

RECORDED WITHOUT FEE UNDER  
SECTION 6103 GOVERNMENT CODE  
OF THE STATE OF CALIFORNIA

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

City of San José  
Department of Parks, Recreation and  
Neighborhood Services  
Community Facilities Development Division  
200 East Santa Clara St., 9th Floor Tower  
San José, CA 95113-1905

Final Tract Map, Tract No. 9753

**FIRST AMENDMENT TO PARKLAND AGREEMENT  
FOR  
TENTATIVE MAP NO. PT05-036  
BETWEEN CITY OF SAN JOSE AND TAYLOR MORRISON OF CALIFORNIA, LLC  
(Chapter 19.38 of SJMC)**

THIS FIRST AMENDMENT TO PARKLAND AGREEMENT is made and entered into by and between the CITY OF SAN JOSE, a municipal corporation of the State of California (“City”) and Taylor Morrison of California, LLC, a California limited liability company, as successor-in-interest to Taylor Woodrow Homes, Inc., a California corporation (“Developer”) on the date of execution by City.

**RECITALS**

A. **Whereas**, on January 20, 2006, City and Developer entered into an agreement entitled “Parkland Agreement For Tentative Map No. PT05-036 between City of San José and Taylor Woodrow Homes, Inc. (Chapter 19.38 of SJMC)” (“Agreement”) under which Developer agreed to satisfy its Parkland Dedication Obligation relating to Tentative Map No. PT05-036, Final Tract Map No. 9753 by constructing and dedicating a 1.30 neighborhood park (“Luna Park”), which Agreement was recorded in the Office of the Santa Clara County Recorder on January 23, 2006 as document number 18778291.

B. **Whereas**, effective January 1, 2008, Taylor Woodrow Homes, Inc., a California corporation was merged into Taylor Morrison Services, Inc., a Delaware corporation, who

assigned all rights, interests and obligations under the Agreement to Developer, and Developer is the assignee under the Agreement.

C. **Whereas**, as part of the development of the residential units under PT05-036 and construction of Luna Park, City approved and Developer constructed a four to six foot wide vegetated swale along two sides of Luna Park and a third vegetative swale along Berryessa Road (collectively “vegetative swales”) to meet its requirements under City’s revised National Pollutant Discharge Elimination System Permit from the Regional Water Quality Control Board.

D. **Whereas**, as a condition of the approval of the construction of the vegetated swales located within Luna Park, Developer was required to ensure the long-term maintenance, repair, and replacement of the vegetated swales.

E. **Whereas**, City and Developer desire to enter into this First Amendment to the Agreement to implement the condition set forth in the approval of the construction of the vegetated swales that final acceptance of Luna Park is contingent upon the execution of an easement and/or maintenance agreement approved by City to ensure the long-term maintenance, repair, and replacement of the vegetative swales.

F. **Whereas**, in order to satisfy the condition that Developer ensure long-term maintenance of the vegetative swales, simultaneously with the execution of this Agreement, City will enter into an “Agreement for Right-of-Entry and Maintenance of the Vegetative Swales Located in Luna Park” with the Modern Ice Owners Association, a California nonprofit mutual benefit corporation, for the long-term maintenance, repair, and replacement of the vegetative swales, as attached hereto as **Exhibit D**.

In view of the above, the parties agree as follows:

**SECTION 1.** PARAGRAPH C of SECTION 2, “OFFER OF DEDICATION; DESIGN AND DEVELOPMENT OF PARK IMPROVEMENTS” is amended to read in its entirety as follows:

“C. The parties acknowledge that the Park Improvements shall consist of the following types of improvements: an open air picnic area, a shade cover picnic area, play equipment for tots, play equipment for youths, resilient surfacing in the play area, a four to six foot vegetated swale along the perimeter of the park to provide storm water runoff drainage for the Development (“vegetative swale”), a pedestrian footbridge over the vegetative swale concrete walkways and plaza area, perimeter fencing, irrigated turf and perimeter landscaping as depicted in **Exhibit A**. The parties further agree that Developer shall receive parkland credits for a portion of the Park Improvements in accordance with the Developer’s Parkland Dedication Obligation, and that Developer shall pay for and construct the remaining portion of the Park Improvements that are in excess of Developer’s Parkland Dedication Obligation, in order to enhance the Development as further described in **Exhibit C**.

1. Final acceptance of the Park Improvements and Park Site is contingent upon the execution of an easement and/or maintenance agreement to ensure the long-term maintenance, repair, and replacement of the vegetative swales in a substantial form similar to the right-of-entry and maintenance agreement attached hereto as **Exhibit D**.

**SECTION 2.** All of the terms and conditions of the AGREEMENT not modified by this First Amendment shall remain in full force and effect.

[INTENTIONALLY LEFT BLANK]

WITNESS THE EXECUTION HEREOF the day and year hereinafter written.

APPROVED AS TO FORM:

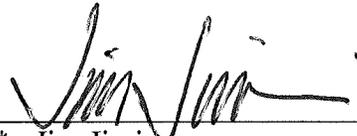
CITY OF SAN JOSE, a municipal corporation

  
\_\_\_\_\_  
JOHNNY V. RHAN  
Deputy City Attorney

By: \_\_\_\_\_  
LEE PRICE, MMC  
City Clerk  
Date: \_\_\_\_\_

"DEVELOPER"

Taylor Morrison of California, LLC, a California limited liability company

  
By: \_\_\_\_\_  
Name\*: Jim Jimison  
Title\*: Vice President  
Taylor Morrison of California, LLC  
5000 Executive Parkway, Suite 175  
San Ramon, CA 94583

\*Proof of authorization for Developer's signatures is required to be submitted concurrently with this Agreement.

\*All Developer's signatures must be accompanied by an attached notary public acknowledgment.

