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TREE PROTECTION PLAN

For

PHALEN

For Service At

4600 NE 138TH AVE,
PORTLAND, OREGON



August 26, 2022

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SUBMITTED
09/01/2022

City of Portland, Oregon – NE 138th Ave

Arboricultural Assessment and Tree Protection

Report Summary:

This report includes the location and status of the trees that fall within the perimeters of the proposed development of the project. The trees are marked on the site plan (Appendix C), including their location and corresponding number. The plan covers the removals and protection requirements for the project following the Title 11 code.

General Information:

Project Location and Identification

The property is in the City of Portland, Oregon. The physical address is:

- 4600 NE 138th Ave, Portland, Oregon.

Proposal

The project proposes to construct two industrial buildings on the property, including site improvements in the form of utilities and new landscaping.

Assignment:

- Locate and identify the trees that will be affected based on the proposed construction according to the provided site plan (Appendix C)
- Provide findings/ recommendations pertaining to the trees.

Tree Inventory and assessment

On 4/20/2021 Peter Van Oss completed the site visit and inventory. The trees were inventoried and compared to the site plan provided. The trees in question were evaluated for the impacts by the construction project, their overall condition, and verified in comparison to the provided site plan which indicates the existing conditions Appendix C. The data collected for each tree includes the tree number, trunk diameter (DBH), tree health and condition, comments if applicable.

Purpose and Use of this Report.

The purpose of this report is to establish a Tree Protection Plan that will serve as directions that need to be followed during the construction project. This report documents this information and is intended to be used by the owner, construction contractor, the sub-contractors, the tree care, and landscape professionals who are involved in the construction project.

Limits of the Report

The trees were visually inspected from the ground only. Dirt was not moved to inspect the root systems of the trees.

Observations

The property neighbors' natural areas to the north and east. The trees to the north are separated from the property by a fence and an access road. There is approximately 20-feet between the property line and the canopy edge of the trees to the north.

The trees involved in this project are primarily small street trees along the perimeter of the property outside of the existing fencing. The trees are newly planted and there are no significant impacts expected.

The natural area on the SW property line is comprised of primarily Cottonwood trees and Service berry. The trees that will be impacted are the Cottonwood trees which are in very poor condition. There is evidence that there might be root decaying fungi present specifically Poplar Canker Disease (Cytopora). Most of the trees have significant crown die-back and/or are dead. Several trees failed at the root collar without roots being lifted.

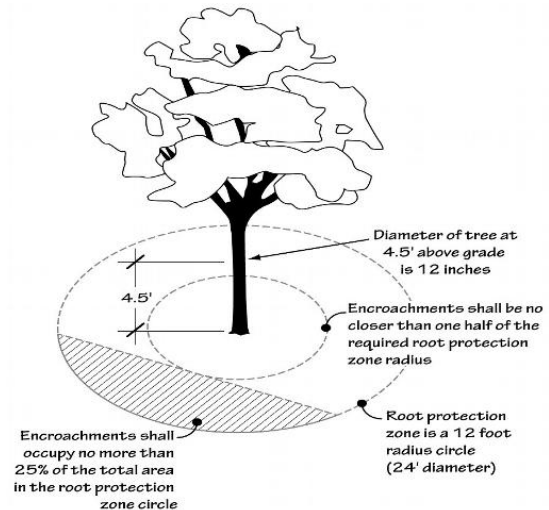
Proposed Tree Removals

Tree #41 is a volunteer Cottonwood and is proposed for removal. The tree will cause issues in the future due to its placement in the landscape.

The Cottonwoods in bordering the property line to the east are proposed for removal since they are failing and in very poor condition. The trees pose a serious risk to the surrounding area. It is recommended that the trees are removed by a professional arborist since they have very large stems that are dead. Pushing or pulling the trees with the use of an excavator is not recommended.

Discussion and Tree Protection

The critical root zone is typically calculated at 6-inches per diameter inch of the trunk measured at 54" from the original grade. For example: a 12-inch DBH tree should have a tree protection zone radius of 6-feet. Depending on the plant species profile the fencing may need to be adjusted to accommodate the tree's construction tolerance. Title 11 states that the RPZ is measured at a rate of one foot per diameter inch of the trees, for example: a 12-inch DBH tree will have to be monitored and may need prescribed mitigation if construction activities commence within 12-feet of the tree. When activities commence within 1-foot per diameter inch from the trunk of the tree, the project arborist shall be notified to observe the ground disturbance activities.



Tree Protection Fencing shall be placed as indicated on Appendix C Site Plan.

The trees can be protected by the existing fencing on the south, west, and north side of the property. The trees to the west that are located on the neighboring property will be impacted by the sewer line extension. It is highly recommended that the portion of the sewer line within the tree protection zone is installed using a directional drill if possible. If directional drilling is not an option, the use of a hydro vac is highly recommended.

