




Costa Mesa Sanitary District

...an Independent Special District

Memorandum

To: Board of Directors

From: Scott Carroll, General Manager 

Date: April 28, 2016

Subject: **City of Newport Beach Encroachment Agreement for Emergency Generator at 23rd Street Pump Station**

Summary

The Costa Mesa Sanitary District constructed an enclosure for an emergency generator that will provide backup power to the 23rd Street Pump Station during power outages. The City of Newport Beach is requesting an encroachment agreement be signed by the two agencies.

Staff Recommendation

That the Board of Directors approve the Encroachment Agreement.

Analysis

During plan checking for this project, the City requested CMSD to construct a concrete masonry, spilt face enclosure that included a roll up door and a metal grate roof to house the emergency generator. Due to the operational importance of an emergency generator at the 23rd Street Pump Station (prevents sanitary sewer overflows during power outages), the City gave CMSD permission to proceed with construction of the enclosure before an encroachment agreement can be signed.

The enclosure is complete and the generator is currently in route and is expected to arrive any day. The Encroachment Agreement is attached hereto as Attachment A. CMSD could incur costs if the City requires CMSD to relocate the enclosure and generator because of future right-of-way improvements.



Protecting our community's health and the environment by providing solid waste and sewer collection services.

www.cmsdca.gov

It is our understanding that the City may possibly want to install a sidewalk in the right-of-way in the future, so the District installed a city standard sidewalk along the front of the generator enclosure.

Strategic Plan Element & Goal

This item complies with Strategic Plan Element 1.0, *Sewer Infrastructure* and Goal No. 1.4 *System Wide Sewer Replacement and Repair Program*.

Legal Review

District Counsel has reviewed and approved the Encroachment Agreement.

Environmental Review

The installation of a generator for backup power at the 23rd Pump Station is a minor alteration and is categorically exempt under the California Environmental Quality Act (CEQA) (Public Resources Code Section 21000 et. seq.) under Section 15301 as a “Class 1” project as stated under **15301; “Class 1 consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities ...”**; pertaining to **15301(b) “Existing facilities of both investor and publicly-owned utilities used to provide electric power, natural gas, sewerage, or other public utility services”**

Financial Review

There are no financial impact to the District for signing the Encroachment Agreement. The total budget for Project 196-C 23rd Street Pump Station Backup Power is \$340,000, with expenses to date of approximately \$155,000.

Public Notice Process

Copies of this report are on file and will be included with the entire agenda packet for the April 28, 2016 Board of Directors regular meeting at District headquarters and on District’s website.

Alternative Actions

1. Do not sign the Encroachment Agreement.
2. Refer the matter back to staff for more information.

Reviewed by:



Wendy Hooper Davis
Finance Manager

Attachment: Encroachment Agreement



CITY OF NEWPORT BEACH

100 Civic Center Drive
Newport Beach, California 92660
949-644-3311 | 949-644-3308 FAX
newportbeachca.gov

April 7, 2016

Costa Mesa Sanitation District
628 W. 19th Street
Costa Mesa, CA 92627

**SUBJECT: Non-Standard Improvements in Public Right-Of-Way (EPN-2016-0106)
at 23rd Street and Irvine Avenue**

Dear Mr. Bernal,

Your request to construct non-standard improvements in the Public Right-Of-Way at 23rd Street and Irvine Avenue requires execution of an Encroachment Agreement.

The attached Encroachment Agreement has been revised to reflect the changes as discussed and agreed upon by Costa Mesa Sanitary District and City's legal counsel.

Please execute the copy of the revised Non-Standard Encroachment Agreement, attached, using a notary and signing in **BLUE INK**, return packet to my attention for processing.

If you have any questions or need additional information, I can be reached by phone (949) 644-3014.

Sincerely,

Kathryne Cho, PE
Civil Engineer

**RECORDING REQUESTED BY AND
WHEN RECORDED RETURN TO:**

Public Works Department
City of Newport Beach
P.O. Box 1768
Newport Beach, CA 92658-8915

Space above this line for Recorder's use only.

**ENCROACHMENT AGREEMENT
(Encroachment Permit Number N2016-0106)**

THIS ENCROACHMENT AGREEMENT ("Agreement") is made and entered into this 11th day of April, 2016, by and between the Costa Mesa Sanitary District, as a California independent special district formed pursuant to California Health and Safety Code Section 6400 et seq. ("District"), and the City of Newport Beach, a California municipal corporation and charter city, organized and existing under and by virtue of its Charter and the Constitution, and the laws of the State of California ("City").