**CALIFORNIA ALL-PURPOSE ACKNOWLEDGEMENT**

File No: ( )

APN No:

STATE OF California )SS  
COUNTY OF Alameda )

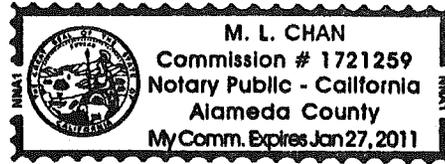
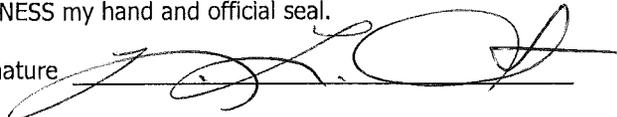
On November 11, 2008 before me, M. L. Chan, Notary Public, personally appeared Jim Jimison

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 signature(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



This area for official notarial seal.

**OPTIONAL SECTION  
CAPACITY CLAIMED BY SIGNER**

Though statute does not require the Notary to fill in the data below, doing so may prove invaluable to persons relying on the documents.

- INDIVIDUAL
- CORPORATE OFFICER(S) TITLE(S)
- PARTNER(S)       LIMITED       GENERAL
- ATTORNEY-IN-FACT
- TRUSTEE(S)
- GUARDIAN/CONSERVATOR
- OTHER

SIGNER IS REPRESENTING:

\_\_\_\_\_  
Name of Person or Entity

\_\_\_\_\_  
Name of Person or Entity

**OPTIONAL SECTION**

Though the data requested here is not required by law, it could prevent fraudulent reattachment of this form.

**THIS CERTIFICATE MUST BE ATTACHED TO THE DOCUMENT DESCRIBED BELOW**

TITLE OR TYPE OF DOCUMENT: \_\_\_\_\_

NUMBER OF PAGES \_\_\_\_\_ DATE OF DOCUMENT \_\_\_\_\_

SIGNER(S) OTHER THAN NAMED ABOVE \_\_\_\_\_

Reproduced by First American Title Company 11/2007

**CERTIFICATE OF INCUMBENCY AND AUTHORITY  
TAYLOR MORRISON OF CALIFORNIA, LLC**

I, the undersigned, hereby certify as follows:

1. I am the Assistant Secretary of Taylor Morrison of California, LLC, a California limited liability company (the "Company").
2. The Company is duly organized, existing and in good standing under the laws of the State of California.
3. In conformity with the provisions of the Company's Articles of Organization and Operating Agreement, the following resolutions were passed on January 1, 2008 and such resolutions remain in full force and effect and have not been amended, modified, revoked or rescinded:

**RESOLVED**, that the following named persons are hereby elected and confirmed to the office indicated opposite their name and shall hold such office until their earlier death, resignation or removal:

K. Dar Ahrens	Vice President
Jim Jimison	Vice President

**RESOLVED FURTHER**, that the officers named above, in their respective capacities as officers of the Company, acting alone or jointly, be, and they hereby are, authorized and directed to execute all documents and to take such action as they may deem necessary or advisable in order to carry out and perform the purposes of the Company and these resolutions.

4. It is within the scope of authority of the officers listed above to execute documentation on behalf of the Company, including without limitation, documents to convey real and personal property.

IN WITNESS WHEREOF, I hereunto subscribe my name on September 26, 2008.

  
\_\_\_\_\_  
Donald D. Steffensen, Jr.  
Assistant Secretary

**EXHIBIT D**  
**AGREEMENT**  
**BETWEEN**  
**THE CITY OF SAN JOSE**  
**AND**  
**MODERN ICE OWNERS ASSOCIATION**  
**AUTHORIZING RIGHT-OF-ENTRY AND MAINTENANCE**  
**OF THE VEGETATIVE SWALES LOCATED IN LUNA PARK**

RD:JVP  
9/11/08  
RECORDED WITHOUT FEE UNDER  
SECTION 6103 GOVERNMENT CODE OF  
THE STATE OF CALIFORNIA

**RECORDING REQUESTED BY:  
AND WHEN RECORDED MAIL TO:  
AND MAIL TAX STATEMENT TO:**  
City of San José – Public Works - Real Estate  
200 E. Santa Clara Street, 5th Floor  
San José, CA 95113-1905

Deed #  
File/Doc. No:  
APN: - - ("portion of ")

Space above this line for Recorder's use

The Undersigned Grantee(s) Declare(s): DOCUMENTARY TRANSFER TAX \$0; CITY TRANSFER TAX \$0; Recorded for the benefit of the City of San José and is exempt from fee per Government Code Sections 27383 and 6103.

- computed on the consideration or full value of property conveyed, OR  
 computed on the consideration or full value less value of liens and/or encumbrances remaining at time of sale,  
 unincorporated area;  City of San José, and  
 \_\_\_\_\_  
Signature of Declarant

**AGREEMENT  
BETWEEN  
THE CITY OF SAN JOSE  
AND  
MODERN ICE OWNERS ASSOCIATION  
AUTHORIZING RIGHT-OF-ENTRY AND MAINTENANCE  
OF VEGETATIVE SWALES LOCATED IN LUNA PARK**

This Agreement for Right-of-Entry and Maintenance of Vegetative Swales Located in Luna Park ("Agreement") is entered into this \_\_\_\_ day of \_\_\_\_\_, 2008 ("Effective Date"), by the CITY OF SAN JOSE, a municipal corporation of the State of California (hereinafter "City"), and MODERN ICE OWNERS ASSOCIATION, a California nonprofit mutual benefit corporation (hereinafter "Association"). Each of City and Association are sometimes hereinafter referred to as a "Party" and collectively as the "Parties."

