# POSSESSION AND USE AGREEMENT

|  |
| --- |
|  |
| DATE |
|  |  |  |  |  |
|  |  |  |  |  |
| CO |  | RTE |  | POST |
|  |  |  |  |  |
|  |  |  |  |  |
| PARCEL NO. |  | EXP AUTH |  | PROJECT ID NO. |
|  |
|  |
| APN |

The parties to this Possession and Use Agreementshall, pursuant to Section 21.7(a) of Title 49, Code of Federal Regulations, comply with all elements of Title VI of the Civil Rights Act of 1964. This requirement under Title VI and the Code of Federal Regulations is to complete the USDOT Non-Discrimination Assurance requiring compliance with Title VI of the Civil Rights Act of 1964, 49 C.F.R. Parts 21 and 28 C.F.R. Section 50.3.

Further, no person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity that is the subject of this Possession and Use Agreement.

 This Possession and Use Agreement (“Agreement”) is made on \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_\_\_, by and between the State of California, acting by and through the Department of Transportation (“State”), and \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Owner”), who shall be collectively referred to as the “Parties.”

## RECITALS

1. State requires immediate possession and use of Owner’s real property to construct a State highway project.  Owner’s property is located in \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ County, California, legally described in the attached Exhibit “A” and identified on the Right of Way map in the attached Exhibit “B.”
2. Property is designated by State as Parcel No[s]. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (the “Parcel”). The Parcel is required for the purpose of constructing a portion of State Highway Route \_\_\_\_\_ (the “Project”). The purpose of this Agreement is to allow the State to proceed with construction of the Project without delay.
3. The Parties acknowledge and agree that any delay in the start of construction of the Project is contrary to public interest. It is the intent of State to offer fair‑market compensation to Owner for permission to enter the Parcel and to construct the Project, and as consideration for the rights set forth in the paragraph entitled “Possession,” below. State has made a firm written offer to pay the total sum of $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ to Owner and any other persons having an interest in the Parcel. This amount does not include compensation for any loss of business goodwill, pre‑condemnation damages, loss of rent or any other claims for just compensation except for the State’s appraised fair market value of the Parcel (and, if applicable, severance damages). This amount does not include reimbursement for relocation benefits which will be handled pursuant to state and federal regulations and policies. The Owner has not accepted this offer.

## OPERATIVE PROVISIONS

 In consideration of the sum to be paid to Owner and in consideration of the foregoing recitals and the promises, covenants and any other conditions set forth in this Agreement, State and Owner agree as follows:

### Possession

1. Owner grants to State and its contractors, agents, representatives, employees and all others deemed necessary by State, the irrevocable right to exclusive possession and use of the Parcel, including but not limited to, the right to remove and dispose of any and all improvements within and/or straddling the right of way, except for any portion of the Parcel wherein less than an exclusive interest is being acquired, and as it relates to those portions, the irrevocable right to nonexclusive possession and use of the property. In consideration for this irrevocable grant of possession and use, State will tender into escrow [\*\*If internal escrow, replace “tender into escrow” with “pay to Owner”] the sum of $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_. Following payment into escrow [\*\*If internal escrow, replace “into escrow” with “to Owner”], State shall have the right to possess the Parcel and begin construction of the Project on [\*\*insert date here if State and Owner agree on effective future possession date, OR, insert “the date the sum is paid into escrow.” (if internal escrow, replace “into escrow” with “to Owner”)] [If TCE acquisition, delete “.” and add (“, except that actual possession and use of the Temporary Construction Easement, identified as Parcel No. ###, will commence on (insert RWC date identified in the Appraisal)”].

### Just Compensation and Appraisal

1. Owner acknowledges that the sum referenced in paragraph 1 represents the full amount of the State‑approved appraisal of what State believes is just compensation owed for the acquisition of the Parcel. Should the Parties fail to reach a settlement and it becomes necessary for State to file a condemnation action to acquire the Parcel, the Parties agree the amount deposited into escrow [\*\*If internal escrow, replace “deposited into escrow” with “paid to Owner”] shall not be admissible as evidence of value in such condemnation proceeding. The Parties agree that the deposit and [\*\*If internal escrow, delete “the deposit and”] payment under this Agreement shall be equivalent to a deposit and payment under California Code of Civil Procedure section 1255.010 and that the basis for such deposit and [\*\*If internal escrow, delete “deposit and”] payment, including but not limited to any appraisal, shall be governed by Code of Civil Procedure section 1255.060. Accordingly, the Parties agree that the amount deposited or withdrawn [\*\*If internal escrow, replace “deposited or withdrawn” with “paid”] under this Agreement may not be given in evidence or referred to in any trial on the issue of compensation.