Tree Protection Recommendation

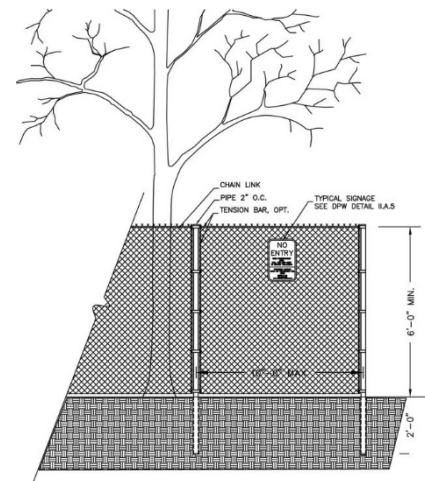
It is recommended to hold a site meeting with the contractors involved in the project to go over the tree plan and have the contractors sign a memorandum. The memorandum should show the provision and the penalty for violation of the Tree Plan. The penalty should include the cost of the appraised tree, fines incurred by the municipalities. The penalties should be made payable to the owner.

Excavation near the TPZ (Tree Protection Zone)

- All excavation, demolition, install of concrete forms.... etc. within 6 inches per diameter inch shall be monitored by one of our Certified Arborists assigned to the project to ensure that the impacts are minimal to the trees to be preserved. Techniques used by the project arborist will follow arboricultural guidelines and best management practices to preserve the trees (such as: City code, ANSI a300 standards... etc.)
- The excavator and/ or equipment shall stay outside the critical root zone/ drip line (tips of the branches) and carefully remove layers of soil while the project arborist probes the soil for roots 2" and larger.
- Exploratory pneumatic excavation may be necessary to determine the exact location of roots 2" diameter and larger, if found the project arborist may deem them to be substantially significant in the retention of the trees. Alternative construction measures may be recommended if large roots are found.
- Trees scheduled for removal located in proximity of the RPZ of the trees to be retained, should be cut, and not pulled over by excavator to minimize root impacts. Use of a stump grinder is recommended to remove stumps.

Tree Protection Fencing

- The tree protection fencing must be chain-link fencing or construction fencing. If construction fencing is used, it must be secured by anchoring the individual panels to the ground to avoid movement. See Appendix C for details.
- The temporary fencing shall be secured with 8-foot metal posts placed 8 feet apart, two feet deep at the edge of the tree protection zone.
- The sign 'Vegetation/ Tree Protection Zone' shall be placed prominently on the fence designated for the tree protection zone and list the penalties for violation.
- The fencing shall be installed prior to any ground disturbance taking place, including clearing, grading, or construction.
- The tree protection fencing may be removed after the final inspection is completed and the project arborist has met with the landscape contractor to go over their plans.



Activities Inside the Tree Protection Zone

Construction activities within the CRZ of the trees must be overseen by the project arborist assigned to the project.

Prohibited activities include but are not limited to:

- Construction activity involving vehicular or equipment access.
- Storage of equipment and materials (including soil and gravel)
- Temporary or permanent stockpiling
- Excavation or fill
- Trenching
- In ground irrigation system installations

Violations of the provisions may result in liability for damages and applicable fines.

Conclusion:

The trees are in fair condition taking species and age into consideration except for the Cottonwood trees. Multiple Cottonwood failure is caused by Poplar Canker Disease (Cytospora). This disease is caused by a fungal infection and is spread by water/irrigation and wind. Poplar Canker is present within the stand and will spread throughout the stand causing tree decline/death. The Cottonwood trees pose a serious risk to the surrounding area and should be allowed to be removed. Provided with the information I received, it is in my professional opinion that the performance path will suffice from an arboricultural standpoint. Care should be taken to follow the recommendations and provisions laid out in this TPP to ensure the success of the retention efforts. I highly recommend a job site walkthrough prior to the start of the project.

Recommendations:

1. Hold an onsite meeting with the parties involved to ensure that all parties involved understand the tree plan and its goals.

Appendix A	Assumptions and Limitations
Appendix B	Certification of Performance
Appendix C	Site plan with tree locations, RPZ and TPZ
Appendix D	Inventory