**RECITALS**

**WHEREAS**, Taylor Morrison of California, LLC, a California limited liability company, as the successor-in-interest to Taylor Woodrow Homes, Inc., a California corporation (hereinafter "Taylor Morrison"), is the owner and developer of the Modern Ice condominium development located on certain real property on Berryessa Road, approximately 500 feet northeasterly of Old Oakland Road in

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the City of San José, County of Santa Clara, State of California (hereinafter the "Project"), as more particularly described in Exhibit A; and

**WHEREAS**, Taylor Morrison is also the predecessor-in-interest to the Association; and

**WHEREAS**, under the provisions of Chapter 19.38 of the San Jose Municipal Code ("Parkland Dedication Ordinance"), developers of residential subdivisions are required to dedicate property for neighborhood and community parks, construct park improvements and/or pay in-lieu fees ("Parkland Dedication Obligation"); and

**WHEREAS**, in order for Taylor Morrison to satisfy its Parkland Dedication Obligation for the Project, Taylor Morrison entered into a parkland agreement with City on January 20, 2006 entitled "Parkland Agreement for Tentative Map No. PT 05-036 Between City of San José and Taylor Woodrow Homes, Inc." to construct park improvements and dedicate to City approximately 1.30 acres of real property adjacent to the Project for a public park, commonly referred to as "Luna Park" (hereinafter "Parkland Agreement"), as more particularly described in Exhibit B attached hereto; and

**WHEREAS**, as part of the development and construction of the Project, City authorized Taylor Morrison to install a four to six foot drain field within Luna Park for off-site drainage and runoff from the Project (otherwise known as a "Vegetative Swales") to meet its requirements under City's revised National Pollutant Discharge Elimination System Permit from the Regional Water Quality Control Board with the condition that Taylor Morrison, as the developer of the Project, develop a long-term plan approved by City to ensure the maintenance, repair, and replacement of the Vegetative Swales, which are more particularly described in Exhibit C attached hereto; and

**WHEREAS**, City and Association desire to enter into this Agreement whereby upon City's acceptance of Luna Park pursuant to the Parkland Agreement, Association shall be responsible for the maintenance, repair, and replacement of the Vegetative Swales as set forth in this Agreement and such obligations hereunder shall be recorded against the Project; and

**WHEREAS**, City's Director of Parks, Recreation and Neighborhood Services ("PRNS Director", including the PRNS Director's designees) is charged with the administration of this Agreement;

**NOW, THEREFORE**, in consideration of the foregoing recitals and the mutual covenants contained in this Agreement and of other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

#### **SECTION 1. AGREEMENT DOCUMENTS.**

The documents forming this entire Agreement between City and Association shall consist of this Agreement including the following:

- |           |                                |
|-----------|--------------------------------|
| Exhibit A | Legal Description of Project   |
| Exhibit B | Legal Description of Luna Park |

Exhibit C	Conceptual Plan and Legal Description of Vegetative Swales
Exhibit D	Maintenance Services
Exhibit E	Labor Compliance Addendum
Exhibit F	Insurance Requirements
Exhibit G	Integrated Pest Management Policy

In the event there are any discrepancies or inconsistencies between the provisions of this Agreement and any of the above-referenced documents the provisions of this Agreement will prevail.

This Agreement and the Exhibits set forth above contain all of the agreements, representations and understandings of the Parties and supersede and replace any previous understandings, commitments, or agreements, whether oral or written.

**SECTION 2. TERM OF AGREEMENT.**

Subject to the provisions of this Section 2 and Sections 19 and 20 below, this Agreement shall be effective on the date that City accepts the dedication of Luna Park pursuant to Section 2 of the Parkland Agreement and Section F and G of Exhibit B of the Parkland Agreement and shall remain in effect until the date that the Vegetative Swales cease to function or operate as a drain field for the off-site drainage runoff from the Project and Association take all required steps under this Agreement to fill-in the Vegetative Swales to at grade level and to design, construct, and maintain an alternative runoff systems (collectively the "Maintenance Term"). In the event that the Vegetative Swales cease to function or operate as a drain field for the off-site drainage runoff from the Project, Association, at its sole cost and expense, shall be obligated to design, engineer, construct and maintain a new vegetative swales runoff system or other landscape based similar runoff solution to meet Association's requirements under City's revised National Pollutant Discharge Elimination System Permit from the Regional Water Quality Control Board and/or other applicable local, state or federal requirements.

**SECTION 3. RIGHT-OF-ENTRY.**

Association, and its agents, employees, representatives, and contractors shall have a non-exclusive right to enter into, over, across, upon, and under Lot 22 as described in Exhibit B attached hereto that is necessary for access, ingress, egress, and all activities related to the maintenance, repair and replacement of the Vegetative Swales during the Maintenance Term under this Agreement as set forth in Section 4 and Exhibit D of this Agreement.

**SECTION 4. DESCRIPTION AND SCHEDULE OF MAINTENANCE SERVICES.**

A. Association shall, at Association's sole cost and expense, fully and timely perform and satisfy any and all terms, conditions, and obligations of this Agreement. Association shall, at Association's sole cost and expense, provide labor, supervision, supplies, materials, equipment,

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and any and all other tools and manpower necessary to maintain, repair, and replace the Vegetative Swales in accordance with this Agreement.

