applicable laws, ordinances, rules and governmental regulations (including, but not limited to, those relative to building, zoning and land use) affecting the development, use, occupancy or enjoyment of the Subject Easement; (f) all matters which would be apparent from an inspection of the Subject Easement; (g) all matters which would be disclosed by a survey of the Subject Easement; and (f) exceptions which are approved and/or accepted by Purchaser in writing (collectively, “**Approved Conditions of Title**”).

2.3 Purchaser shall cause Old Republic Title Company (the “**Title Company**”) to deliver to Seller and Purchaser an updated Preliminary Title Report for the Easement within five (5) business days after the later of the Effective Date or the date Escrow (defined in Section 8, below) is opened, and in any event, no later than ten business days prior to Close of Escrow. Within thirty (30) days from the Effective Date, Purchaser shall have completed its review of all title matters affecting the Subject Easement to the extent desired by Purchaser and shall obtain whatever assurances and/or commitments it desires from the Title Company as to title matters and the title insurance policies which Purchaser desires the Title Company to issue to Purchaser at the Closing for the Subject Easement (the “**Title Policy**”). Purchaser shall cause Escrow Agent (defined in Section 8, below) at Close of Escrow to provide Purchaser with a standard CLTA or ALTA (as the Purchaser may request in its sole discretion) policy of title insurance in the amount of the Purchase Price issued by the Title Company, together with any endorsements reasonably requested by Purchaser, showing title vested in Purchaser for the Subject Easement, subject only to the Approved Conditions of Title set forth above and the standard and printed exceptions, exclusions and stipulations contained in the form of owner’s title insurance policy to be obtained by Purchaser. Purchaser shall pay all premiums for the Title Policy and any endorsements to the Title Policy.

3. “As Is” Sale; Release by Purchaser. Purchaser specifically acknowledges and agrees that Seller is selling and Purchaser is purchasing the Subject Easement on an “As-Is, Where-Is, With All Faults” basis as of the Closing and that Purchaser is not relying on any representations or warranties of any kind whatsoever, express or implied, from Seller, its agents, employees or attorneys as to any matters concerning the Subject Easement, including without limitation: (a) the quality, nature, adequacy and physical condition of the Subject Easement and any improvements thereon, (b) the quality, nature, adequacy, and physical condition of soils, geology and any groundwater, (c) the presence of hazardous materials on, under or about the Easement or the adjoining or neighboring lands, (d) the quality of any labor and materials used in any improvements on the Subject Easement, and (e) the condition of title to the Subject Easement. Seller hereby specifically disclaims: (i) all warranties implied by law arising out of or with respect to the execution of this Agreement, any aspect or element of the Subject Easement, or the performance of Seller’s obligations hereunder including, without limitation, all implied warranties of merchantability, habitability and/or fitness for a particular purpose; and (ii) any warranty, guaranty or representation, oral or written, past, present or future, of, as to, or concerning (x) the nature and condition of the Subject Easement or other items conveyed hereunder, including, without limitation, the water, soil, and geology, the suitability thereof and

of the Subject Easement or other items conveyed hereunder for any and all activities and uses which Purchaser may elect to conduct thereon, the existence of any environmental hazards or conditions thereon (including but not limited to the presence of asbestos or other hazardous substances) or compliance with applicable environmental laws; (y) the nature and extent of any right-of-way, possession, lien, encumbrance, license, reservation, condition or otherwise; and (z) the compliance of the Subject Easement or other items conveyed hereunder or its operation with any laws (including environmental laws), ordinances, rules, requirements, resolutions, policy statements and regulations. Upon recording of the Easement Deed, Purchaser fully releases, acquits and discharges Seller from any and all claims related to the matters set forth above, excepting from such release and discharge only those warranties and representations of the Seller set forth in Section 13.

4. Waiver of Property Rights and Interests. Upon receipt by Seller of the Purchase Price, Seller for itself and for its agents, successors and assigns fully releases, acquits and discharges Purchaser and its officers, officials, council members, employees, attorneys, accountants, other professionals, insurers, and agents, and all entities, boards, commissions, and bodies related to any of them (collectively, the “**Released Parties**”) from all claims that Seller, its agents, successors and assigns has or may have against the Released Parties arising out of or related to Purchaser’s acquisition of the Subject Easement and the grant of any right-of-entry, including, without limitation, all of Seller’s property rights and interests in the Property as burdened by the Subject Easement, including but not limited to (i) any improvements, including improvements pertaining to the realty, furniture, fixture, and equipment, (ii) business goodwill and lost income (past or future) relating to the Subject Easement, (iii) lost income, (iv) relocation benefits, (v) severance damages, if any, (vi) any and all rights pertaining to the Eminent Domain Law contained in the Code of Civil Procedure sections 1230.010 *et seq.*, including, but not limited to the Code of Civil Procedure section 1245.245, and (vii) economic or consequential damages, (viii) professional consultant fees and attorney’s fees and costs, and (ix) all other costs, and any and all compensable interests, and/or damages, and/or claims, of any kind and nature, claimed or to be claimed, suffered or to be suffered, by Seller, its agents, successors and assigns by reason of Purchaser’s acquisition of the Subject Easement, provided that nothing herein shall release Purchaser from any liability resulting from Purchaser’s breach of any agreement, warranty, or covenant for which it is responsible under this Agreement.

4.1 Waiver of Civil Code Section 1542. Seller, on behalf of itself and its agents, successors and assigns, expressly waives all rights under Section 1542 of the Civil Code of the State of California (“**Section 1542**”), or any other federal or state statutory rights or rules, or principles of common law or equity, or those of any jurisdiction, government, or political subdivision thereof, similar to Section 1542 (hereinafter referred to as a “**Similar Provision**”). Thus, Seller and its agents, successors and assigns, and any business, enterprise, or venture in which they are involved, may not invoke the benefits of Section 1542 or any Similar Provision in order to prosecute or assert in any manner the matters released in Section 3 above. Section 1542 provides as follows:

“A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE

MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.”

Seller's Initials: DM

DANIEL M. HUMPHREYS

Seller's Initials: KH

KATHERINE F. HUMPHREYS

4.2 Survival. The provisions of this Section 4 shall survive the Closing and shall not be merged into the Easement Deed, and shall be fully enforceable after Close of Escrow (Close of Escrow defined in Section 6, below).

