

RESOLUTION NO. 2008-22

**A RESOLUTION BY THE BOARD OF DIRECTORS OF
THREE RIVERS LEVEE IMPROVEMENT AUTHORITY IN REGARD TO
ACQUISITION OF FILL FROM THE PLATTERS**

WHEREAS, the Three Rivers Levee Improvement Authority (Authority) is engaged in a public works project to repair certain levees within Yuba County, California, for the purpose of providing greater protection from flooding; and

WHEREAS, as part of the public works project, Authority is constructing its Phase 4 Feather River Setback Levee (the "Project") in order to improve the Feather River levee that protects the communities of Linda, Olivehurst, and Plumas Lake; and

WHEREAS, Authority is interested in acquiring temporary interests in certain portions of the Platters' real property (the "Property") as a result of which Authority would be permitted to excavate borrow material from the Property to construct a new Feather River Levee, and then to return other fill material to the borrow pit and re-grade the Property for its ultimate use; and

WHEREAS, the Platters and JTS, as the option holder, have previously executed an "Option Agreement" dated August 1, 2003 whereby the Platters have granted to JTS certain rights to acquire 278.4 acres of land, which land includes the Property; and

WHEREAS, in addition to granting Authority the rights it seeks, the Platters and JTS are willing to execute an agreement to modify the rights and obligations contained within the Option Agreement.

NOW, THEREFORE, BE IT RESOLVED by the Board of Trustees of the Three Rivers Levee Improvement Authority as follows:

Section 1. The Board hereby authorizes its Executive Director to acquire fill for the Project by executing an agreement with the Platters and JTS, in a form substantially similar to the draft attached hereto.

PASSED AND ADOPTED this 1st day of April, 2008, by the Board of Three Rivers Levee Improvement Authority by the following vote:

AYES: Directors Brown, Crippen, Graham, Griego, Logue

NOES: None

ABSENT: None

ABSTAIN: None



Chair

ATTEST: DONNA STOTTLEMEYER,
CLERK OF THE BOARD



APPROVED AS TO FORM: GENERAL COUNSEL
SCOTT SHAPIRO

SAMPLE AGREEMENT

**AGREEMENT GRANTING TO THREE RIVERS LEVEE IMPROVEMENT
AUTHORITY A RIGHT TO ENTER AND REMOVE SOIL**

APN's: 016-030-001, 014-380-020, and 016-040-022

This AGREEMENT GRANTING TO THREE RIVERS LEVEE IMPROVEMENT AUTHORITY A RIGHT TO ENTER AND REMOVE SOIL ("Agreement") is entered into and is effective on the latest date next to the signatures on the last page. It is among **E. PLATTER AND SONS, INC.** ("Owner"), **JTS COMMUNITIES, INC.** ("Option Holder") and **THREE RIVERS LEVEE IMPROVEMENT AUTHORITY** ("Authority"). For purposes of this Agreement, the Authority's officers, employees, representatives, contractors and subcontractors shall be collectively referenced herein as "Authority's Representatives".

FACTS AND CIRCUMSTANCES

This Agreement is made with reference to the following facts and circumstances, among others:

A. Authority is engaged in a public works project to repair certain levees within Yuba County, California, for the purpose of providing greater protection from flooding. As part of the public works project, Authority is constructing its Phase 4 Feather River Setback Levee (the "Project") in order to improve the Feather River levee that protects the communities of Linda, Olivehurst, and Plumas Lake.

B. Authority is interested in acquiring temporary interests in certain portions of Owner's real property (the "Property") as a result of which Authority would be permitted to excavate Borrow Material (as defined below) from the Property to construct a new Feather River Levee, and then to return other Fill Material (as defined below) to the borrow pit and re-grade the Property for its ultimate use. The Property is more particularly described on Exhibit "A-1", "A-2", "A-3", and "A-4", attached hereto and incorporated herein by this reference.

C. Owner and Option Holder have previously executed an "Option Agreement" dated August 1, 2003 whereby Owner has granted to Option Holder certain rights to acquire 278.4 acres of land, which land includes the Property. As a result of the extension of that Option Agreement under Section 2.03.B. of that Option Agreement, Option Holder has rights to exercise the option until August 1, 2009.

D. In addition to granting Authority the rights its seeks under this Agreement, Owner and Option Holder are executing this Agreement to modify the rights and obligations contained within the Option Agreement, all on the terms and conditions set forth in this Agreement.