Appendix A- Assumptions and Limitations

1. A field examination of the site was made. My observations and conclusions are as of that date.
2. Care has been taken to obtain all information from a reliable source, however the Arborist can neither guarantee nor be responsible for accuracy of information provided by others.
3. Unless stated otherwise, information contained in this report covers only those trees that were examined and reflects the condition of those trees at the time of inspection. The inspection is limited to visual examination of the subject trees without dissection, excavation, probing, or coring. There is no warranty or guarantee that problems or deficiencies of the subject tree may not arise in the future.
4. All trees possess the risk of failure. Trees can fail at any time, with or without obvious defects or applied stress. Trees are living biological organisms, and I cannot predict nor guarantee their stability or failure.
5. Sketches or drawings in this report are intended as visual aids and are not necessarily to scale and should not be used as engineering or architectural reports or surveys.
6. This report and any values/opinions expressed herein represents my opinion as an arborist. Inaction on the part of those receiving the report is not the responsibility of the Arborist.
7. Loss or alteration of this report invalidates the entire report.
8. It is the contractor's/ owner's responsibility to contact us in a timely matter to ensure that a project arborist is available when inspections and/ or observations are required. Please allow two weeks for scheduling purposes.
9. Any legal description provided to the consultant/ appraiser is assumed to be correct. Any titles and ownerships to any property are assumed to be good and marketable. No responsibility is assumed for matters legal in character. Any and all property is appraised or evaluated as though free and clear, under responsible ownership and competent management.
10. The consultant/ appraiser shall not be required to give testimony or attend court by reason of this report unless subsequent contractual arrangements are made, including payment for such services.
11. Possession of this report does not imply right of publication or use for any other purpose by any other than the person to whom it is addressed, without the prior expressed written consent of the consultant/ appraiser.

Appendix B - Certification of Performance

I, Sibyl Weise, certify that:

- I have personally inspected the trees and the property referred to in this report and have stated my findings accurately. The extent of the evaluation or appraisal is stated in the attached report and the Terms of the Assignment.
- I have no current or prospective interest in the vegetation or the property that is subject of this report and have no personal interest or bias with respect to the parties involved.
- The analysis, opinions and conclusions stated herein are my own and are based on current scientific procedures and facts.
- My analysis, opinions and conclusions were developed, and this report has been prepared according to commonly accepted arboricultural practices.
- No one provided significant professional assistance to me, except as indicated in the report.
- My compensation is not contingent upon reporting of a predetermined conclusion that favors the cause of the client or any other party nor upon the results of the assessment, the attainment of stipulated results, or the occurrence of any subsequent events.

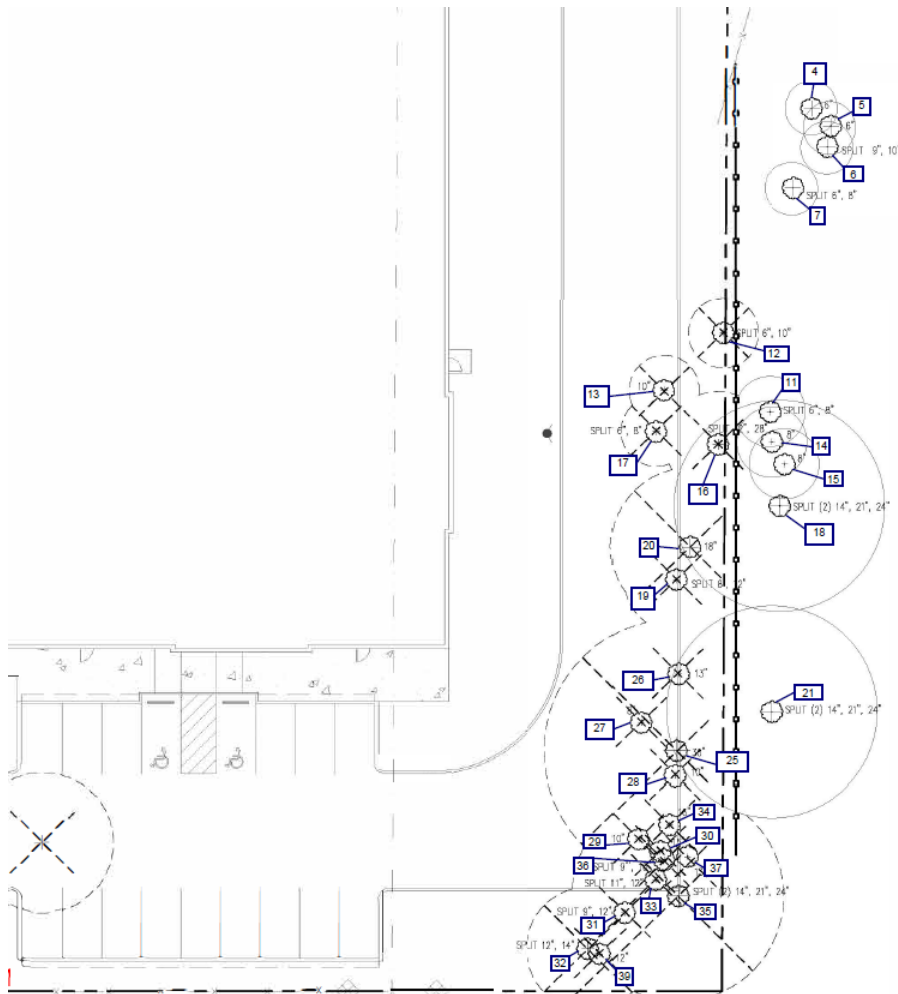
I further certify that I am a Certified Arborist with Tree Risk Assessment Qualifications by the ISA. I have been involved in the arboricultural field in a full-time capacity for a period of 7 years.