5. Escrow. Purchaser and Seller have opened or shall, within five days of the Effective Date of this Agreement, open an escrow (“Escrow”) in accordance with this Agreement at Old Republic Title Company (“Escrow Agent”). This Agreement, together with any supplementary escrow instructions prepared by Escrow Agent and executed by Purchaser and Seller, constitutes the joint escrow instructions of Purchaser and Seller, and Escrow Agent to whom these instructions are delivered is hereby empowered to act under this Agreement. The parties hereto agree to do all acts necessary to close this Escrow in the shortest possible time.

5.1 Documents and Funds. Prior to the Close of Escrow Seller shall execute, acknowledge and deliver into Escrow the Easement Deed, as defined herein. The Certificate of Acceptance attached to the Easement Deed shall be executed, acknowledged and delivered into Escrow by Purchaser on or before the Close of Escrow. Purchaser and Seller agree to deposit with Escrow Agent any additional funds and/or instruments as may be necessary to complete this transaction.

5.2 Escrow Account. All funds received in the Escrow shall be deposited with other escrow funds in a general escrow account(s) and may be transferred to any other escrow trust account in any state or national bank doing business in the State of California. All disbursements shall be made by check from such account.

6. Escrow Agent Authorization. Escrow Agent is authorized to, and shall:

6.1 Costs and Expenses. Charge to Purchaser: (a) all premiums for the Title Policy and any title endorsements, (b) all documentary transfer taxes, (c) all City transfer taxes, (d) all fees charged by the Escrow Agent in connection with the consummation of the transaction described herein, and (e) all document recording charges, all of which shall be paid by Purchaser through Escrow. Purchaser shall pay outside of Escrow all costs and expenses related to its due diligence investigations, and all legal and professional fees and costs of attorneys and other consultants and agents retained by Purchaser. Seller shall pay outside of Escrow all legal fees and costs incurred by Seller. If the Closing does not occur for any reason, then Purchaser shall pay all cancellation fees charged by Escrow Agent.

6.2 Disbursement.

(a) Disburse funds, including the Purchase Price to Seller or the individual members of Seller as they may direct; provided, if Seller fails to provide such directions or the members of Seller provide inconsistent directions, Escrow Agent may retain all

or a portion of such funds as it deems prudent until the members of Seller provide consistent directions, and Purchaser shall not have any liability to Seller or its individual members arising from failure or delay to distribute funds or distribution of funds contrary to any member of Seller's directions.

(b) Record the Easement Deed and Certificate of Acceptance.

(c) Deliver to Purchaser the originals of the Title Policy, and the Non-Foreign Transferor Declaration; deliver to Purchaser and Seller conformed copies of the Easement Deed and Certificate of Acceptance when conditions of the Escrow have been fulfilled by Purchaser and Seller.

6.3 Close of Escrow. The term "**Close of Escrow**," if and where written in these instructions, shall be deemed to have occurred on the date the Easement Deed and other necessary instruments of conveyance are recorded in the office of the Marin County Recorder. Recordation of instruments delivered through this Escrow is authorized, if necessary or proper in the issuance of the policy of title insurance.

6.4 Time Limits. All time limits within which any matter specified is to be performed may be extended by mutual agreement of the parties. Any amendment of, or supplement to, any instructions must be in writing.

6.5 Time of the Essence. TIME IS OF THE ESSENCE IN THESE INSTRUCTIONS AND, EXCEPT AS OTHERWISE PROVIDED BELOW, ESCROW IS TO CLOSE ON OR BEFORE JUNE 15, 2023, UNLESS SAID DATE IS EXTENDED BY THE MUTUAL WRITTEN AGREEMENT OF THE PARTIES. If this Escrow is not in condition to close by such date, then any party who has fully complied with this Agreement may, in writing, demand the return of its money or property; provided, however, no demand for return shall be recognized until five days after Escrow Agent shall have mailed copies of demand to all other parties at the respective addresses shown in the notice provisions below, and if any objections are raised within such five-day period, Escrow Agent is authorized to hold all money, papers and documents until instructed by a court of competent jurisdiction or mutual instructions.

7. FIRPTA. Seller and Purchaser agree to execute and deliver as directed by Escrow Agent any instrument, affidavit, and statement, including without limitation the Non-Foreign Transferor Declaration, which is attached hereto as Exhibit C, if applicable, and to perform any act reasonably necessary to comply with the provisions of FIRPTA and any similar state act and regulation promulgated thereunder.

8. Tax Requirements. Escrow Agent shall prepare and file with all appropriate governmental or taxing authorities a uniform settlement statement, closing statement and tax withholding forms, including an IRS 1099-S form, and be responsible for withholding taxes, if any such forms are provided for or required by law.

8.1 Transfer Taxes. No transfer tax shall be due because Purchaser is a public entity.

9. Feasibility.

9.1 Waiver of Investigations. Except as provided in Section 2.3, Purchaser waives the need for a due diligence or feasibility period and the right to conduct further investigations of the Easement.

10. Conditions Precedent to Close of Escrow.

10.1 Purchaser's Conditions Prior to Closing. The obligation of the Purchaser to complete the purchase of the Subject Easement is subject to the satisfaction of the following conditions:

(i) Seller shall deliver through Escrow the executed, acknowledged and recordable Easement Deed.

(ii) Seller shall deliver through Escrow a Non-Foreign Transferor Declaration, if applicable.

(iii) Seller shall deliver through Escrow such other documents as are necessary to comply with Seller's obligations under this Agreement.

(iv) Seller shall not be in default of any of its obligations under the terms of this Agreement, and all of Seller's representations and warranties made as of the date of this Agreement shall continue to be true and correct as of the Close of Escrow.

(v) Escrow Agent shall have committed to deliver to Purchaser an owners title insurance policy as required by Section 2.3 hereof.

On failure of any of the conditions set forth above, Purchaser may terminate its obligations under this Agreement with no further liability to Seller by giving notice to Seller on or before the expiration of the time allowed for each condition. In the event of such termination by the Purchaser, the Escrow Agent shall return any portion of the Purchase Price already deposited, to Purchaser. Purchaser's failure to elect to terminate its obligations shall constitute a waiver of the condition by Purchaser.

10.2 Seller's Conditions Precedent to Closing. The obligation of Seller to complete the sale of the Subject Easement is subject to the satisfaction of the following conditions:

(i) Purchaser shall not be in default of any of its obligations under the terms of this Agreement, and all of Purchaser's representations and warranties made as of the date of this Agreement shall continue to be true and correct as of the Close of Escrow.