- B. Association shall be fully responsible for all maintenance, repair, replacement, and operation of the Vegetative Swales. Association shall provide the following general maintenance, repair, and replacement of the Vegetative Swales: (1) regular inspections of the Vegetative Swales, irrigation system in and around the Vegetative Swales, and all components connected thereto to ensure clean, safe, attractive and functional condition according to those standards set forth in this Agreement; (2) removal of all trash and debris in and around Vegetative Swales; (3) mowing the fescue grasses; (4) cleaning all drain inlets and outlets of surface silt; (5) cleaning of any subsurface pipes leading to and from the Vegetative Swales to the public drain system; (6) replacement of fescue grasses in areas where dead patches exist; (7) topographical or grading repairs such as low pots, divots, or compaction; (8) replacement of all filter fabric; and (9) any and all necessary maintenance and repairs, subject to **Exhibit D** of this Agreement, to maintain the life of the Vegetative Swales as required by PRNS Director. The maintenance, repairs, and replacement described in this Section 3B and **Exhibit D** of this Agreement are collectively referred to as the "Maintenance Services".
- C. Association's Maintenance Services must be completed according to the specifications set out in **Exhibit D** of this Agreement. The frequency of the performance of the Maintenance Services shall be as set forth in **Exhibit D** and as otherwise expressly provided for in this Agreement. The frequency of Maintenance Services not otherwise specified in this Agreement shall be determined by the Association so long as the performance standards set forth in this Agreement are satisfied.
- D. Association shall not store any equipment, materials, or supplies in, on, or upon Luna Park, unless Association has received written consent from City.
- E. Association agrees and acknowledges that Luna Park will be a public park, open to the public during the hours set by City and that nothing herein gives Association the right to restrict or to exclude any person or entity from Luna Park. If Association believes that any area of Luna Park needs to be restricted or closed for public safety purposes to perform the Maintenance Services described herein, Association shall obtain City's prior written approval of any restriction on access and also obtain City's prior written approval of the method of providing notice to the public.
- F. Association and City shall meet on a quarterly basis at Luna Park to inspect the Vegetative Swales and review the Maintenance Services provided herein by Association.

## **SECTION 5. INDEPENDENT CONTRACTOR.**

Association, in the performance of this Agreement, is an independent contractor. Association shall maintain complete control over all of its employees, agents, subcontractors, and representatives in the performance of this Agreement. Neither Association nor any person retained by Association may represent, act, or purport to act as the agent, representative, or employee of City. Neither Association nor City is granted any right or authority to assume or create any obligation on behalf of the other.

**SECTION 6. COMPLIANCE WITH LAWS.**

- A. Association shall comply with all applicable laws, ordinances, codes and regulations (collectively "laws") of the federal, state and local governments, including without limitation, any and all laws specified elsewhere in this Agreement.
- B. Without limiting the generality of the foregoing provision, all persons retained by Association to perform Maintenance Services required under this Agreement shall possess the requisite licenses and necessary permits to perform such Maintenance Services.

**SECTION 7. PREVAILING WAGE.**

Association, and its agents, contractors, subcontractors, or any other person or entity performing any Maintenance Services on behalf of Association under this Agreement, shall pay those persons or entity performing work related to this Agreement those specified Prevailing Wage rates as set forth in Exhibit E (Wage Policy) and shall meet the documentation and reporting requirements set forth therein.

**SECTION 8. PERSONNEL/IDENTIFICATION.**

- A. Any and all personnel employed or retained by Association in performance of this Agreement shall be qualified to perform the duties assigned to them by Association and shall be of good moral character. Association's personnel employed or retained to perform any portion of the Maintenance Services shall conduct themselves at all times in a courteous and businesslike manner.
- B. Association represents and warrants to City that any personnel retained by Association to perform Maintenance Services shall not have any criminal record for offenses related to the possession or use of controlled substances, sex offenses or any criminal offense involving violence.
- C. All personnel who perform Maintenance Services will wear clothing or a nametag, which bears the Association's name, or if an approved subcontractor, the clothing shall bear the name of the subcontractor or company performing Maintenance Services. The clothing worn by any personnel performing any Maintenance Services shall be appropriate for the work assigned and shall give a neat and professional appearance. All vehicles of workers performing Maintenance Services shall (1) have appropriate identification as approved by the PRNS Director; (2) not be allowed on Luna Park without the appropriate parking permit displayed on the dashboard; and (3) travel and park only in designated and approved sidewalk and path of travel as approved by the PRNS Director. In no event shall any vehicles be driven or parked in any turf areas, landscaping, soft surfaces located within Luna Park.

**SECTION 9. NONDISCRIMINATION.**

Association shall not discriminate, in any way, against any person on the basis of race, sex, color, age, religion, sexual orientation, actual or perceived gender identity, disability, ethnicity, or national origin in connection with or related to the performance of this Agreement.

**SECTION 10. GIFTS.**

- A. Association acknowledges that Chapter 12.08 of the San José Municipal Code prohibits City's officers and designated employees from accepting gifts as defined in Chapter 12.08.
- B. Association agrees not to offer any City officer or designated employee any gift prohibited by Chapter 12.08.
- C. Association's offer or giving of any gift prohibited by Chapter 12.08 will constitute a material breach of this Agreement. In addition to any other remedies City may have in law or equity, City may terminate this Agreement for such breach as provided in Section 20 of this Agreement.

**SECTION 11. DISQUALIFICATION OF FORMER EMPLOYEES.**

Association is familiar with Chapter 12.10 of the San José Municipal Code ("Revolving Door Ordinance") relating to the disqualification of City's former officers and employees in matters which are connected with their former duties or official responsibilities. Association shall not utilize either directly or indirectly any officer, employee, or agent of Association to perform Maintenance Services under this Agreement, if in the performance of such Maintenance Services, the officer, employee, or agent would be in violation of the Revolving Door Ordinance.

**SECTION 12. TAXES AND CHARGES.**

Association shall be responsible for payment of all taxes, fees, contributions, or charges applicable to the conduct of Association's business.

**SECTION 13. CONFIDENTIAL INFORMATION.**

All City data, documents, discussions or other information developed or received by or for Association in performance of this Agreement are confidential and must not be disclosed to any person except as authorized by City, or as required by law.

**SECTION 14. OWNERSHIP OF MATERIALS.**

All reports, documents or other materials developed or discovered by Association or any other person engaged directly or indirectly by Association to perform Maintenance Services are City's property without restriction or limitation upon their use by City.