NOW, THEREFORE, in mutual consideration of the promises made herein, the Parties agree as follows:

1. **Rights and Obligations of the Authority.**

a. **Permission to Enter.** Permission is hereby granted by Owner and Option Holder to Authority and Authority's Representatives to enter onto the Property from Feather River Boulevard and Country Club Road, within 14 days following execution of this Agreement, for the purpose of removing Borrow Material, together with the right of ingress and egress over the Property in connection therewith, to deposit tools and construction materials, and to take all other actions as may be reasonably necessary to remove certain Borrow Material. Permission is further granted to take the same and similar actions in regard to the placement of Fill Materials on the Property as further described below.

b. **Removal of Borrow Material; Placement of Fill Material.** Authority may excavate all soils from the Property, which soils shall be defined herein as "Borrow Materials," for the purpose of construction of the Project, with no limitation on quantity. Authority shall replace the Borrowed Material with soils from the existing Feather River levee, which soils shall be collectively herein defined as "Fill Materials." Authority shall implement the following measures to optimize replacement soil quality for the Fill Material to be placed on the Property:

(i) The top 6 inches of the existing soil will be removed and stockpiled prior to borrow operations. After the excavated area is backfilled with Fill Materials, this salvaged soil will be replaced in a six-inch layer over the top of the backfilled area.

(ii) The borrow pits on the Property will be backfilled with Fill Material from the existing Feather River Levee. The Fill material shall be free of significant concentrations of organic materials, rubble and debris. The soil to be backfilled will be identified as originating in three separate reaches of that levee designated as Reach 1 (south tie-in with setback levee to Pump Station No. 3 (approximate existing levee Sta. 291+50)), Reach 2 (Pump Station No. 3 to existing levee Sta. 320+00), and Reach 3 (existing levee Sta. 320+00 to Country Club Rd (approximate existing levee Sta. 355+00)). If upon evaluation of the volume of the borrow pit and the volume of the three levee reaches, the Authority determines that Reaches 1, 2 and 3 will not provide enough soil to backfill the borrow pits, TRLIA will obtain additional soil from Reach 4 of the existing levee (approximate existing levee Sta. 370+00 to Sta. 450+00) as needed to fill the borrow pits. The soils from Reach 3 (and Reach 4 if used) will be placed first in the bottom of the borrow pit. The soil from Reach 1 and Reach 2 will be placed last, i.e., in the upper portion of the backfilled areas. Authority shall not use any fill from the area of the 1997 levee break section as backfill without separate written approval granted by Owner. All Fill Material will be placed in maximum of 12

inch lifts and compacted to 95% of the maximum dry density in accordance with ASTM D 698.

(iii) The Fill Material will be covered with the six inches of salvaged topsoil as described under item (i) above.

c. **Removal of Equipment; Debris.** Authority agrees that immediately prior to the termination of this Agreement, it will remove from the Property all construction equipment, tools, and building materials associated with construction of the Project and any trash, and other debris, deposited during construction. All concrete from the main irrigation lines shall be removed from the Property by Authority. Authority shall also demolish the barn located on parcel APN 016-030-001 and shall dispose of the debris offsite.

d. **Restoration of Grade.**

(i) Authority shall restore the property to a grade that contains a fall of 15/100's of a foot for each 100 lineal feet from north to south for the portions of the property that are located in APN's 014-380-020 and 016-030-001 and level east to west on all APNS. Authority shall restore the portion of the property that is located in APN 016-040-022 to an approximate level grade. Consistent with TRLIA's setback levee construction contract documents, grading and surveying tolerances shall be +/- 0.1 foot. Notwithstanding the forgoing, Authority shall return approximately the same volume of Fill Material to the Property as has been removed by Authority.

(ii) The Fill Material shall not contain any plastic material such as that used as part of the levee construction.

e. **Protection and Abandonment of Wells.** Authority shall preserve and protect irrigation wells "W-1" and "W-2" as shown on the attached Exhibit "A-4". Authority shall remove and seal irrigation well "W-3" as shown in the attached Exhibit "A-4". Authority will preserve and protect monitoring well "W-4" as shown on the attached Exhibit "A-4".

f. **Removal of Power Poles.** Authority shall remove from the ground the smaller electrical power pole owned by the Owner and shown as "PP1" on the attached Exhibit "A-4" Said power pole "PP1" will remain the property of Owner and Authority shall preserve the removed pole and make it available for Owner to remove from the site. Authority shall have no obligation with respect to larger electrical power pole owned by PG&E and shown as "PP2" on the attached Exhibit "A-4"

2. **Term.** This Agreement shall be effective upon the execution by the Parties and shall remain in full force and effect until August 1, 2011.