(ii) Purchaser shall have deposited with the Escrow Agent the duly executed and acknowledged Certificate of Acceptance and other documents required to close Escrow, the Purchase Price in immediately available funds, and the Purchaser's share of closing costs described herein.

(iii) At or before the Closing, Purchaser shall deposit into Escrow such other documents as are necessary to comply with Purchaser's obligations under this Agreement.

(iv) Before the Closing, Seller shall deposit into Escrow the written approval from Seller's mortgage lender, Wells Fargo Bank, for the sale of the Subject Easement by Seller to Purchaser as provided by this Purchase and Sale Settlement Agreement.

On failure of any of the conditions set forth above, Seller may terminate its obligations under this Agreement with no further liability to Purchaser by giving notice to Purchaser on or before the expiration of the time allowed for each condition. Seller's failure to elect to terminate its obligations shall constitute a waiver of the condition by Seller.

11. Closing Statement. Seller instructs Escrow Agent to release a copy of Seller's closing statement to Purchaser.

12. Loss or Damage to Property. Loss or damage to the Subject Easement, by fire or other casualty, occurring prior to the recordation of the Easement Deed, shall be at the risk of Seller. In the event that loss or damage to the Subject Easement, by fire or other casualty, occurs prior to the recordation of the Easement Deed, Purchaser may elect to either terminate this Agreement or waive the right to terminate and close Escrow without any offset to the Purchase Price or any rights to insurance proceeds, if any.

13. Warranties, Representations, and Covenants of Seller. Seller hereby warrants, represents, and/or covenants to Purchaser that:

13.1 Pending Claims. To the best of Seller's knowledge, there are no actions, suits, claims, legal proceedings, or any other proceedings affecting the Property or any portion thereof, at law, or in equity before any court or governmental agency, domestic or foreign, except as disclosed in Recital C.

13.2 Encroachments. To the best of Seller's knowledge, there are no encroachments onto the Subject Easement by improvements on any adjoining property, nor do any improvements located on the Property encroach on the Subject Easement.

13.3 Seller's Title. Until the Close of Escrow, Seller shall not intentionally do anything which would impair Seller's title to any of the Subject Easement.

13.4 Condition of Land. To the best of Seller's knowledge, there are no substances, materials or conditions on the Property to be burdened by the Subject Easement that qualify as a Hazardous Material (as defined below) or otherwise violate any Environmental Law (as defined below). For the purposes of this Agreement, the following items have the following meanings:

(i) "Environmental Law" means any law, statute, ordinance or regulation pertaining to health, industrial hygiene or the environment including, without limitation, CERCLA (Comprehensive Environmental Response, Compensation and Liability Act of 1980) and RCRA (Resources Conservation and Recovery Act of 1976).

(ii) **“Hazardous Material”** means any substance, material or waste which is or becomes designated, classified or regulated as being “toxic” or “hazardous” or a “pollutant” or which is or becomes similarly designated, classified or regulated, under any Environmental Law, including asbestos, petroleum and petroleum products.

13.5 Conflict with Other Obligation. To the best of Seller’s knowledge, neither the execution of this Agreement nor the performance of the obligations herein will conflict with, or breach any of the provisions of any bond, note, evidence of indebtedness, contract, lease, covenants, conditions and restrictions, or other agreement or instrument to which Seller or the Property may be bound with respect to the Subject Easement.

13.6 Authority. Seller is the owner of and has the full right, power, and authority to sell, convey, and grant the Subject Easement to Purchaser as provided herein and to carry out Seller’s obligations hereunder. If Seller is a trust, corporation, partnership, limited liability company or other similar entity, each party executing this Agreement on behalf of Seller represents and warrants that such person is duly and validly authorized to do so on behalf of Seller.

13.7 Bankruptcy. Neither Seller nor any related entity is the subject of a bankruptcy proceeding, and permission of a bankruptcy court is not necessary for Seller to be able to transfer the Subject Easement as provided herein.

13.8 Governmental Compliance. To the best of Seller’s knowledge, Seller has not received any notice from any governmental agency or authority alleging that the Subject Easement is currently in violation of any law, ordinance, rule, regulation or requirement applicable to its use and operation. If any such notice or notices are received by Seller following the date this Agreement is signed by Purchaser, Seller shall notify Purchaser within ten days of receipt of such notice. Seller then, at its option, may either elect to perform the work or take the necessary corrective action prior to the Close of Escrow or refuse to do so, in which case Seller shall notify Purchaser of such refusal and Purchaser shall be entitled to either close Escrow with knowledge of such notice(s) or terminate this Agreement.

13.9 Non-Foreign Transferor. Seller is not a **“foreign person”** within the meaning of the Foreign Investment in Real Property Act or any similar state statute, and Seller will comply with all of the requirements of the Foreign Investment in Real Property Act and any similar state statute in connection with this transaction.

13.10 Change of Situation. Until the Close of Escrow, Seller shall, upon learning of any fact or condition which would cause any of the warranties and representations in this Section not to be true as of the Close of Escrow, immediately give written notice of such fact or condition to Purchaser.

14. Broker’s Commission. Seller and Purchaser each warrants and represents that it has not engaged the services of any agent, finder or broker in connection with the transaction which is the subject of this Agreement, and that it is not liable for any real estate commissions, broker’s fees or finder’s fees which may accrue by means of the sale of the Subject Easement. Seller and Purchaser agree to and do hereby indemnify and hold the other harmless from and

against any and all costs, liabilities, losses, damages, claims, causes of action or proceedings which may result from any broker, agent or finder, licensed or otherwise, which it has employed in connection with the transaction covered by this Agreement.

15. Construction of Faux Rock Façade. Purchaser agrees that the retaining wall to be constructed for the Project within the boundaries of the Subject Easement shall include a faux rock façade using materials selected by Purchaser.

16. Indemnification Regarding Project Construction Activities. Purchaser agrees to defend, indemnify, and hold harmless Seller with regard to any third-party claims arising out of Purchaser's construction activities for the Project on the Property. This section shall not be interpreted to require indemnity or defense of claims that are released by Purchaser under Section 4 of this Agreement.

17. Survival. Any covenants, agreements, and indemnifications that this Agreement does not require to be fully performed prior to Close of Escrow shall survive Close of Escrow and shall be fully enforceable after Close of Escrow in accordance with their terms.