**SECTION 15. ASSIGNABILITY.**

Association may not assign any rights, duties, or obligations under this Agreement without the prior written consent of City, provided, however, that the City acknowledges and agrees that the Association does not presently have any employees, and thus, is authorized to hire appropriately qualified contractors and/or subcontractors to perform the Maintenance Services under this Agreement. Otherwise, any attempt by Association to assign or transfer this Agreement, in violation of this Section 15 will be voidable at City's sole discretion.

**SECTION 16. ALTERATIONS.**

Association may not make any improvements, alterations, additions, or changes to the Vegetative Swales ("Alterations") other than normal maintenance and repairs as described in **Exhibit D** and in furtherance of providing agreed upon Maintenance Services, without obtaining City's prior written consent upon such terms as City in its discretion may deem appropriate. Alterations, which involve structural changes to the Vegetative Swales, may be required to be approved in advance by City Council. Alterations which are non-structural changes to the Vegetative Swales may be approved by PRNS Director and shall not be unreasonably or arbitrarily withheld.

**SECTION 17. INDEMNIFICATION.**

- A. Association shall protect, defend, indemnify and hold harmless City, its officers, employees and agents against any claim, loss or liability arising out of or resulting in any way from work performed under this Agreement due to the willful or negligent acts (active or passive) or omissions by Association's officers, employees, agents, subcontractors or any person or entity acting on behalf of Association. The acceptance of Maintenance Services hereunder by City shall not operate as a waiver of such right of indemnification.
- B. The provisions of this Section 17 shall survive expiration or sooner termination of this Agreement.

**SECTION 18. INSURANCE REQUIREMENTS.**

Association agrees that Association or its subcontractor shall have and maintain the policies set forth in the attached **Exhibit F**, entitled "Insurance Requirements." All policies, endorsements, certificates, and/or binders shall be subject to approval by the Director of Human Resources or the Director's authorized designee ("Risk Manager") of the City as to form and content. These requirements are subject to amendment or waiver if so approved in writing by the Risk Manager. Association agrees to provide City with a copy of said policies, certificates and/or endorsements before any work commences under this Agreement.

**SECTION 19. TERMINATION.**

- A. City, at its sole discretion, may immediately terminate this Agreement, without cause, with written notice of termination to Association.
- B. City's PRNS Director is authorized to terminate this Agreement on City's behalf under this Section 19 or Section 20 below.
- C. In the event of termination, Association shall immediately deliver to City copies of all reports, documents, and other work performed by or on behalf of the Association under this Agreement.

**SECTION 20. DEFAULT AND TERMINATION.**

- A. Each of Association's obligations under this Agreement shall be deemed material. If Association fails to perform any of its obligations under this Agreement, City may terminate this Agreement upon thirty (30) days advance written notice ("Notice Period") to Association,

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specifying Association's breach and providing Association with either the opportunity to cure the specified breach or the opportunity to commence to cure the specified breach within the Notice Period in those instances where the specified breach cannot reasonably be cured within the Notice Period. In the event Association fails to cure or to commence to cure the specified breach within the Notice Period, City may terminate this Agreement.

B. The remedies under this Agreement are cumulative and are in addition to the rights available to the Parties at law or in equity.

**SECTION 21. WAIVER.**

Association acknowledges and agrees that City's waiver of any breach or violation of any provision of this Agreement shall not be deemed to be a waiver of any other provision or a waiver of any subsequent breach or violation of the same or any other provision. City's acceptance of the performance of any of the Maintenance Services hereunder will not be a waiver of any provision of this Agreement.

**SECTION 22. GOVERNING LAW.**

This Agreement shall be construed and its performance enforced under California law.

**SECTION 23. VENUE.**

In the event that suit is brought by either Party to this Agreement, the Parties agree that venue must be exclusively vested in the state courts of the County of Santa Clara, or if federal jurisdiction is appropriate, exclusively in the United States District Court, Northern District of California, San José, California.

**SECTION 24. NOTICES.**

All notices and other communications required or permitted to be given under this Agreement must be in writing and must be personally served, or mailed, postage prepaid via U.S. mail, or sent via courier service, or by facsimile, addressed to the respective Parties as follows:

To City:

Department of Parks, Recreation and Neighborhood Services  
200 East Santa Clara Street  
San Jose, CA 95113  
Attn: Parks Manager, Downtown Region  
Phone: (408) 277-2734  
Fax: (408) 292-6416

To Association:

Board of Directors  
Modern Ice Owners Association  
c/o Darren Merritt, or successor  
317 Lennon Lane, Suite 200  
Walnut Creek, CA 94598  
Phone: (925) 937-4378

Notice will be effective on the date personally delivered or sent via facsimile with confirmation, or if sent by courier service, on the date of receipt. If mailed, notice will be effective three (3) days after deposit in the mail. The Parties shall notify each other in writing of changes in either their respective addresses or their representatives subject to notification in accordance with the provisions of this section.

**SECTION 25. COMMUNICATION WITH PARK STAFF AND PARK CONCERNS.**

PRNS staff shall be notified immediately in the event that an incident relating to the Vegetative Swales (i) requiring the filing of a police report, (ii) resulting in the Vegetative Swales or related improvements being in an unsafe condition, (iii) otherwise materially affecting the operation of the Vegetative Swales or Luna Park, or (iv) non-life threatening emergency should occur on the in or around the Vegetative Swales (collectively "Park Incidents"). Communication described in this Section 25 shall be in addition to notices described in Section 24 above. Association shall provide communication as follows:

Life threatening emergencies, or crimes in progress.	Contact emergency services: 911
Park Incidents or non-life threatening Vegetative Swales emergencies occurring on weekdays between the hours of 7a.m. and 3 p.m.	Contact Park Maintenance District 5 Supervisor: Office (408) 975-7203 Cell (408) 666-5624
Park Incidents or non-life threatening Park emergencies occurring on weekdays between the hours of 3 p.m. and 7a.m., on weekends, or on City holidays.	Contact Parks Standby Duty Supervisor: Pager (408) 231-0372 Cell (408) 464-7041
Public's comments, concerns	Refer public to 24 Hour Park Concerns Line: (408) 793-5510

**SECTION 26. FORCE MAJEURE.**

A. "Force Majeure Event" shall be defined as any matter or condition beyond the reasonable control of a Party, including war, public emergency or calamity, fire, earthquake, extraordinary inclement weather, Acts of God, strikes, labor disturbances or actions, civil disturbances or

riots, litigation brought by third parties against either City or Association or both, or any governmental order or law which causes an interruption in the performance of this Agreement or prevents timely delivery of materials or supplies.