Sincerely,



Sibyl Weise
SavATree
Certified Arborist PN-8718A
ISA Qualified Tree Risk Assessor
971-375-7280 (Direct/ Cell)
sweise@savatree.com





Appendix D- Inventory

	ObjectID	Survey ID	Common Name	Scientific Name	DBH	Crown Spread	Condition Health	Structure	Notes Condition	Field
1	11008		Black cottonwood	Populus trichocarpa	14.7	15	Poor	Poor	Stem failure	
2	11009		Black cottonwood	Populus trichocarpa	10	18	Poor	Poor		
3	No tag		Black cottonwood	Populus trichocarpa	8	18	Fair	Fair		
4	No tag		Black cottonwood	Populus trichocarpa	6	16	Poor	Poor		
5	No tag		Black cottonwood	Populus trichocarpa	6	12	Fair	Fair		
6	No tag		Black cottonwood	Populus trichocarpa	19	26	Fair	Fair		
7	No tag		Black cottonwood	Populus trichocarpa	14	28	Poor	Fair		
8	No tag		Black cottonwood	Populus trichocarpa	7	28	Poor	Poor		
9	No tag		Service serviceberry	Amelanchier canadensis	10	34	Good	Good		
10	10868		Black cottonwood	Populus trichocarpa	12	36	Poor	Poor	Dying	
11	No tag		Black cottonwood	Populus trichocarpa	14	27	Poor	Poor	Dying	
12	No tag		Black cottonwood	Populus trichocarpa	16	34	Fair	Fair		
13	10867		Black cottonwood	Populus trichocarpa	10	35	Poor	Poor		
14	No tag		Black cottonwood	Populus trichocarpa	8	10	Dead	Poor		
15	10866		Black cottonwood	Populus trichocarpa	8	8.5	Dead	Poor		
16	No tag		Black cottonwood	Populus trichocarpa	29	38	Poor	Poor	Dying	
17	10857		Black cottonwood	Populus trichocarpa	14	40	Poor	Poor	Dying	
18	10859		Black cottonwood	Populus trichocarpa	41	32	Poor	Poor	Dying	
19	10860		Black cottonwood	Populus trichocarpa	16	38	Dead	Poor		
20	10854		Black cottonwood	Populus trichocarpa	18	32	Poor	Poor		
21	10856		Black cottonwood	Populus trichocarpa	41	18	Fair	Fair		
22	18650		Black cottonwood	Populus trichocarpa	12	0	Dead	Fair		
23	No tag		Black cottonwood	Populus trichocarpa	18	0	Dead	Poor		
24	No tag		Black cottonwood	Populus trichocarpa	18	0	Dead	Poor		
25	No tag		Black cottonwood	Populus trichocarpa	30	1086	Dead	Poor		
26	10841		Black cottonwood	Populus trichocarpa	8	36	Poor	Poor	Dying	
27	10839		Black cottonwood	Populus trichocarpa	8	38	Poor	Poor	Dying	
28	No tag		Black cottonwood	Populus trichocarpa	10	36	Fair	Fair		
29	10836		Black cottonwood	Populus trichocarpa	10	30	Fair	Fair		

30	No tag	Black cottonwood	Populus trichocarpa	15	39	Fair	Fair
31	10818	Black cottonwood	Populus trichocarpa	16	21	Fair	Poor
32	10819	Black cottonwood	Populus trichocarpa	20	18.5	Dying	Poor Dying
33	10816	Black cottonwood	Populus trichocarpa	18	35	Dying	Poor Dying
34	10829	Black cottonwood	Populus trichocarpa	18	38	Fair	Poor
35	10815	Black cottonwood	Populus trichocarpa	42	40	Poor	Poor Dying
36	10811	Black cottonwood	Populus trichocarpa	10	23	poor	Poor Dying
37	10812	Black cottonwood	Populus trichocarpa	13	23	Poor	Poor Dying
38	10816	Black cottonwood	Populus trichocarpa	11	12	Dead	Poor Dying
39	10815	Black cottonwood	Populus trichocarpa	12	30	Dying	Poor Dying
40	No tag	Black cottonwood	Populus trichocarpa	36	38	Good	Good
41	No tag	Black cottonwood	Populus trichocarpa	16	30	Fair	Poor

Glossary

DBH	The diameter of the tree measured at 54" from the ground.
TPP	Tree Protection Plan
TPZ	Tree Protection Zone
RPZ	Root Protection Zone
TPF	Tree Protection Fencing
Soil Amelioration	Enriching the soil with nutrients.