18. Waiver, Consent and Remedies. Each provision of this Agreement to be performed by Purchaser and Seller shall be deemed both a covenant and a condition and shall be a material consideration for Seller's and Purchaser's performance hereunder, as appropriate, and any breach thereof by Purchaser or Seller shall be deemed a material default hereunder. Either party may specifically and expressly waive in writing any portion of this Agreement or any breach thereof, but no such waiver shall constitute a further or continuing waiver of a preceding or succeeding breach of the same or any other provision. A waiving party may at any time thereafter require further compliance by the other party with any breach or provision so waived. The consent by one party to any act by the other for which such consent was required shall not be deemed to imply consent or waiver of the necessity of obtaining such consent for the same or any similar acts in the future. No waiver or consent shall be implied from silence or any failure of a party to act, except as otherwise specified in this Agreement. All rights, remedies, undertakings, obligations, options, covenants, conditions and agreements contained in this Agreement shall be cumulative and no one of them shall be exclusive of any other. Except as otherwise specified herein, either party hereto may pursue any one or more of its rights, options or remedies hereunder or may seek damages or specific performance in the event of the other party's breach hereunder, or may pursue any other remedy at law or equity, whether or not stated in this Agreement.

19. Attorneys' Fees. In the event any declaratory or other legal or equitable action is instituted between Seller, Purchaser and/or Escrow Agent in connection with this Agreement, then as between Purchaser and Seller, the prevailing party shall be entitled to recover from the losing party all of its costs and expenses, including court costs and reasonable attorneys' fees, and all fees, costs and expenses incurred on any appeal or in collection of any judgment.

20. Notices. All notices or other communications required or permitted hereunder shall be in writing, and shall be personally delivered, sent by reputable overnight courier, or sent by registered or certified mail, postage prepaid, return receipt requested, and shall be deemed received upon the earlier of: (i) if personally delivered, the date of delivery to the address of the

person to receive such notice; (ii) if mailed, three business days after the date of posting by the United States post office; or (iii) if delivered by Federal Express or other overnight courier for next business day delivery, the next business day. Notice of change of address shall be given by written notice in the manner described in this Section. Rejection or other refusal to accept or the inability to deliver because of a change in address of which no notice was given shall be deemed to constitute receipt of the notice, demand, request or communication sent. Unless changed in accordance herewith, the addresses for notices given pursuant to this Agreement shall be as follows:

If to Seller: Daniel & Katherine Humphreys
78 Southern Heights Blvd.
San Rafael, CA 94901

If to Purchaser: City of San Rafael
1400 Fifth Avenue
San Rafael, CA 94901
Attention: Philip Buckley
Telephone: (415) 419-6841

with a copy to: Burke, Williams & Sorensen, LLP
1901 Harrison Street, 9th Floor
Oakland, CA 94612-3501
Attention: Benjamin Stock
Telephone: (510) 273-8780

21. Default. Failure or delay by either party to perform any covenant, condition or provision of this Agreement within the time provided herein constitutes a default under this Agreement. The injured party shall give written notice of default to the party in default, specifying the default complained of. The defaulting party shall immediately commence to cure such default and shall diligently complete such cure within ten days from the date of the notice. The injured party shall have the right to terminate this Agreement by written notice to the other party in the event of a default which is not cured within such ten-day period.

22. Interpretation. In this Agreement (unless the context requires otherwise), the masculine, feminine and neuter genders and the singular and the plural shall be deemed to include one another, as appropriate. The words "include" and "including" shall be interpreted as though followed by the words "without limitation." This Agreement shall be interpreted as though jointly prepared by both parties.

23. Entire Agreement. This Agreement and its exhibits constitute the entire agreement between the parties hereto pertaining to the subject matter hereof, and the final, complete and exclusive expression of the terms and conditions thereof. All prior agreements, representations, negotiations and understanding of the parties hereto, oral or written, express or implied, are hereby superseded and merged herein.

24. Captions. The captions used herein are for convenience only and are not a part of this Agreement and do not in any way limit or amplify the terms and provisions hereof.

25. Governing Law. This Agreement and the exhibits attached hereto have been negotiated and executed in the State of California and shall be governed by and construed under the laws of the State of California without reference to its choice of laws rules.

26. Invalidity of Provision. If any provision of this Agreement as applied to any party or to any circumstance shall be adjudged by a court of competent jurisdiction to be void or unenforceable for any reason, the same shall in no way effect (to the maximum extent permissible by law) any other provision of this Agreement, the application of any such provision under circumstances different from those adjudicated by the court, or the validity or enforceability of this Agreement as a whole.

27. Amendments. No addition to or modification of any provision contained in this Agreement shall be effective unless fully set forth in writing by Purchaser and Seller.

28. Counterparts. This Agreement may be executed in any number of identical counterparts and each counterpart shall be deemed to be an original document. All executed counterparts together shall constitute one and the same document, and any counterpart signature pages may be detached and assembled to form a single original document. This Agreement may be executed by signatures transmitted by facsimile, adobe acrobat or other electronic image files and these signatures shall be valid, binding and admissible as though they were ink originals.

29. Time of Essence. Time is of the essence of each provision of this Agreement.

30. Binding Upon Successors. The terms and conditions, covenants, and agreements set forth herein shall apply to and bind the heirs, executors, administrators, assigns and successors of the parties hereof.

31. Offer. Any delivery of unsigned copies of this Agreement is solely for the purpose of review by the party to whom delivered, and neither the delivery nor any prior communications between the parties, whether oral or written, shall in any way be construed as an offer by Purchaser or Seller, nor in any way imply that Purchaser or Seller is under any obligation to enter the transaction which is the subject of this Agreement. The signing of this Agreement by Seller constitutes an offer which shall not be deemed accepted by Purchaser unless and until this Agreement has been executed on behalf of Purchaser by its City Manager or his/her designee after adoption of a resolution or minute action by the City Council of the City of San Rafael. Seller agrees that this offer shall be acceptable and cannot be revoked for a period of 30 days following presentation by Seller.

32. Computation of Time. The time in which any act is to be done under this Agreement is computed by excluding the first day (such as the day escrow opens), and including the last day, unless the last day is a holiday or Saturday or Sunday, and then that day is also excluded. The term "**holiday**" shall mean all holidays as specified in sections 6700 and 6701 of the California Government Code. If any act is to be done by a particular time during a day, that time shall be Pacific Time Zone time.