### Escrow

1. This transaction will be handled through an escrow with \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, Escrow No. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ [\*\*If internal escrow, replace “escrow with , Escrow No. ” with “internal escrow with the California Department of Transportation, (add address of appropriate district office), internal Escrow No. (add Caltrans escrow number)”]. State shall pay all escrow fees incurred in this transaction. Owner shall be entitled to the sum referred to in paragraph 1, less any amounts payable to any other persons having an interest in the Parcel. Any unearned rents will be prorated in escrow and State shall be credited with any outstanding security deposits. Owner shall not be entitled to receive any proceeds until:
2. All holders of liens and encumbrances on the Parcel have received full payment for all principal and interest due to them and have executed a reconveyance of their interests in the Parcel;
3. All other parties having interests in the Parcel have received payment or have consented to a payment to Owner; and
4. State has acknowledged in writing that it concurs that all other parties having interests in the Parcel have received full payment or have consented to Owner’s withdrawal.

**\*\* *See Optional Paragraph Checklist.***

1. This escrow shall remain open until either a final settlement, or until termination of this Agreement, or until a Final Order of Condemnation under section 1268.030 of the California Code of Civil Procedure is entered by the court and recorded by State. Any sum disbursed to Owner from this escrow shall be deducted from the ultimate amount received by Owner as a result of any settlement, award, or verdict of just compensation for the Parcel.

### Effective Date

1. This Agreement is effective as of [\*\*insert the future agreed to possession date specified in Section 1 above, OR, if external escrow “the date the sum is paid into escrow as set forth in Section 1 above”, OR, if internal escrow “the date the sum is paid to Owner as set forth in Section 1 above”] (the “Effective Date“). From and after the Effective Date, Owner shall not assign, sell, encumber or otherwise transfer all or any portion of their interest in the Parcel, or the property, without first obtaining State’s prior written consent.

### Taxes

1. Owner agrees to submit payment, when due, to the County tax collector for all taxes and special assessments on the Parcel that are due during the period from the date of possession (as set forth in paragraph 1 of this Agreement) to the date title transfers to the State. Title transfers to the State on the date the Grant Deed or Final Order of Condemnation is recorded in the office of the County recorder. Owner shall not be required to pay taxes or special assessments on the Parcel on or after the date title transfers to the State. After the date title transfers to the State, the State will request that the County tax collector cancel taxes and/or special assessments for the period from the date of possession to the date title transferred to the State. After the tax cancellation request is made by the State, Owner may file a claim with the County tax collector for a refund of any tax overpayment. Notwithstanding any other provision of this Agreement, no cancellation shall be made of all or any portion of any taxes that were due prior to the date of possession but which were unpaid; escrow shall pay in a timely manner all delinquent property taxes due from the sums deposited into escrow. (California Revenue and Taxation Code section 5084.)

### Eminent Domain Proceedings

1. This Agreement is made with the understanding that State will continue to negotiate in good faith with Owner to acquire its interest in the Parcel by direct purchase.
2. If State begins proceedings in eminent domain, it is understood and agreed that this Agreement shall continue in effect until either a settlement is reached or a Final Order of Condemnation under section 1268.030 of the California Code of Civil Procedure is entered by the court and recorded by the State.

### Waiver Notice Pursuant to Code of Civil Procedure Section 1245.235

1. Section 1245.235 of the California Code of Civil Procedure requires the State of California, Department of Transportation, to give each person whose property is to be acquired by eminent domain notice and a reasonable opportunity to appear before the California Transportation Commission and be heard on the matters referred to in section 1240.030 of the Code of Civil Procedure, which provides:

 The power of eminent domain may be exercised to acquire property for a proposed project only if all of the following are established:

1. The public interest and necessity require the project.
2. The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury.
3. The property sought to be acquired is necessary for the project.
4. The offer required by section 7267.2 of the Government Code has been made to the Owner or others of record.
5. By granting this irrevocable right to possession and use of the Parcel to State, Owner agrees to the following:
6. Owner specifically waives the notice required by Code of Civil Procedure section 1245.235 of the hearing on the matters referred to in Code of Civil Procedure section 1240.030, and Owner shall not object to the adoption of the resolution of necessity by the California Transportation Commission authorizing the taking of the property described in Exhibit “A.”
7. Owner shall not object to the filing of an eminent domain proceeding to acquire the property described in Exhibit “A.”
8. In any eminent domain action filed by State to acquire the property described in Exhibit “A,” Owner shall not challenge State’s right to acquire such property, and the only issue shall be the amount of just compensation for the property.