- B. Should a Force Majeure Event prevent performance of this Agreement, in whole or in part, the Party affected by the Force Majeure Event shall be excused or performance under this Agreement shall be suspended to the extent commensurate with the Force Majeure Event; provided that the Party availing itself of this Section 26 shall notify the other Party within ten (10) days of the affected Party's knowledge of the commencement of the Force Majeure Event; and provided further that the time of suspension or excuse shall not extend beyond that reasonably necessitated by the Force Majeure Event.
- C. Notwithstanding the foregoing, the following shall not excuse or suspend performance under this Agreement:
1. Performance under this Agreement shall not be suspended or excused for a Force Majeure Event if such event is not defined as a Force Majeure Event.
  2. Negligence or failure of Association to perform its obligations under this Agreement shall not constitute a Force Majeure Event.
  3. The inability of Association for any reason to have access to funds necessary to carry out its obligations under this Agreement or the termination of any contract by any subcontractor or for Association's default under such contract shall not constitute a Force Majeure Event.

**SECTION 27: BOOKS AND RECORDS.**

- A. Association shall be solely responsible to implement internal controls and record keeping procedures in order to comply with this Agreement and all applicable laws. Association or its subcontractor shall maintain any and all ledgers, books of account, invoices, vouchers, cancelled checks, inspection reports, maintenance schedule, repair or replacement records, and other records or documents evidencing or relating to the activities performed by or on behalf of Association under this Agreement, including, without limitation, those relating to the inspection, maintenance, repairs, and replacement of the Vegetative Swales. At a minimum, records shall be maintained for a period of three (3) years, or for any longer period required by law, whichever is longer. Notwithstanding the previous sentence, Association or its subcontractor shall retain such records beyond three (3) years so long as any litigation, audit, dispute, or claim is pending. At a minimum, such records and documents retained under this Section 27 shall contain the following information: (1) type of activity performed, (2) time and date of activity, (3) planned frequency of activity, (4) observations during inspection or maintenance, and (5) any maintenance, repairs, or replacement required or performed.
- B. Any records or documents required to be maintained pursuant to this Agreement shall be made available for inspection or audit at no cost to City, at any time during regular business hours, upon written request by the City Attorney, the City Auditor, the City Manager, or a designated representative of any of these officers. Copies of such documents shall be provided to City for inspection at City Hall when it is practical to do so. Otherwise, unless an alternative is

RD:JVP  
9/11/08

mutually agreed upon, the records shall be available at Association's address indicated for receipt of notices in this Agreement.

- C. Where City has reason to believe that such records or documents may be lost or discarded due to dissolution, disbandment or termination of Association's business, City may, by written request by any of the above-named officers, require that custody of the records be given to City and that the records and documents be maintained in City Hall. Access to such records and documents shall be granted to any party authorized by Association, Association's representatives, or Association's successor-in-interest.

#### **SECTION 28. MISCELLANEOUS.**

- A. If any part of this Agreement is for any reason found to be unenforceable, all other parts nevertheless remain enforceable.
- B. Subject to the provisions of Section 15, this Agreement binds and inures to the benefit of the Parties and their respective successors, assigns and legal representatives.
- C. The headings of the sections and exhibits of this Agreement are inserted for convenience only. They do not constitute part of this Agreement and are not to be used in its construction.
- D. Where this Agreement requires or permits City to act and no officer of the City is specified, City's Manager or the designated representative of City's Manager has the authority to act on City's behalf.
- E. This Agreement runs with the land and binds all persons and entities having or acquiring any right, title or interest in the Project, and their heirs, successors, assigns and anyone claiming any interest thereto. Each and all of the limitations, easements, obligations, covenants, conditions, and restrictions contained in this Agreement shall be deemed to be, and shall be construed as equitable servitudes, enforceable by any Party to this Agreement.
- F. This Agreement, including all Exhibits attached thereto, represents the entire understanding of the Parties as to those matters contained herein. No prior oral or written understanding shall be of any force or effect with respect to those matters covered hereunder. This Agreement may only be amended by formal written agreement executed by both Parties.
- G. Whenever required by the context of this Agreement, the singular includes the plural and the masculine includes the feminine and vice versa. This Agreement is not to be construed as if it had been prepared by one of the Parties, but rather as if all the Parties had prepared it. Unless otherwise indicated, all references to sections and subsections are to this Agreement.

WITNESS THE EXECUTION HEREOF on the day and year first hereinabove written.

RD:JVP  
9/11/08

APPROVED AS TO FORM:

\_\_\_\_\_  
JOHNNY V. PHAN  
Deputy City Attorney

CITY OF SAN JOSE,  
a municipal corporation of the State of  
California

\_\_\_\_\_  
Lee Price, MMC  
City Clerk

Date: \_\_\_\_\_

Modern Ice Owners Association, a California  
nonprofit mutual benefit corporation

\_\_\_\_\_  
Signature\*

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Title

Date: \_\_\_\_\_

\*Proof of authorization for Association's signatures is required to be submitted concurrently with this Agreement.