33. Legal Advice. Each party represents and warrants to the other the following: they have carefully read this Agreement, and in signing this Agreement, they do so with full knowledge of any right which they may have; they have received independent legal advice from their respective legal counsel as to the matters set forth in this Agreement, or have knowingly chosen not to consult legal counsel as to the matters set forth in this Agreement; and, they have freely signed this Agreement without any reliance upon any agreement, promise, statement or representation by or on behalf of the other party, or their respective agents, employees, or attorneys, except as specifically set forth in this Agreement, and without duress or coercion, whether economic or otherwise.

34. Cooperation. Each party agrees to cooperate with the other in the closing of this transaction and, in that regard, to sign any and all documents which may be reasonably necessary, helpful, or appropriate to carry out the purposes and intent of this Agreement.

35. Reservation of City's Right to File Suit. Seller understands and acknowledges that if for any reason this Agreement is terminated, Purchaser expressly reserves its rights to bring an action in the Superior Court of the State of California, County of Marin, pursuant to the requirements set forth in the eminent domain statutes of the State of California.

- Exhibit A Legal Description and Plat Map of the Easement Area
- Exhibit B Form of Easement Deed and Certificate of Acceptance
- Exhibit C FIRPTA Certificate

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the date first written above.

SELLER:

PURCHASER:

**DANIEL M. HUMPHREYS AND
KATHERINE F. HUMPHREYS**

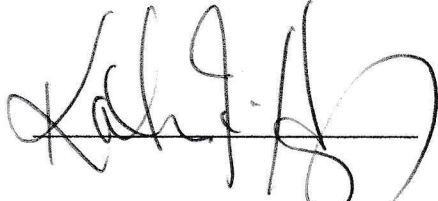
**CITY OF SAN RAFAEL, a
California municipal corporation**

By: 

By: _____

Name: DANIEL M. HUMPHREYS

Name: _____

By: 

Its: _____

Name: KATHERINE F. HUMPHREYS

EXHIBIT A – LEGAL DESCRIPTION AND PLAT MAPS

ROADWAY EASEMENT

EASEMENT AREA:

Real property situated in the City of San Rafael, County of Marin, State of California, and described as follows:

Being an easement over a portion of that property described by the grant deed to Daniel M. Humphreys and Katherine F. Humphreys filed for record on June 15, 2017 as Document Number 2017-0024838, Official Records of Marin County, more particularly described as follows:

COMMENCING at a ½ inch iron pipe with plastic plug "LS 4794" located at the Southwest corner of Parcel One, also being the Northwest corner of Parcel Two of that map entitled "Boundary Line Adjustment Between Parcel One and Parcel Two of Lands Conveyed to Burke" filed for record on December 11, 1992, in Book 31 of Surveys, at Page 25, Marin County Records, thence along the westerly line of Parcel One, North 13°20'00" East, 11.27 feet; thence continuing along said westerly line, North 01°59'00" West, 60.40 feet; thence North 75°58'00" West, 29.01 feet to the **POINT OF BEGINNING** of the parcel herein described; thence continuing westerly along said line, 40.49 feet; thence North 05°18'00" East, 10.13 feet; thence departing from said westerly line, South 62°33'54" East, 43.20 feet to the **POINT OF BEGINNING** of the hereinabove described parcel of land.

Containing 202.71 square feet, more or less.

Basis of Bearings: Book 31 of Surveys at Page 25, Marin County Records

SLOPE EASEMENT

EASEMENT AREA:

Real property situated in the City of San Rafael, County of Marin, State of California, and described as follows:

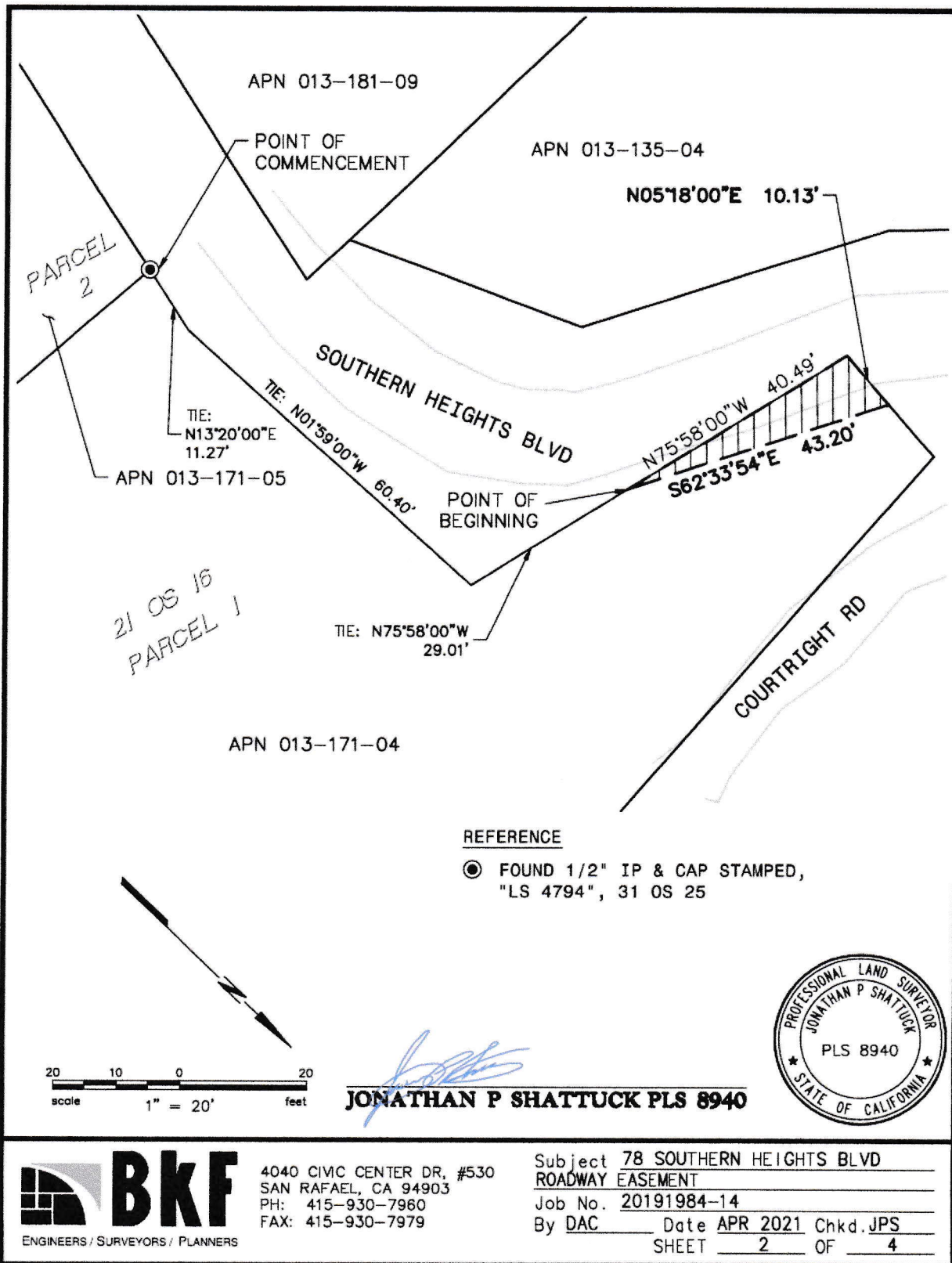
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Containing 629.17 square feet, more or less.