TITLE 11 TREE REVIEW SHEET

Permit #: _____

TREE PRESERVATION STANDARDS 11.50.040

When to use this form for tree preservation:

- ☐ Ground disturbance or 100 sf of construction staging on unpaved portions of RPZ of non-exempt tree(s)
- ☐ Site size at least 5,000 square feet (may be less if preserving trees for density)
- ☐ Not zoned IH, IG1, EX or CX and not a City-owned site
- ☐ Building coverage less than 85%
- ☐ Tree preservation not regulated by land use review or Title 33 only

Note: If 11.50 is not applicable no regulated trees may be shown for removal on plans (refer to UF) and Tree Code info fields should be marked zero.

☐ **PRESCRIPTIVE PATH** ☐ **PERFORMANCE PATH (ARBORIST REPORT ATTACHED)**

- ☐ Checked dead, dying or nuisance species and heritage tree
- ☐ Checked for any concurrent building or UF permits showing tree requirements
- ☐ No work, tree removal, or utilities in RPZ of protected trees or per arborist report
- ☐ Protection fence (new or existing) clearly labeled and with materials and dimensions and closed at street
- ☐ Trees to be removed are X'd (and others not protected listed as optional if customer uncertain)
- ☐ Tree Protection stamp with correct path checked and arborist report attached to this sheet if applicable
- ☐ Yellow signs and inspection info form to applicant, copies of this form stapled to sets #1 and #2.

Number of non-exempt trees 12 inches diameter or larger	
Number of trees preserved or paid fee in lieu <i>Note: All trees 36 inches or greater must be preserved unless exempted by arborist or per inch fee paid in lieu and 45-day neighborhood notice completed</i>	# Preserved _____ # Paid fee _____

Tree Diameter	Preserved Species (attach list if more)

TREE DENSITY STANDARDS 11.50.050

Exemptions (check if applicable): ☐ Under NCU \$ ☐ Demo, SD, or ZP Permit ☐ Exempt Zone/District

Total Required Tree Density (see Table 50-1, on reverse)	Required	Proposed	
	# of trees	Tree Density Achieved	Minimum Planting Area
Special species* trees preserved (< 6")	x 300 sf		
Preserved trees 6" increment (diameter/6 per tree, round down)	x 500 sf		
Small trees planted	x 300 sf		50 square feet 3 feet x 3 feet
Medium trees planted	x 500 sf		75 square feet 5 feet x 5 feet
Large trees planted	x 1000 sf		150 square feet 10 feet x 10 feet
Payment to Tree Fund (One 1.5-inch diameter tree)	x 500 sf		

REQUIRED MITIGATION PAYMENT

Size of Tree Removed (inches in diameter)	Required Mitigation
At least 12 and less than 20	The cost of two 2-inch diameter trees
At least 20 and less than 36	The cost of four 2-inch diameter trees
At least 36 or more	The cost per inch of tree removed

TREE PLANTING REQUIREMENTS

Table 50-1 Determining Required Tree Area		
Development Type	Option A	Option B
One and Two Family Residential	40 percent of site or development impact area	Site area minus building coverage of existing and proposed development
Multi Dwelling Residential	20 percent of site or development impact area	
Commercial/Office/Retail/Mixed Use	15 percent of site or development impact area	
Industrial	10 percent of site or development impact area	
Institutional	25 percent of site or development impact area	
Other	25 percent of site or development impact area	

GUIDELINES FOR ARBORIST REPORTS

ARBORIST REPORTS MUST INCLUDE:

1. Address or tax account number.
2. Arborist information: ISA or ASCA number and contact information and signature
3. Date and time of most recent assessment
4. Tree information
 - Specify the tree's species (taxonomic ID), size (DBH), condition, location, and extent of root cover
 - Describe the tree's tolerance to construction impact based on its species and health
 - Identify any prior impacts that have occurred within the root zone
5. IF DEVELOPMENT ONSITE HAS NOT YET BEGUN (see Performance Path Tree Protection Plans 11.60.030.C.2):
 - Explanation of why the prescriptive path (11.60.030.C.1) is not practicable
 - Detailed description of alternate tree protection measures, **including remedial actions taken to mitigate negative impacts on the tree**, if necessary
 - Description of alternate construction techniques and materials, if applicable
 - If tree protection measures require an arborist to be onsite:
 - Provide stages of construction arborist is to be onsite
 - Copy of the contract for onsite inspections and final report
 - Final arborist report verifying the viability of tree(s) provided prior to final inspection
6. IF DEVELOPMENT ACTIVITIES ONSITE HAVE ALREADY OCCURRED, AND CORRECTIONS ARE REQUIRED:
 - Description of how the tree has been impacted by the onsite development activity
 - Explanation of techniques and materials used to ensure continued viability of tree to be preserved
 - Description of the proposed tree protection measures to be implemented
7. ALL REPORTS must provide explanation of how/why proposed protection measures will allow for continued tree preservation, and be submitted with a site plan that follows requirements as per 11.50.070. *Supporting documents, including photographs, are encouraged to be submitted with your report.*