### Refund

1. Owner agrees that in the event the ultimate amount of any settlement, award, or verdict is less than the total of the sums paid to and withdrawn by Owner, the Owner shall refund the difference including interest at the apportionment rate of interest as provided in Code of Civil Procedure section 1268.350 to State.

### Waiver

1. Owner waives any right to challenge State’s right to possess, acquire, and use the Parcel in any subsequent eminent domain proceedings filed by State. Owner also waives all claims and defenses in its favor in any subsequent eminent domain proceeding, except a claim for greater compensation.

### Date of Valuation

1. In the event proceedings in eminent domain begun, the date of valuation for determining the amount of just compensation for the Parcel shall be the date the State deposits the funds identified in Section 1 above into escrow [\*\*OR, if internal escrow, “the date the State makes payment to owner as identified herein”].

### Interest

1. Compensation awarded in an eminent domain proceeding shall draw interest as prescribed by section 1268.350 of the California Code of Civil Procedure. Owner shall be entitled to receive interest on any sum received as compensation for its interest in the Parcel, whether pursuant to this Agreement, a subsequent settlement or court judgment, beginning on the date State takes possession of the Parcel pursuant to this Agreement and ending on the earliest of the dates as provided in Code of Civil Procedure section 1268.320.

### Hazardous Materials

1. If any hazardous materials or waste (as defined by California Health and Safety Code section 25100, et. seq., and/or 42 U.S.C. §9601, et. seq.) are present on the Parcel on the date State takes possession of the Parcel, Owner shall be responsible for and bear the entire cost of all removal, disposal, cleanup and decontamination which may be required because of these hazardous materials.

 Owner shall further hold State, its officers and employees harmless from all responsibility, liability and claims for damages to persons or property resulting from the existence or use of hazardous materials which are present on the Parcel on the date State takes possession under this Agreement.

### Abandonment of Proceeding

1. Under section 1268.510 of the California Code of Civil Procedure, at any time after the commencement of proceedings in eminent domain, State reserves the right to abandon the proceeding in whole or in part.

**\*\* *See Optional Paragraph Checklist re Ceasing Business Operations and Rental Units.***

### Authority to Execute and Bind

1. Each of the Parties represents and warrants that each of the persons executing this Agreement has full and complete legal authority to do so and thereby binds the party to this Agreement.

### Entire Agreement

1. This Agreement reflects the entire agreement between the Parties and shall supersede all prior or contemporaneous oral or written understandings, statements, representations or promises between the Parties concerning the matters contained herein.

### Governing Law

1. This Agreement is made and entered into in the State of California, and shall in all respects be interpreted, enforced and governed under the laws of said state. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning and not strictly for or against any of the Parties.

### Successors in Interest

1. This Agreement shall be binding upon and inure to the benefit of the heirs, devisees, executors, administrators, legal representatives, successors and assigns of the Parties.

### Understanding of Agreement

1. This Agreement has been negotiated in good faith and each party warrants and represents that in executing this Agreement, they are not relying upon any representation, promise, inducement or statement made in negotiation that has not been included in the terms of this Agreement.

### Fees and Costs

1. Except as otherwise provided in this Agreement, each party shall bear all costs (including but not limited to expert and appraisal fees) (excluding appraisal fees not to exceed $5,000 pursuant to section 1263.025 of the California Code of Civil Procedure) and attorneys’ fees individually incurred in connection with negotiating the matters described in this Agreement.

### Severability

1. In case any part, term, portion or provision of this Agreement is determined to be illegal, invalid or unenforceable, the remaining parts, terms, portions and provisions shall remain valid, enforceable, and in full force and effect.

### Amendment to Agreement

1. This Agreement may only be amended by written agreement, executed by all Parties.

### Counterparts

1. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

### Memorandum of Agreement

1. State shall record a memorandum of this Agreement.

**\*\* *See Optional Paragraph Checklist re Indemnification.***

|  |  |  |  |
| --- | --- | --- | --- |
| DATED: |  |  |  |
|  |  | OWNER |
|  |  |  |
|  |  |  |
| RECOMMENDED FOR APPROVAL [per delegations]: |
|  |  |  |
|  |  |  |
| DATED: |  |  | By: |  |
|  |  |  | [Name] |
|  |  |  | Right of Way Agent |
|  |  |  |
|  |  |  |
| DATED: |  |  | By: |  |
|  |  |  | [Name] |
|  |  |  | Chief, Acquisition Branch |
|  |  |  |
|  |  |  |
| APPROVED BY: |
|  |  |  |
|  |  |  |
| DATED: |  |  | STATE OF CALIFORNIA |
|  |  | DEPARTMENT OF TRANSPORTATION |
|  |  |  |
|  |  |  |
|  |  |  |
|  |  | By: |  |
|  |  |  | [Name] |
|  |  |  | Deputy District Director, Right of Way |
|  |  |  |
|  |  |  |