\*All Association's signatures must be accompanied by an attached notary public acknowledgement.

**EXHIBIT A**

**LEGAL DESCRIPTION OF PROJECT**

Lots 1 through 21, inclusive, as shown on that certain final subdivision map for Tract 9753 filed for record on February 27, 2006 in Book 797 of Maps at Pages 45 through 49, inclusive, in the Official Records of the County of Santa Clara, State of California.

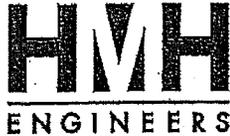
**EXHIBIT B**

**LEGAL DESCRIPTION OF LUNA PARK**

Lot 22 on the final map of Tract 9753 recorded on February 27, 2006 in Book 797 of Maps of Pages 45-49 in the Official Records of Santa Clara County, State of California.

**EXHIBIT C**

**LEGAL DESCRIPTION OF VEGETATIVE SWALES**



August 25, 2008  
HMH 3390.01.270  
Page 1 of 1

<sup>C</sup>  
EXHIBIT "X"

REAL PROPERTY in the City of San Jose, County of Santa Clara, State of California, being a portion of Lot 22 as shown on that Map of Tract 9753 filed for record on February 27, 2006, in Book 797 of Maps, pages 45 through 49, Santa Clara County Records, described as follows:

BEGINNING at the southerly corner of said Lot 22, being the intersection of the northeasterly line of Modern Ice Drive and the northwesterly line of Berryessa Road;

Thence along said northeasterly line, North 43°10'17" West, 8.50 feet, to a line that is parallel with and 8.5 feet northwesterly of said northwesterly line of Berryessa Road, also being the TRUE POINT OF BEGINNING;

Thence along said parallel line, North 46°49'43" East, 144.00 feet;

Thence North 43°10'17" West, 21.50 feet;

Thence South 46°49'43" West, 70.21 feet;

Thence North 88°10'17" West, 25.47 feet;

Thence North 43°10'17" West, 22.00 feet;

Thence North 07°05'06" West, 102.01 feet;

Thence North 37°54'54" East, 53.74 feet;

Thence North 82°54'54" East, 80.00 feet;

Thence North 07°05'06" West, 32.00 feet, to the northerly line of said Lot 22;

Thence along said northerly line, South 82°54'54" West, 145.00 feet, to the easterly line of Modern Ice Drive;

Thence along the easterly and northeasterly lines of Modern Ice Drive, the following three courses:

1. Thence South 07°05'06" East, 222.50 feet;
2. Thence along a tangent curve to the left, having a radius of 22.00 feet, through a central angle of 36°05'11" for an arc length of 13.86 feet;
3. Thence South 43°10'17" East, 23.66 feet, to the TRUE POINT OF BEGINNING.