RECITALS

WHEREAS, City is the vested owner of the public right-of-way known as 23rd Street, generally located at the northwest corner of 23rd Street and Irvine Avenue, Newport Beach, California ("Right-of-Way") and more particularly depicted in Exhibit A;

WHEREAS, District desires to construct certain non-standard improvements as further described herein ("Permitted Improvements") within the "Right-of-Way";

WHEREAS, District has expended approximately \$250,000 to improve the backup electricity for District's generator at what is known as the District's "23rd Street Pump Station" which will serve to protect the public health, safety and welfare of the residents of City and the State of California in protecting against sewer system overflows that might otherwise flow to the waters of the United States, and in particular to the Santa Isabella Channel and then to the Back Bay and Pacific Ocean; and

WHEREAS, said Permitted Improvements are necessary to implement District's Sewer System Management Plan, and in particular, the System Evaluation and Capacity Assurance Plan, required by the State Water Resources Control Board Waste Discharge Order currently in effect;

WHEREAS, said Permitted Improvements may interfere in the future with City's ability to construct, operate, maintain, and replace City and other public facilities and improvements within Right-of-Way; and

WHEREAS, the parties hereto desire to enter into this Agreement providing for fulfillment of the conditions required by City to permit District to construct and maintain said Permitted Improvements.

NOW, THEREFORE, in consideration of the mutual promises, the parties hereto agree as follows:

1. City and District acknowledge that the above Recitals are true and correct and are hereby incorporated by reference into this Agreement.
2. It is mutually agreed that Permitted Improvements shall be defined as the following and depicted on Exhibit A, attached hereto and incorporated herein by reference:
 - a. An 8.17-ft x 3.33-ft x 5.33-ft 60-Hertz emergency generator and appurtenances encroaching up to 7-ft into the Right-of-Way;
 - b. A 16.08-ft x 8-ft x 8.67-ft generator enclosure with foundation constructed of concrete masonry units ("CMU") split face finish encroaching up to 8-ft into the Right-of-Way;
 - c. A 12.33-ft x 7-ft green colored automatic roll up door with mechanism encroaching up to 8-ft into the Right-of-Way;
 - d. A metal grate roof constructed of 6-inch x 12-inch by 1.5-inch grating planks encroaching up to 7.33-ft into Right-of-Way, as approved by the Public Works Department;
 - e. In addition, if any improvements actually built or installed during the time of construction vary from Permitted Improvements approved herein, such variations or changes must be approved in advance by the Public Works Department and shall be shown on the "As Built" plans.
3. City will permit District to construct, reconstruct, install, maintain, use, operate, repair and replace said Permitted Improvements and appurtenances incidental thereto, within a portion of Right-of-Way, if in substantial conformance with the plans and specifications on file in City. City will further allow District to take all reasonable measures necessary or convenient in accomplishing the aforesaid activities.
4. City shall incur no liability whatsoever in the event of the termination of this Agreement or subsequent removal of improvements by City consistent with the terms of this Agreement. In addition to the other rights of the Parties pursuant to this Agreement, rights granted under this Agreement may be terminated by City in any of the below circumstances.
 - a. If the City reasonably determines that relocation of the Permitted Improvements is necessary because of any change in street grade or alignment or any other needed change to City's property, as reasonably determined by City in its sole discretion, the City may terminate this

Agreement. In such event, City may require that District remove and/or relocate the Permitted Improvements at District's sole expense. City shall use reasonable efforts to accommodate relocation of the Permitted Improvements to a different location upon the Right-of-Way if possible and, if not possible, City will assist the District in determining an appropriate area for the relocation of the Permitted Improvements to property other than the Right-of-Way. District agrees to remove and/or relocate the Permitted Improvements promptly, according to the complexity of the operation. City agrees to provide advance notice, commensurate with the knowledge it has that termination, removal, and/or relocation is required.

- b. If City has reasonably determined that District has abandoned the Permitted Improvements, the City may terminate any rights of District under this Agreement.
- c. If a public emergency occurs affecting the health or safety of residents or the environment, District's right to use the Permitted Improvements may be suspended or, if reasonably necessary, terminated by City.