Basis of Bearings: Book 31 of Surveys at Page 25, Marin County Records

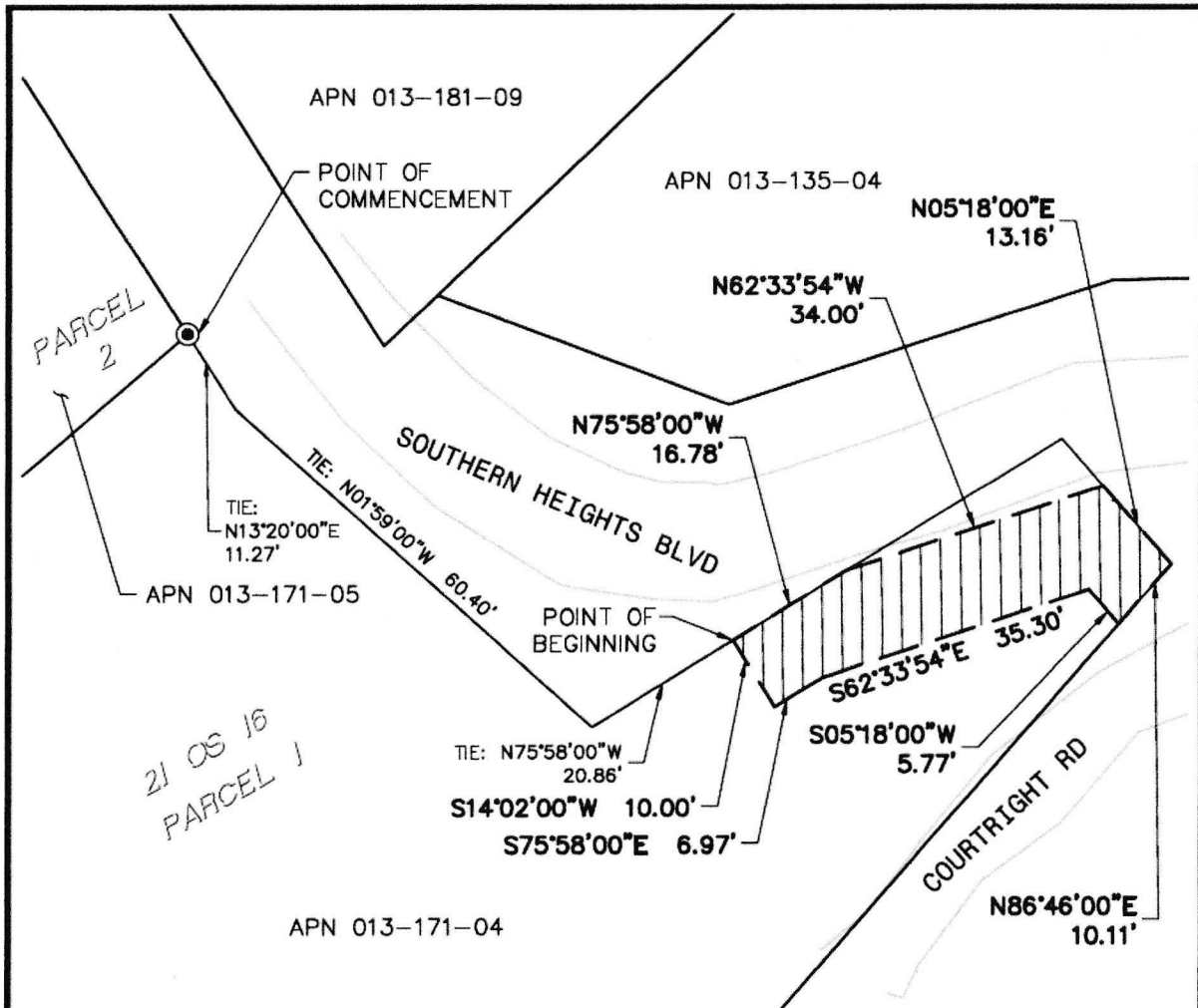
Exhibit A



191984-14_ROAD-SLOPE-EXHIBIT.dwg © 2021 BKF ENGINEERS

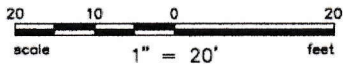
Exhibit A

OAK #4831-3129-6735 v2



REFERENCE

- FOUND 1/2" IP & CAP STAMPED, "LS 4794", 31 OS 25



[Signature]
JONATHAN P SHATTUCK PLS 8940



4040 CIVIC CENTER DR, #530
 SAN RAFAEL, CA 94903
 PH: 415-930-7960
 FAX: 415-930-7979

Subject 78 SOUTHERN HEIGHTS BLVD
SLOPE EASEMENT
 Job No. 20191984-14
 By DAC Date APR 2021 Chkd. JPS
 SHEET 4 OF 4

EXHIBIT B

EASEMENT DEED

Recording Requested by and
After Recordation Mail to:

City of San Rafael
1400 Fifth Avenue
San Rafael, CA 94901
Attention: _____

*This document is exempt from the
payment of a recording fee pursuant to Government Code § 27383*

EASEMENT GRANT DEED

WHEREAS, DANIEL M. HUMPHREYS AND KATHERINE F. HUMPHREYS (“**Grantor**”) are the owners of that certain real property in the City of San Rafael, County of Marin, State of California, APN 013-171-04, commonly known as 78 Southern Heights Boulevard, San Rafael, California, 94901, as more particularly described in that grant deed filed as Document No. 2017-0024838, in the Official Records of the County of Marin (“**Property**”).