3. **Compensation.**

a. **Compensation to Option Holder.** Option Holder acknowledges and agrees that Authority shall not be obligated to pay any cash

compensation to Option Holder for the rights granted herein to Authority because the further extension of Option Holder's option beyond the date provided for in the Option Agreement, coupled with Authority's agreement to grade the Property under Section 4 below as requested by Option Holder, is sufficient consideration from Authority to Option Holder.

b. Compensation to Owner. Owner acknowledges and agrees that this Section 3.b provides the exclusive compensation to Owner for the rights granted herein to Authority. Subject to Section 3.c, Authority shall pay Owner the amount of One Million Fifty Four Thousand Nine Hundred Twenty Five Dollars (\$1,054,925) by May 1, 2008; provided, that in the Authority's sole discretion this payment date may be delayed by up to 45 days, and the Authority shall pay interest on that amount compounded daily at the State Controller's Office – Surplus Money Investment Fund rate. The compensation (\$1,054,925) consists of the following elements:

(i) Compensation to the Owner of \$250,000 per year for the use of the Property for three years and \$125,000 for the use of the property for a fourth year.

(ii) Compensation to Owner for the costs of reinstallation of fencing and gates following Authority's final placement of Fill Materials on the Property, in the amount of \$51,925 which is estimated to compensate for the loss and replacement of 9 gates and 10,335 linear feet of barb wire fencing. However, Owner is entitled to remove existing fencing and gates prior to April 1, 2008 at their discretion and at their own expense. If fencing and gates in excess of the amounts indicated above are taken by Authority, Owner shall be further compensated at the rate of \$4.50 per linear feet for fencing and \$600 per gate to be paid in a single lump sum payment within three months of the removal of the fencing. Owner is entitled to the \$51,925 and this further compensation even if Owner elects to not reinstall the fencing and gates.

(iii) Compensation to Owner for the costs of reinstallation of an irrigation system following Authority's final placement of Fill Materials on the Property, estimated to cost in the amount of \$100,000.00. However, Owner is entitled to remove existing irrigation fixtures prior to April 1, 2008 at their discretion and at their own expense. Owner is entitled to this compensation even if Owner elects to not reinstall the irrigation system.

(iv) Compensation to Owner for the costs to prepare and replant the property with an irrigated pasture seed mix estimated to cost \$ 25,000.00. Owner is entitled to this compensation even if Owner elects to not replant the pasture.

(v) Compensation to Owner to partially cover the costs of attorney time for the preparation of this Agreement in the amount of \$3,000.

c. Condition Precedent to Payment. A condition precedent to the payment of compensation by the Authority to the Owner is that the State executes the Funding Agreement which is the basis for a substantial portion of this funding. The

Parties understand that representatives from the State have stated their expectation that the State Funding Agreement will be executed by the end of March.

d. **Right to Extend.** Authority shall have a right to extend this Agreement in one year increments at a further cost of \$250,000 per year. Authority must provide notice of such extension by February 1st of the year in which the Agreement is set to terminate. The effect of such extension shall be to also provide a further one year extension to Option Holder under Section 4(a) below.

4. **Future Uses of the Property by the Owner and Option Holder; Interplay with Rights and Obligations Under the Option Agreement.**

a. Under the Option Agreement Option Holder has until August 1, 2009 to exercise its option, and is to provide notice under Section 3.04 of the Option Agreement of such exercising by June 1, of that year. This Agreement shall extend Option Holder's option until August 1, 2011, with Option Holder to provide notice of exercising the option to Owner 120 days prior to close of escrow, but no later than April 1, 2011 at latest.

b. Upon its completion of the re-grading of the Property, Authority shall return the Property to the Owner, and the Owner shall have exclusive rights to the use of the Property unless and until the Option Holder exercises the option under Section 4.b. above.

5. **Property to be Kept Free of Encumbrances.** Authority shall defend, hold harmless, and indemnify Owner and Option Holder from any and all third party encumbrances and/or liens against the Property arising out of the removal of the Borrow Material and placement of Fill Materials, including, without limitation, any claim or liability in any way connected with the failure of Authority to pay any of its contractors or subcontractors, or the failure of any contractor or subcontractor of Authority to pay any person(s) referred to in Section 3181 of the California Civil Code.