5. District and City further agree as follows:

- a. District may construct and install Permitted Improvements and appurtenances incidental thereto in substantial conformance with the plans and specifications on file in City's Public Works Department, and as described on Exhibit A.
- b. District shall maintain Permitted Improvements in accordance with generally prevailing standards of maintenance and pay all costs and expenses incurred in doing so. However, nothing herein shall be construed to require District to maintain, replace or repair any City-owned pipeline, conduit or cable located in or under said Permitted Improvements, except as otherwise provided herein.
- c. If City or other public facilities or improvements are damaged by the installation or presence of Permitted Improvements, District shall be responsible for the cost of repairs.
- d. Should City be required to enter onto said Right-of-Way to exercise its primary rights associated with said Right-of-Way, including but not limited to, the maintenance, removal, repair, renewal, replacement or enlargement of existing or future public facilities or improvements, City may remove portions of Permitted Improvements, as required, and in such event:
 - (i) City shall notify District in advance of its intention to accomplish such work, provided that an emergency situation does not exist.
 - (ii) District shall be responsible for arranging for any renewal, replacement, or restoration of Permitted Improvements affected by such work by City.

- (iii) City agrees to bear only the cost of any removal of Permitted Improvements affected by such work by City.
 - (iv) District agrees to pay all costs for the renewal, replacement, or restoration of Permitted Improvements.
- 6. In addition to the provisions of Section 4 of this Agreement, in the event either party breaches any material provision of this Agreement, the other party, at its option may, in addition to the other legal remedies available to it, terminate this Agreement and, in the event the breaching party is District, City may enter upon Right-of-Way and remove all or part of the improvements installed by District. Termination because of breach shall be upon a minimum of ten (10) calendar days' notice, with the notice specifying the date of termination. The breaching party shall have 10 days after notice to cure the breach.
- 7. In the event of any dispute or legal action arising under this Agreement, the prevailing party shall not be entitled to attorneys' fees.
- 8. District shall defend, indemnify and hold harmless City, its City Council, boards and commissions, officers and employees from and against any and all loss, damage, liability, claims, suits, costs and expenses whatsoever, including reasonable attorneys' fees (when outside attorneys are so utilized), regardless of the merit or outcome of any such claim or suit arising from or in any manner connected with the design, construction, maintenance, or continued existence of Permitted Improvements.
- 9. District agrees that this Agreement shall remain in full force and effect from execution thereof; shall run with the land; shall be binding upon the heirs, successors, and assigns of District's interest in the land, whether fee or otherwise; and shall be recorded in the Office of the County Recorder of Orange County, California.
- 10. The laws of the State of California shall govern this Agreement and all matters relating to it and any action brought relating to this Agreement shall be adjudicated in a court of competent jurisdiction in the County of Orange, California.
- 11. The terms of this Agreement shall be construed in accordance with the meaning of the language used and shall not be construed for or against either party by reason of the authorship of the Agreement or any other rule of construction which might otherwise apply.
- 12. This Agreement represents the full and complete understanding of every kind or nature whatsoever between the parties hereto, and all preliminary negotiations and agreements of whatsoever kind or nature are merged herein. No verbal agreement or implied covenant shall be held to vary the provisions herein.
- 13. A waiver by either party of any breach, of any term, covenant or condition contained herein shall not be deemed to be a waiver of any subsequent breach of the same or

any other term, covenant or condition contained herein, whether of the same or a different character.

14. District shall, at District's own cost and expense, comply with all statutes, ordinances, regulations and requirements of all governmental entities, including federal, state, county or municipal, whether now in force or hereinafter enacted.
15. If any term or portion of this Agreement is held to be invalid, illegal, or otherwise unenforceable by a court of competent jurisdiction, the remaining provisions of this Agreement shall continue in full force and effect.

[SIGNATURES ON NEXT PAGE]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed on the dates written below.

**APPROVED AS TO FORM:
CITY ATTORNEY'S OFFICE**

Date: 4/7/16

By: 
Aaron C. Harp
City Attorney

CITY OF NEWPORT BEACH,
a California municipal corporation

Date: _____

By: _____
Dave Kiff
City Manager

ATTEST:

Date: _____

**DISTRICT(S): Costa Mesa Sanitary
District, as a California independent
special district formed pursuant to
California Health and Safety Code
Section 6400 et seq.**

Date: _____

By: _____
Leilani I. Brown
City Clerk

By: _____
Michael Scheafer
President

Date: _____

By: _____
Robert Ooten
Secretary

[END OF SIGNATURES]

District must sign in the presence of notary public

**ATTACHMENTS: Exhibit A — Permitted Improvements Plan as Approved by
Public Works**

ACKNOWLEDGMENT

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California

County of _____ } ss.

On _____, 20____ before me, _____, Notary Public, personally appeared _____, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signatures(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature

(seal)

ACKNOWLEDGMENT

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California

County of _____ } ss.