Construction/Professional Services Agreement

Project (the "Project")	138 th Avenue Development
Project Address	4600 NE 138 th Avenue
Owner ("Owner")	138 AVENUE LIT JP-MJD2, LLC
Owner Address and Fax	450 Newport Center Dr., Ste. 405 Newport Beach, CA 92660 Phone: (949) 720-8050
Contractor/ Vendor ("Company")	SavaTree Consulting Group, an Oregon limited liability company
Company Address and Fax	8160 NE Mauzey Court Hillsboro, OR 97124 Ph: (503) 645-2242
Scope of Services (the "Work")	Certified arborist supervision during construction activities outlined in the Tree Protection Plan. Cost of recommended mitigation measures is not included.
Contract Price (the "Contract Price")	Work to be performed on a time and material basis at a rate of [REDACTED] per hour. Total Contract Price shall not exceed [REDACTED] without prior written approval.
Commencement Date (the "Commencement Date")	09/19/22
Completion Date (the "Completion Date")	12/01/22

In consideration of the foregoing and the "Contract Provisions" attached hereto, which are incorporated herein by this reference, the parties agree to the terms of this Construction/Professional Services Agreement ("Agreement") as of September 19, 2022.

OWNER:

138 Avenue LIT JP-MJD2, LLC,
a California limited liability company

By: DeArmey Investments, LLC,
a California limited liability company

By: Michael DeArmey
Name: Michael J. DeArmey
Title: Manager

COMPANY:

SavATree Consulting Group
an Oregon limited liability company

By: Sibyl Weise
Name: Sibyl Weise
Title: Arborist Consultant

CONTRACT PROVISIONS

1. Work.

(a) Work. Company agrees to furnish and transport all necessary labor, materials, tools, equipment, supplies, implements, information, technical drawings required to perform and completely finish the Work described in the Scope of Work section hereinabove, in a workmanlike and professional manner consistent with the highest commercially acceptable standards in the industry, free of any and all liens and claims of laborers, artisans, materialmen, suppliers, and subcontractors.

(b) Non-Conforming Work. Company, at its sole cost and expense, shall promptly correct non-conforming Work, as reasonably determined by Owner. If Company fails to correct such Work within 7 days after notice from Owner, Owner may, without prejudice to any other available remedies, correct such deficiencies, in which case Company shall reimburse Owner for the cost of the correction within 10 days after receipt of a bill therefor or, at Owner's option, Owner may deduct the cost of correction from payments due Company.

(c) Change Orders. Except as set forth herein, no extras, additions, deletions, or other changes to the Work shall be allowed unless agreed to in advance in a writing signed by Company and Owner (each, a "Change Order"). Each Change Order shall set forth (i) the change in Contract Price, if any, resulting from the change in Work, (ii) the precise change in Work that will be required, and (iii) the effect on the construction schedule, if any.

(d) Compliance with Laws; Safety. Company shall perform the Work in conformity with all applicable federal, state, county, and municipal laws, ordinances, rules, and regulations. Company shall, at its expense, obtain all licenses, permits, and inspections required in order to perform and complete the Work and shall pay all taxes, contributions, and premiums required to be paid in connection with the Work and/or Company's operations. Company shall maintain a safe and clean working environment and manage all waste streams to the appropriate disposition location.

(e) Licenses. Company possesses all the legally required local, state, and federal licenses needed to prosecute and complete the work described herein.

2. Contract Price; Payment Terms.

(a) Inclusions; Modifications. The Contract Price includes all labor, materials, tools, equipment, supplies, implements, and appliances necessary for the proper execution and completion of the Work. The Contract Price can be modified only by Change Order.

(b) Progress Payments. By the last day of each month, Company shall submit to Owner (i) a written request for payment in form satisfactory to Owner (each, a "Payment Request") detailing the value of the Work performed and completed to date from which a retainage of 10% may be deducted by Owner in its discretion, (ii) releases or progress lien waivers in form satisfactory to Owner ("Progress Lien Waivers") showing that its labor, materials, and other bills have been paid and that all subcontractors have been paid, and (iii) such other documentation as may be reasonably requested by Owner. Owner shall have 30 days after receipt of a Payment Request to make payment thereon for Work properly performed pursuant to the terms of this Agreement. Notwithstanding the foregoing to the contrary, Owner may withhold any one or more progress payments if Company is in default hereunder. No more than one Payment Request shall be submitted in any month.