6. **Owner and Option Holder Not Liable.** Owner and Option Holder shall not be liable for any loss, damage, or injury of any kind or character to any person, entity, or property arising from Authority's or its employees', agents', assigns', or contractors' use of the Property, or any portion thereof, or by any act or omission by Authority under this Agreement, or by any of Authority's Representatives, licensees, or invitees, or by or from any accident on the Property arising out of this contract, or by any fire or other casualty thereon, occasioned by the failure of Authority to maintain the Property in a safe condition. Authority shall defend, hold harmless, and indemnify Owner and Option Holder or any successor in interest thereto from any loss, liability, or damage resulting from the activities of Authority, "Authority's Representatives, or anyone acting pursuant to authorization from Authority in relation to the Property. However, Authority shall have no obligation to indemnify Owner and Option Holder for any loss, liability, or damage caused by the sole and active negligence of either Owner or Option Holder, or any of Owner or Option Holder's employees, agents, or authorized users, including, but not limited to, tenants, invitees or permittees.

7. **Coordination with Owner and Option Holder Regarding Construction Activities.** Authority shall coordinate its proposed activities with Owner and Option Holder to ensure that its work on the Property is conducted at times and in a manner that will not unreasonably interfere with the use and enjoyment of the Property and/or the adjacent property of Owner and Option Holder and its tenants, if any, and other authorized users.

8. **Compliance with Laws.** Authority shall be responsible to comply with any and all applicable laws, rules, regulations and ordinances in connection with any use of the Property pursuant to this Agreement.

9. **As-Is Condition of Property.** Authority acknowledges that Owner and Option Holder has made no representation or warranty of any kind or nature whatsoever regarding the condition of the Property, the Borrow Material, or their fitness or suitability for Authority's intended use hereunder. Authority agrees to accept the Property and the Borrow Material in their AS-IS condition and acknowledges that Authority has conducted, or has had the opportunity to conduct, any and all inspections of the condition of the Property and the Borrow Material that Authority deems necessary or desirable.

10. **Ownership of Borrow Material and Fill Material.** All Borrow Material excavated and removed from the Property shall become the property of Authority or its designee. All Fill Material after replacement on the Property shall become the property of Owner.

11. **Insurance; Fire Protection.** During the term of this Agreement and any extension thereof, Authority shall ensure that the contractor performing the borrow and fill activities obtains and thereafter maintains insurance listing Owner and Option Holders as additional insureds on a commercial general liability insurance, with a combined single limit of liability not less than \$1 million. Such insurance shall be provided by an insurer rated no less than A-IX by A&M Best's Insurance Rating Guide. Authority shall also require its contractor to carry worker's compensation insurance as required by law. Authority shall also require that its contractor keeps the Property in good condition such as to limit the risk of fire at all times during the term of this Agreement.

12. **Attorney Fees; Litigation Costs.** If any legal action or other proceeding, including without limitation arbitration or an action for declaratory relief is brought to enforce this Agreement or because of a dispute, breach, default, or misrepresentation in connection with this Agreement, the prevailing party shall be entitled to recover reasonable attorney fees and other costs, in addition to any other proper relief. Prevailing party includes (a) a party who dismisses an action in exchange for sums allegedly due; (b) the party that receives performance from the other party of an alleged breach of covenant or a desired remedy, if it is substantially equal to the relief sought in an action; or (c) the party determined to be prevailing by a court of law.

13. **Assignment.** This Agreement is binding upon Owner's, Option Holder's, and Authority's successors in interest, heirs, and assigns. Authority agrees that it will not, voluntarily assign this Agreement to any other party without Owner and Option Holder's prior written consent, which may be withheld in Owner and Option Holder's sole and absolute discretion. Neither Owner nor Option Holder shall be permitted to assign this Agreement or sell their interests in the Property without the permission of Authority. Authority may record this Agreement as against the Property to preserve its rights herein. Authority shall promptly terminate this Agreement of record on the earlier of completion of all work contemplated by this Agreement or any termination of this Agreement.

14. **Time of the Essence.** Time is of the essence in this Agreement and every provision contained in this Agreement.

15. **Construction.** The title and headings of the Sections in this Agreement are intended solely for reference and do not modify, explain, or construe any provision of this Agreement. All references to sections and recitals shall, unless otherwise stated, refer to the Sections and Recitals of this Agreement. In construing this Agreement, the singular form shall include the plural and vice versa. This Agreement shall not be construed as if it had been prepared by one of the parties, but rather as if all parties have prepared the Agreement.