On _____, 20____ before me, _____, Notary Public, personally appeared _____, proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signatures(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

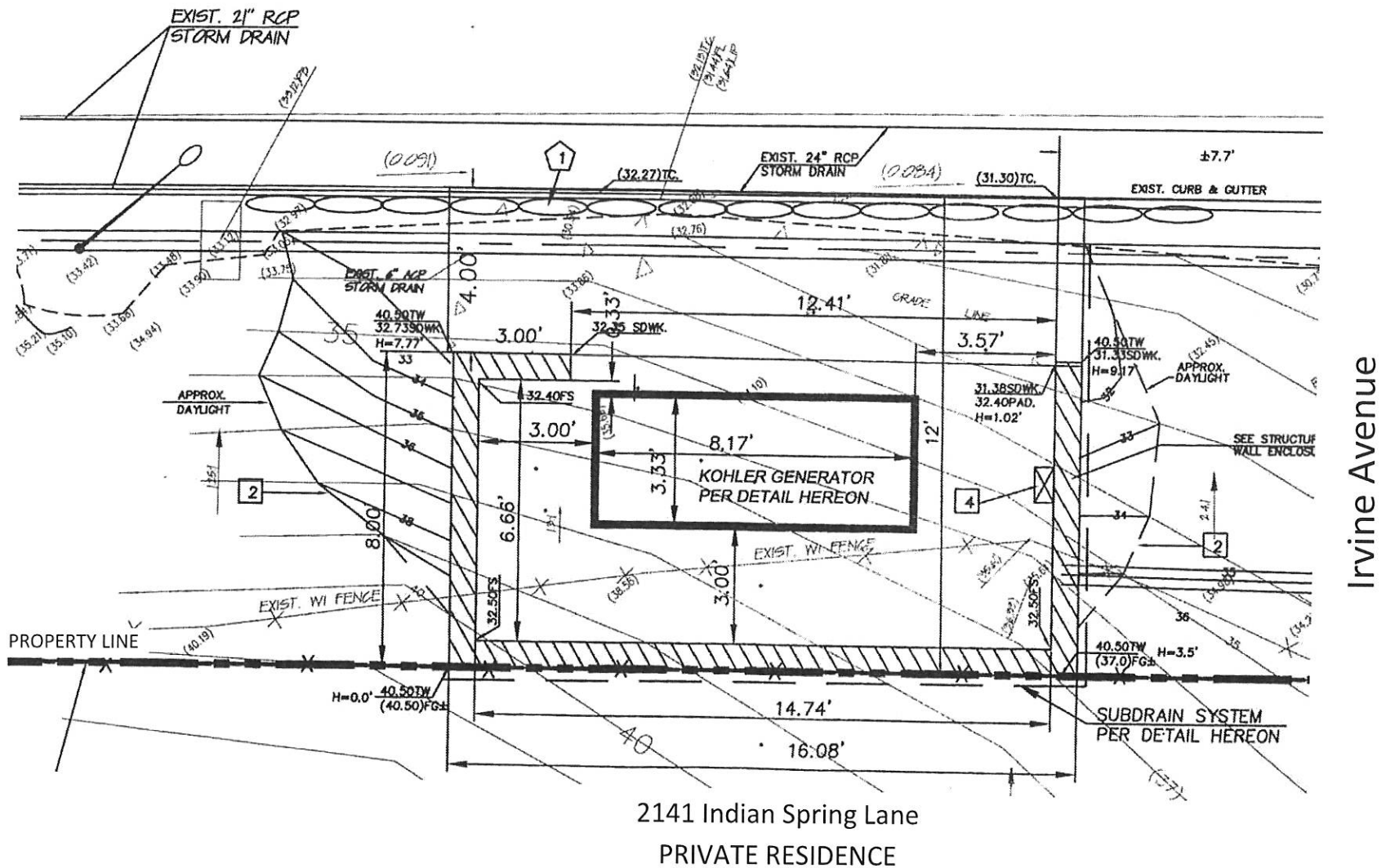
WITNESS my hand and official seal.