(c) Final Payment. Company's request for final payment shall be made upon completion of the Work following the procedures set forth in subsection 2(b) above, except that final lien waivers from Company and all subcontractors in form satisfactory to Owner shall be provided in lieu of Progress Lien Waivers. Owner shall have 30 days after receipt of Company's final request for payment to make such payment. Acceptance of final payment by Company shall constitute a waiver of claims by Company.

(d) Non-Payment of Bills. If it appears that bills for labor or materials are not being paid, Owner may, in its sole discretion, pay such amounts directly and deduct the same from the Contract Price.

(e) No Acceptance. Payment by Owner shall neither be conclusive of full performance by Company nor considered an acceptance of defective work or improper materials.

3. Time of Construction; Force Majeure. Company shall commence performance of the Work on the Commencement Date and shall Complete the Work on or before the Completion Date. As used herein, "Complete" means that the Work is fully and finally performed in strict accordance with this Agreement. If Company is delayed in the performance of the Work by acts or omissions of Owner, acts of God, governmental delays, strikes or other labor conflicts, war, or fire, the period for performance set forth herein shall be extended for a reasonable period of time set by Owner.

4. Default; Termination.

(a) Default. The occurrence of any of the following shall be an event of default hereunder: (i) Company fails to perform or observe any term or obligation in this Agreement; (ii) Company fails to make payment to any labor or material suppliers; or (iii) Company becomes insolvent, files a petition in bankruptcy, or is generally unable to pay its obligations as they become due.

(b) Termination. Upon the occurrence of an event of default, Owner may, without prejudice to any other rights or remedies available to Owner at law or in equity, terminate this Agreement by delivering written notice to Company. In the event of such termination, Owner may take immediate possession of the Project and all materials thereon owned by Company and may finish the Work by any method Owner deems necessary.

(c) Payment after Termination. Company shall not be entitled to receive further payment until the Work is complete. If the unpaid balance of the Contract Price

exceeds the cost of finishing the Work, such excess shall be paid to Company to the extent included in a Payment Request delivered in accordance with Section 2 above. If the cost of finishing the Work exceeds the unpaid balance of the Contract Price, Company shall reimburse Owner for the difference within 10 days after receipt of a bill therefor.

(d) Permitted Termination. Owner may, in the exercise of its sole discretion, terminate this Agreement (a) at any time on 30 days prior written notice to Company; or (b) in the event of any sale, transfer, or conveyance of the Project by Owner, voluntarily or involuntarily, by delivering written notice of such transfer to Company, which termination (a "Permitted Termination") shall be effective as of the date designated in the notice from Owner to Company. A Permitted Termination shall be without penalty or cost to Owner. In the event of any such Permitted Termination, Owner shall pay Company for the cost of the Work performed through the effective date of such termination within 30 days after such Permitted Termination, provided Company complies with the terms of Section 2 applicable to all payments.

5. Indemnification. Company shall indemnify, defend, and hold harmless Owner and its shareholders, members, partners, managers, directors, officers, employees, agents, and affiliates from and against any and all losses, costs, damages, injuries, liabilities, liens, demands, or penalties of any nature whatsoever, including court costs and attorneys' fees, arising out of claims by third parties and resulting from any act or omission of Company, its employees, agents, or subcontractors, or any breach of this Agreement by Company, its employees, agents, or subcontractors.

6. Waiver. To the extent permitted by law, Company waives any and all claims against Owner or the Project by Company and its employees, agents, and subcontractors for property loss or damage or personal injury suffered or incurred in connection with this Agreement or the Work, except to the extent caused by the gross negligence or willful misconduct of Owner.

7. Insurance.

(a) Required Coverages. Company (and its subcontractors), at its sole cost and expense, shall obtain before beginning the Work and maintain in force at all times relevant to this Agreement: (i) workers compensation insurance covering all of its employees, which insurance shall include the following: (A) Coverage A – statutory amount and (B) Coverage B – employer's liability insurance: \$1,000,000 each accident; \$1,000,000 disease, policy limit; and \$1,000,000 disease, each employee; (ii) broad form commercial general liability insurance for personal injury and property damage in the amount of \$1,000,000 per occurrence combined single limit/\$2,000,000 aggregate (i.e., such insurance shall include contractual liability coverage, personal injury protection, and completed operations coverage and hold harmless provision in favor of Owner and Owner's lender); (iii) automobile liability insurance in the amount of \$1,000,000 combined single limit; (iv) professional liability insurance in the amount of \$1,000,000 each claim, \$3,000,000 aggregate; (v) property insurance coverage for tools and equipment brought onto and/or used on the Project by Company in an amount equal to the replacement cost of all such tools and equipment; and (vi) if applicable, builder's risk insurance on the improvements to be erected pursuant to this Agreement at 100% of their replacement value. All insurance policies shall be underwritten by insurance companies acceptable to Owner with a current AM Best rating of A VIII or higher and shall provide for 30 days written notice to Owner prior to the cancellation or any material change to any provisions therein.