16. **Integration.** This Agreement, all attached exhibits, and all related documents referred to in this Agreement, constitute the entire agreement between the parties. There are no oral or parol agreements which are not expressly set forth in this Agreement and the related documents being executed in connection with this Agreement. This Agreement may not be modified, amended, or otherwise changed except by a writing fully executed by all parties to this Agreement.

17. **Third Party Rights.** This Agreement has been made and is made solely for the benefit of Owner, Option Holder and Authority. Nothing in this Agreement, express or implied, is intended to confer upon any person, other than the parties and their respective successors and permitted assigns, any rights or remedies. Nothing in this Agreement is intended to relieve or discharge the obligation or liability of any third persons to any party to this Agreement.

18. **Further Assurances.** Each of the parties hereto shall execute and deliver any and all additional papers, documents, and other assurances, and shall do any and all acts and things reasonably necessary in connection with the performance of their obligations hereunder and to carry out the intent of this Agreement.

19. **Severability.** If any term or provision of this Agreement is held invalid or unenforceable, the remainder of this Agreement shall not be affected and shall be enforced to the fullest extent permitted by law.

20. **Waivers.** No waiver or breach of any provision shall be deemed a waiver of any other provision. No extension of time for performance of any obligation or

act shall be deemed an extension of time for any other obligation or act. Failure by a party to insist upon the strict performance of any of the provisions of this Agreement by the other party, or the failure by a party to exercise its rights upon the default of the other party shall not constitute a waiver of such party's right to insist and demand strict compliance by the other party with the terms of this Agreement thereafter.

21. **Incorporation of Exhibits.** All attached exhibits are incorporated in this Agreement by reference.

22. **Authority of Parties.** All persons executing this Agreement on behalf of a party warrant that they have the authority to execute this Agreement on behalf of that party.

23. **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which taken together shall constitute one and the same instrument. The execution of this Agreement shall be deemed to have occurred, and this Agreement shall be enforceable and effective only upon the complete execution of this Agreement by Owner and Option Holder and Authority.

24. **Governing Law.** This Agreement shall be governed by and construed in accordance with California law.

25. **Notices.** All notices, requests, demands and other communications required to or permitted to be given under this Agreement shall be in writing and shall be conclusively deemed to have been duly given: (a) when hand-delivered to the other party; or (b) when received when sent by facsimile at the address and number set forth below (provided that any notice given by facsimile shall be deemed received on the next business day if such notice is received after 5:00 p.m. (recipient's time) or on a nonbusiness day); or (c) three (3) business days after the same have been deposited in a United States post office with first class or certified mail return receipt requested postage prepaid and addressed to the parties as set forth below; or (d) the next business day after same have been deposited with Federal Express or a comparable national express courier, postage prepaid, addressed to the parties as set forth below with next business day delivery guaranteed:

If to Authority: Three Rivers Levee Improvement Authority

Paul Brunner, Executive Director
Yuba County 1-Stop Center
1114 Yuba Street, Suite 218
Marysville, California 95901-5273
Telephone: (530) 749-5679
Facsimile: (530) 749-6990

If to Owner: E. Platter And Sons, Inc.

E. Platter & Sons Inc.
Thomas H Platter, Pres.
1233 Country Club Rd.
Plumas Lake, Ca. 95961-9622
530-743-3074
530-743-3074
rplatter@comcast.net

If to Option Holder: JTS Communities, Inc.

Telephone: _____

Facsimile: _____

With copies to:

Owner's Attorney:
Patricia D. Elliott, Esq.
McDonough Holland & Allen PC
555 Capitol Mall, 9th Floor
Sacramento, CA 95814
Telephone: (916) 444-3900
Direct: (916) 325-4581
Fax: (916) 444-5918
pelliott@mhalaw.com

Option Holder's Attorney:

Authority's Attorney:

Scott L. Shapiro
Attorney at Law
DOWNEY BRAND
555 Capitol Mall, 10th Floor
Sacramento, CA 95814
P: 916/444-1000
F: 916/444-2100
sshapiro@downeybrand.com

A party may change or supplement the addresses given above, or designate additional addresses, for purposes of this paragraph 25, by giving the other parties written notice of the new address in the manner set forth above.

OWNER:

E. PLATTER AND SONS, INC.

By: _____
Thomas Platter

Date: _____

Title: _____

By: _____
Roberta Platter

Date: _____

Title: _____

OPTION HOLDER:

JTS COMMUNITIES, INC.

By: _____
Print Name: _____

Date: _____

Title: _____

AUTHORITY:

THREE RIVERS LEVEE IMPROVEMENT AUTHORITY

By: _____
Paul Brunner
Executive Director

Date: _____