Signature

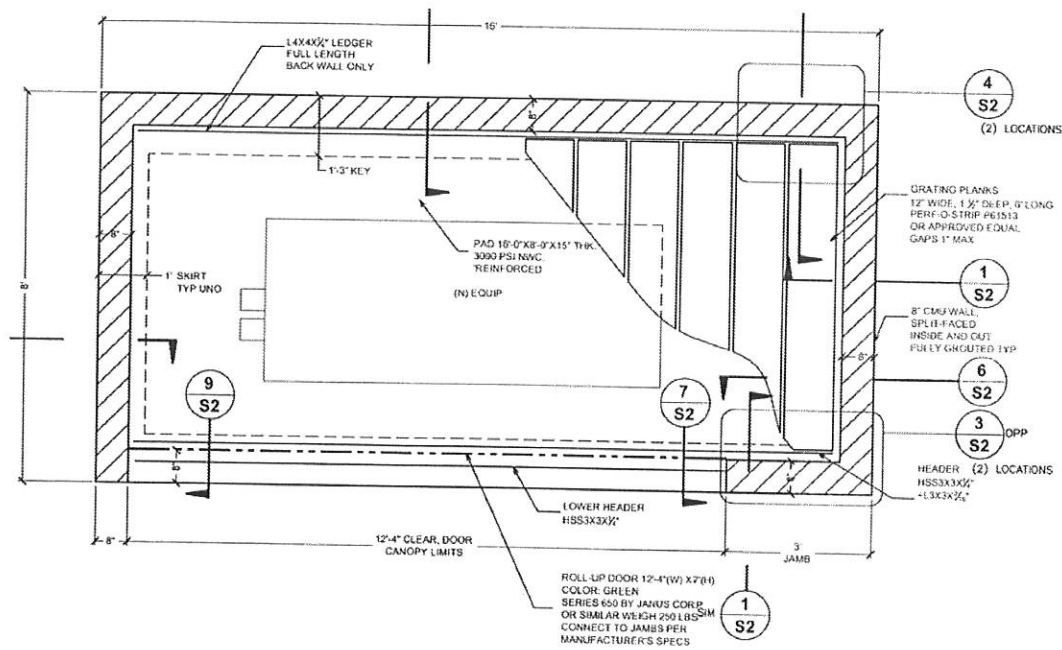
(seal)

EXHIBIT A
PERMITTED IMPROVEMENTS PLAN

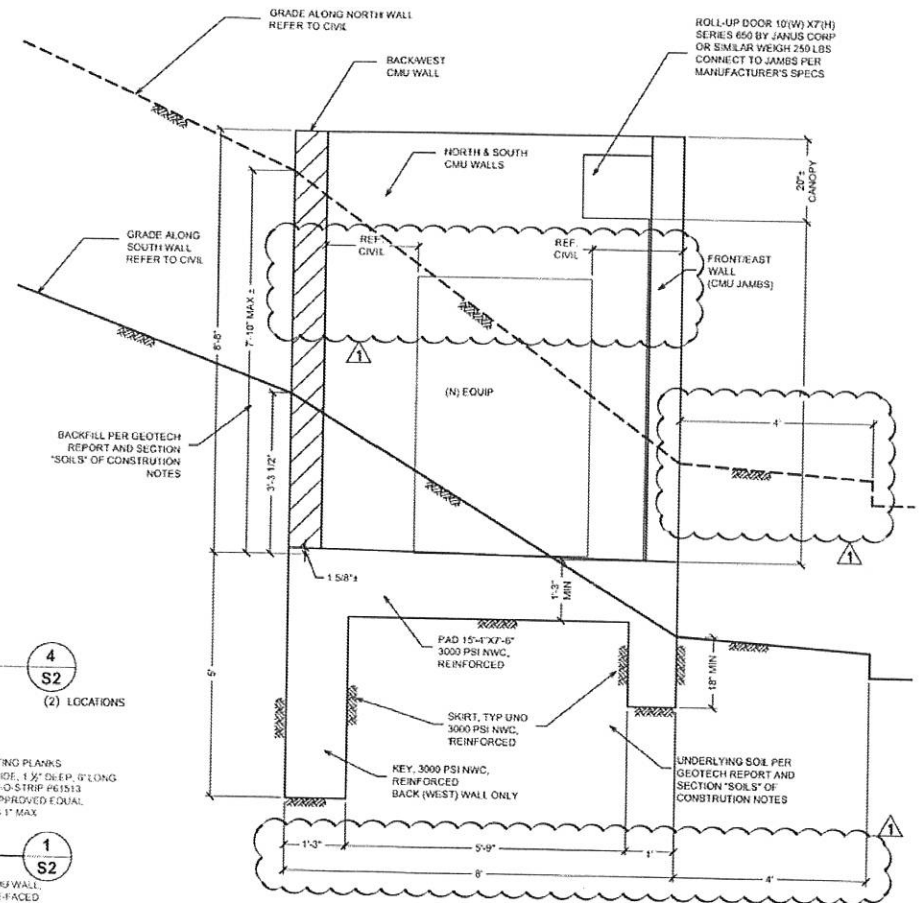
PROJECT SITE PLAN



PLAN VIEW



Owner: Costa Mesa Sanitary District
Address: 23rd Street near Irvine Avenue



PROFILE VIEW