# POSSESSION AND USE AGREEMENT CHECKLIST

* 1. Fill in the “blanks” in the opening paragraph and in paragraphs A, B, C under “Recitals.”
	2. Fill in the appropriate information for each paragraph listed below:
* 1 – Modify language as indicated if internal escrow; Fill in blank with probable compensation amount; Choose between inserting future date **OR** “the date the sum is paid into escrow” **OR** “the date the sum is paid to Owner” as appropriate; Add last clause if a temporary construction easement is being acquired.
* 2 – Modify language as indicated if internal escrow;
* 3 – **Escrow** – Modify language as indicated if internal escrow;
* 5 – **Effective Date** – Choose between inserting future agreed to date **OR** “the date the sum is paid into escrow as set forth in Section 1 above” **OR** “the date the sum is paid to Owner as set forth in Section 1 above” as appropriate;
* 13 – **Date of Valuation** – Modify language as indicated if internal escrow.
	1. Review the list of **Optional Paragraphs** and decide if any apply. Search for \*\* in the Agreement and insert the appropriate Optional Paragraph(s).
	2. Search for and delete all \*\* and instructions with \*\*.
	3. Review Agreement to ensure all issues (blanks) have been addressed.
	4. Renumber paragraphs if necessary. Consult with the Legal Department if there are questions.
	5. Insert names for signature blocks.
	6. Prepare a Memorandum of Possession and Use Agreement; must be notarized and recorded immediately after execution.

## OPTIONAL PARAGRAPHS

□ **Escrow**

 ¶ 3 - To confirm there is no lease or tenancy INSERT:

1. Owner represents and warrants to State that neither the Parcel nor the property is subject to any lease or tenancy, and there is no party other than Owner who is entitled to any proceeds for the acquisition or damaging of the Parcel.

□ **Ceasing Business Operations** *(Use this title.)*

 ¶ # - If there is a business operating on the property, INSERT PARAGRAPH, PARAGRAPH # & FILL IN DATES & TIMES:

 #. Owner shall cease all business operations and related activities on the Parcel, except for any portion of the Parcel wherein less than an exclusive interest is being acquired, no later than \_\_\_\_\_\_\_\_\_\_ a.m. / p.m. on \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_\_\_, and shall fully vacate and remove any and all fixtures, equipment and personal property from the Parcel no later than \_\_\_\_\_\_\_\_\_\_ a.m. / p.m. on \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_\_\_. If Owner has not fully vacated the Parcel by \_\_\_\_\_\_\_\_\_\_ a.m. / p.m. on \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_\_\_, State may obtain an immediate Writ of Possession pursuant to California Code of Civil Procedure sections 512.010 and 1230.050.

□ **Rental Units** *(Use this title.)*

 ¶ # - If there is a tenant on the parcel, INSERT PARAGRAPH, PARAGRAPH # & FILL IN appropriate information:

 #. State agrees to pay Owner lost rental for the tenancy from the date vacated until the date State acquires possession under this Agreement. The Parties agree that the monthly rental for tenancy is/are as follows:

 **[list rental]**

 The Parties further agree that payment to Owner of lost rental hereunder is in addition to and does not constitute just compensation, severance damages, or any other damages allowable under Part 3, Title 7 of the Code of Civil Procedure (the Eminent Domain Law). In addition, the Parties agree that payment for lost rental hereunder is made solely for purposes of leaving the tenancy vacant until the date of possession, at which time the leases/rental of such tenancy terminate by operation of law pursuant to Code of Civil Procedure section 1265.140. Owner shall not claim nor be entitled to any additional lost rental under this Agreement or in any eminent domain proceedings.

□ **Indemnification** *(Use this title.)*

 ¶ # - If Owner requests indemnification, INSERT:

 #. State agrees to indemnify, defend, and hold harmless \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ [Owner] from any liability arising out of State’s operations under this Agreement. State further agrees to assume responsibility for any damages proximately caused by reason of State’s operations under this agreement and State will, at its option, either repair or pay for such damage.

* REVIEW AGREEMENT.
* HAVE ALL ISSUES BEEN ADDRESSED?
* IS ALL THE APPROPRIATE INFORMATION FILLED IN?
* ARE ALL PARAGRAPHS SEQUENTIALLY NUMBERED?
* HAVE PAGES FROM THE CHECKLIST BEEN REMOVED FROM THE AGREEMENT?