WHEREAS, Grantor desires to grant the City of San Rafael, a California municipal corporation (“**Grantee**”), for itself, its successors and assigns and all those taking by, under or through it or them, a roadway and slope easement on the Property.

NOW THEREFORE, FOR GOOD AND VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, Grantor hereby grants to Grantee, an easement to construct, reconstruct, install, operate, inspect, maintain, replace, remove and use as a roadway, together with the right of surface ingress and egress for service vehicle access to said facility and the right to use said easement for staging during periods of construction, reconstruction, installation, inspection, maintenance, replacement, and removal in, on, across, under, and through that portion of the Property, and a slope easement for slopes of cuts and fills adjacent to such right of way, for purposes of excavating, sloping, cutting, filling, and erection of supporting retaining walls or other similar facilities, as depicted and more particularly described in Attachment 1 attached hereto and incorporated herein, and a slope easement for the right to construct, replace, remove, maintain or modify slopes in, upon, over, and across that portion of the Property depicted and more particularly described in Attachment 1 attached hereto and incorporated herein. The provisions hereof shall inure to the benefit of and bind the successors and assigns of the respective parties hereto.

IN WITNESS WHEREOF, the Grantor has caused this Easement Grant Deed to be executed as of the ___ day of _____, 2023.

GRANTOR:

DANIEL M. HUMPHREYS AND KATHERINE F. HUMPHREYS

By: _____
[Notary acknowledgment required]

Name: DANIEL M. HUMPHREYS

By: _____
[Notary acknowledgment required]

Name: KATHERINE F. HUMPHREYS

Exhibit B

Attachment 1

ROADWAY EASEMENT

EASEMENT AREA:

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Basis of Bearings: Book 31 of Surveys at Page 25, Marin County Records

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EASEMENT AREA:

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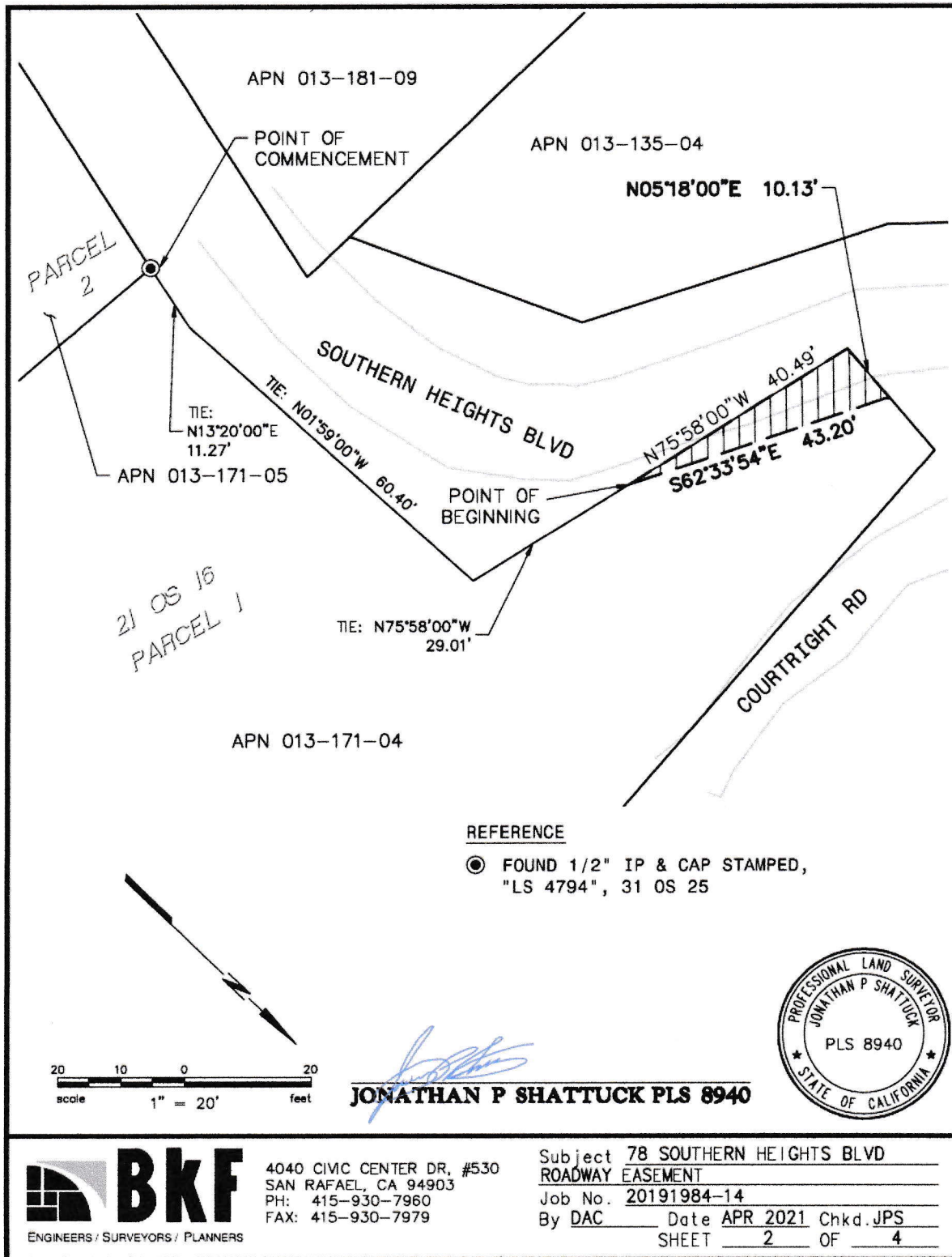
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Basis of Bearings: Book 31 of Surveys at Page 25, Marin County Records