(b) Certificates. Prior to beginning the Work, Company shall furnish Owner with certificates evidencing the foregoing coverages; and Company shall maintain and keep on file current certificates that show Company is so insured. The certificate of liability insurance shall state that the policy insures Owner against liability for all claims arising out of or in connection with the Work.

(c) Other Requirements. All employer's liability, commercial general liability, automobile liability, and builder's risk insurance policies maintained by Company shall be primary coverages and not contributory with any coverages maintained by Owner. All employer's liability, commercial general liability, and automobile liability insurance policies shall name Owner, 138 Avenue LIT JP-MJD2, LLC, and any other parties and/or entities required by Owner (including, but not limited to, Owner's lender) as additional insureds for both ongoing and completed operations. Owner shall be named as loss payee on any builder's risk policy purchased by Company. The commercial general liability and builder's risk insurance policies shall insure on an occurrence and not claims-made basis. For builder's risk claims caused by Company, its employees, agents, or subcontractors, Company shall be responsible for the payment of the first **[\$25,000]** of the deductible under any builder's risk policy carried by Owner. The workers compensation policy (Coverages A and B) shall include a waiver of all rights of subrogation against Owner and 138 Avenue LIT JP-MJD2, LLC for injuries sustained by Company's employees while working at the Project. Completed operations coverage shall be maintained by Company for at least two years from final completion of the Work.

8. Company's Representations. Company represents and warrants to Owner that (a) all materials and equipment furnished under this Agreement will be new and of good quality, (b) the Work will be free from defects, and (c) the Work will conform to the requirements of this Agreement.

9. Independent Company. Company declares that it is engaged in an independent business and agrees to perform the Work as an independent contractor and not as the agent, employee, or servant of Owner. Company has and hereby retains the right to exercise full control and supervision over the Work and full control over the employment, direction, compensation, and discharge of all persons assisting in the Work. Company hereby agrees to be solely responsible for all matters relating to payment of its employees, including compliance with Social Security withholding, and all other regulations governing such matters. Company hereby agrees to be responsible for its own acts and those of its employees, agents, and subcontractors.

10. Notices. All notices required to be given under this Agreement shall be in writing and shall be deemed to have been received (a) upon delivery if delivered by hand, (b) 1 day after deposit with a nationally-recognized overnight courier service, or (c) upon telecopied confirmation of receipt if sent by facsimile with the original sent by U.S. Mail. All notices to Company shall be sent to the address listed on the first page of this Agreement. All notices to Owner shall be sent to the address listed on the first

page of this Agreement, with a copy to Phelan-MJD2, LLC, 450 Newport Center Dr, Suite 405, Newport Beach, CA 92660, Attn: Legal Department; Fax 949.720.8090. The address to which any notice may be given, made, or sent to a party may be changed by written notice given by such party in accordance with this Section 10.

11. Amendments. No modification or amendment of this Agreement shall be effective unless made in writing, signed by Company and Owner.

12. Assignment; Binding Effect. Company shall not assign this Agreement in whole or in part or subcontract or delegate any of the Work without the prior written consent of Owner, which may be withheld in its sole discretion. Subject to the foregoing restrictions, this Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and assigns.

13. Attorneys' Fees. In the event a legal proceeding is instituted to interpret or enforce this Agreement, the prevailing or innocent party shall be entitled to recover from the other party all costs and expenses, including without limitation attorneys' fees and costs.

14. Severability. If any of the provisions of this Agreement are held to be unenforceable, the remaining provisions of this Agreement shall remain in full force and effect.

15. Survival. The rights and obligations created in Sections 5, 6, 8, and 13 shall survive completion of the Work and/or termination of this Agreement.

16. Entire Agreement; Conflict; Authority. This Agreement represents the entire and integrated agreement between the parties and supersedes prior negotiations, representations, or agreements, whether written or oral. To the extent of any conflict between the terms of this Agreement and any other agreement between Owner and Company, the terms of this Agreement shall govern and control. The parties executing on behalf of Owner and Company, respectively, hereby represent to the other party that they have full authority to execute this Agreement and create a fully binding contract pursuant to the terms hereof.

17. Governing Law. This Agreement shall be construed and enforced in accordance with the laws of the state in which the Project is located.

18. Scope of Work. Quantities identified on Company's proposal are for informational purposes only. Project is bid as a guaranteed maximum price contract.

Owner Initials: _____

Company Initials: _____