Exhibit B

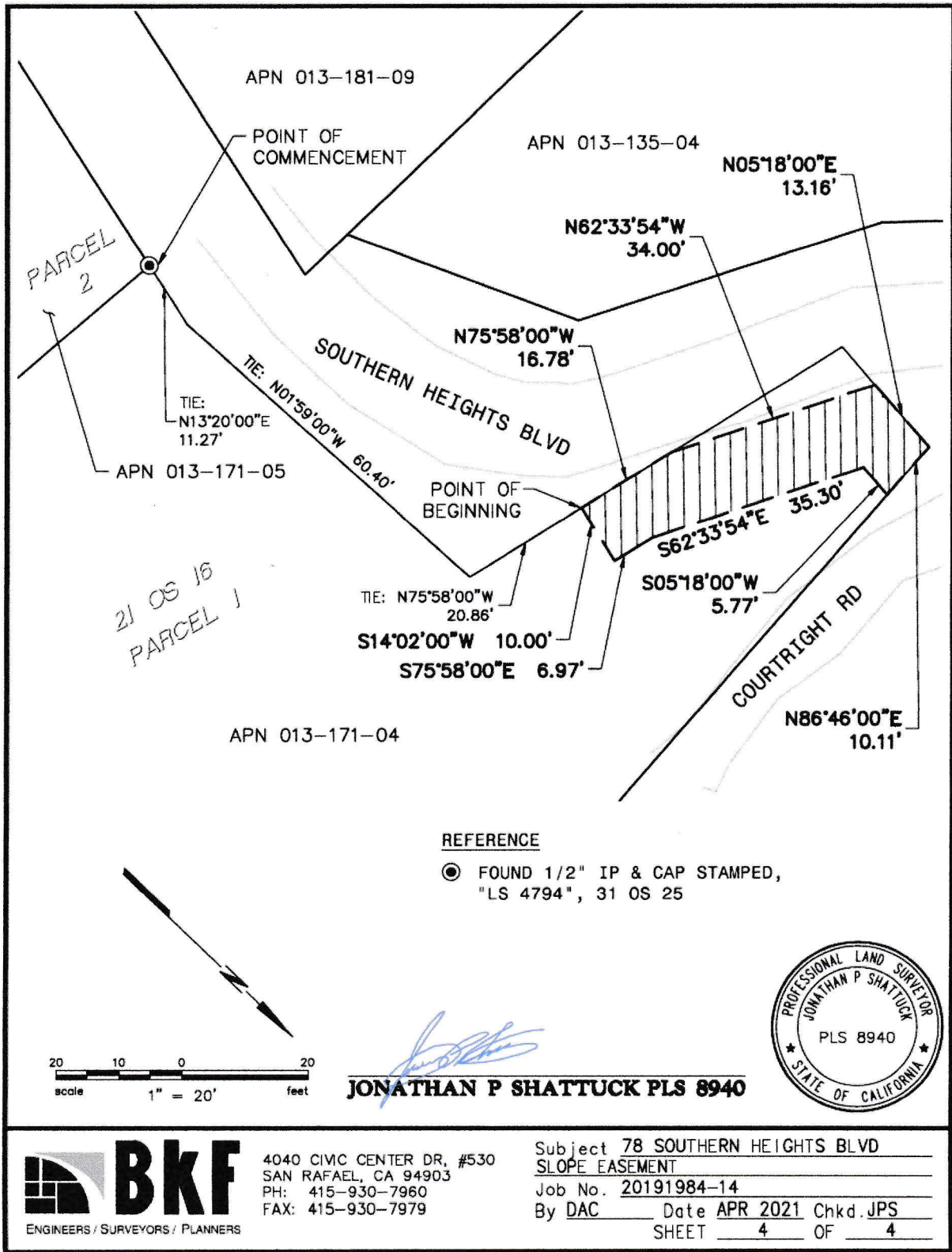
Plat Map of Road Easement



191984-14_ROAD-SLOPE-EXHIBIT.dwg © 2021 BKF ENGINEERS

Exhibit B

Plat Map of Slope Easement



191984-14_ROAD-SLOPE-EXHIBIT.dwg © 2021 BKF ENGINEERS

Exhibit B

Certificate of Acceptance

This is to certify that the interests in real property conveyed by the Easement Grant Deed dated _____, 2023, from DANIEL M. HUMPHREYS AND KATHERINE F. HUMPHREYS, as grantor, to the City of San Rafael, a municipal corporation, as grantee, are hereby accepted by the City Manager of the City of San Rafael pursuant to authority conferred by Resolution No. _____ of the City Council adopted on _____, 2023, and the City of San Rafael, as grantee, consents to recordation of said Easement Grant Deed.

Date: _____, 2023

By: _____
City Manager

Exhibit B

EXHIBIT C

FIRPTA AFFIDAVIT

Section 1445 of the Internal Revenue Code of 1954, as amended (“**Code**”), provides that a transferee of a U.S. real property interest must withhold tax if the transferor is a foreign person. To inform the transferee that withholding of tax is not required upon the disposition of a U. S. real property interest by DANIEL M. HUMPHREYS AND KATHERINE F. HUMPHREYS, as Transferors, the undersigned hereby certifies the following:

1. Each of the Transferors is not a foreign corporation, foreign partnership, foreign trust, or foreign estate (as those terms are defined in the Code and the Income Tax Regulations promulgated thereunder);
2. The Transferors’ U. S. employer identification number or social security number are [redacted].
3. The Transferors’ office address or mailing address is [redacted].

The Transferors understand that this Certification may be disclosed to the Internal Revenue Service by the Transferee and that any false statement contained herein could be punished by fine, imprisonment, or both.

Under penalty of perjury the undersigned declares that he/she has examined this Certification and to the best of his/her knowledge and belief it is true, correct, and complete, and further declares that he/she has authority to sign this document on behalf of the Transferors.

Dated: _____, 2023

By: _____
DANIEL M. HUMPHREYS, a natural person

By: _____
KATHERINE F. HUMPHREYS, a natural person

CONSENT OF ESCROW AGENT

Escrow Agent hereby acknowledges receipt of this Agreement, which has been executed by the parties. Escrow Agent hereby agrees (i) to be and serve as Escrow Agent pursuant to this Agreement; and (ii) subject to further supplemental escrow instructions mutually agreeable to the parties and Escrow Agent, to be bound by the Agreement in the performance of its duties as Escrow Agent and to hold and disburse all funds received by Escrow Agent in accordance with the provisions of this Agreement; provided, however, Escrow Agent shall have no obligation, liability, or responsibility under any amendment to the Agreement unless and until the same is accepted by Escrow Agent in writing. Escrow Agent further agrees to immediately deliver to each of Seller and Purchaser's counsel one original counterpart of this Agreement executed by the Parties and Escrow Agent. Escrow Agent has assigned this Agreement file number _____.

OLD REPUBLIC TITLE COMPANY

By: _____
Name: _____
Its: _____