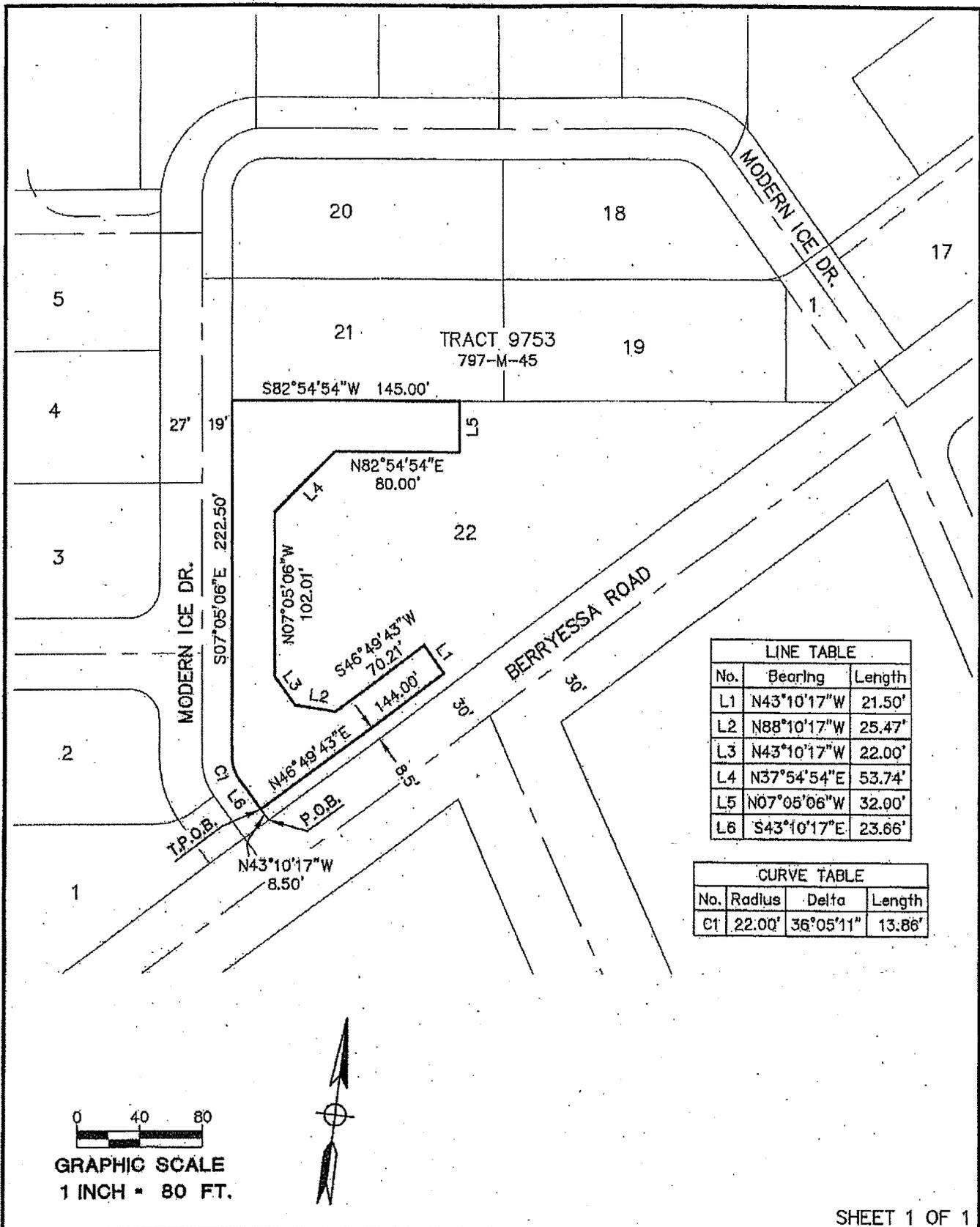
Containing 0.33 acres, more or less

3390LD03.doc

SAN JOSE  
1570 Oakland Road  
San Jose, California 95131  
408.487.2200 Tel 408.487.2222 Fax  
www.hmh-engineers.com

GILROY  
7888 Wren Avenue, Bldg. 8  
Gilroy, California 95020  
408.846.0707 Tel 408.846.0676 Fax





SHEET 1 OF 1

Date: 08-25-08  
 Scale: 1" = 80'  
 Designed: -  
 Drawn: TG  
 Checked: SD  
 Proj. Eng: -  
 3390PL03

**HMH**  
**ENGINEERS**  
 San Jose  
 (408) 447-2200  
 Gilroy  
 (408) 646-0707  
 www.hmh-engineers.com

Plat to accompany description  
 SAN JOSE CALIFORNIA

DRAFT--Contact the Office of the City Clerk at (408) 535-1260 or CityClerk@sanjoseca.gov for final document.

## EXHIBIT D

### MAINTENANCE SERVICES

#### I. GENERAL

##### A. Scope of Work

Association shall furnish all supervision, labor, material, equipment and transportation required to maintain, repair, and replace the Vegetative Swales, including any components or improvements connected thereto, in a safe, clean, functional, and attractive condition throughout the term of this Agreement. All Maintenance Services shall be performed in accordance with all procedures set forth in operating manuals and warranty documentation for the care and preservation of the Vegetative Swales, including any components or improvements connected thereto, applicable maintenance standards of City park maintenance standards, and in conformance with all applicable laws and regulations relating to maintenance, repairs, and replacement of storm detention facilities, detention or retention ponds, or Vegetative Swales. City will provide all available operating manuals, warranty documentation, and applicable maintenance standards, laws and regulations for the performance of the Maintenance Services of the Vegetative Swales prior to commencement of the Association's obligations under this Agreement. City may also at later date provide additional operating manuals, warranty documentation, and applicable maintenance standards, laws and regulations for the performance of the Maintenance Services of the Vegetation Swales when such information are known or become available to City. Notwithstanding the preceding two sentences, nothing herein negates the Association responsibility to comply with all applicable ordinances, laws, and regulations in the performance of the Maintenance Services of the Vegetative Swales.

##### B. Work Force

Association shall designate one (1) qualified representative with experience in park or storm detention facility management to (1) meet with City on a quarterly basis at Luna Park to discuss maintenance and repairs of the Vegetative Swales; (2) be available by telephone for any emergency; (3) schedule and coordinate maintenance, repairs, and replacement required under this Agreement; (4) coordinate and prepare Incident Reports; and (5) address and respond to any questions or concerns that may arise during the performance of the Maintenance Services set forth in this Agreement.

All employees, agents, representatives, contractors or subcontractors ("work force") at Luna Park to perform Maintenance Services shall be personally presentable at all times. All work force shall be competent, qualified and be a U.S. citizen or have the legal right to work in the United States.

##### C. Days and Hours of Maintenance Services

Maintenance Services shall be performed on Monday, Tuesday, Wednesday, Thursday, or Friday between 6:30 a.m. and 4:00 p.m., unless in an emergency or prior written approval by City. Unless in an emergency, Association shall notify the City's Downtown Area Parks Manager at least twenty-four (24) hours prior to entering Luna Park for performance of the Maintenance Services of the Vegetative Swales.

D. Materials

All materials used in the performance of this Agreement shall be approved in advance by PRNS Director. Association shall meet all applicable Agricultural licensing and reporting requirements.

II. HEALTH AND SAFETY

A. Association shall ensure the Vegetative Swales, and any connections thereto, are clean, safe, functional and attractive by performing the following tasks:

1. Conduct health and safety inspections of the Vegetative Swales, irrigation system in and around Vegetative Swales, and any connections thereto, at least once each month.
2. Removing all trash, debris and other articles on, in, and around the Vegetative Swales at least once each month.
3. Identify and conduct timely repair of the Vegetative Swales, or any connections thereto, to extend the life of the Vegetative Swales and the various connections and components thereto.
4. Identify and immediately remove and/or repair any potentially dangerous conditions or safety hazards in, on, under or around the Vegetative Swales.
5. Inspect and clean, if necessary, any subsurface pipes leading to and from the Vegetative Swales at least once every three (3) months.
6. Ensure that no water or debris overflow from the Vegetative Swales into any part of Luna Park.
7. Other tasks as mutually agreed upon after each quarterly meeting between City and Association.

III. ROUTINE MAINTENANCE

Association shall perform the following scheduled routine maintenance of the Vegetative Swales:

wale		Frequency	Activity
	Inspect for uniform sheet flow over the invert of the channel.	Bi-annually during a storm event.	Correct any channelized, eroded, or ponded areas.
	Inspect for 80% vegetation coverage and for signs of erosion.	At least once during each wet and dry season.	Revegetate barren spots before the start of the wet season. Provide erosion protection if revegetation is

			not successful.
Inspect for standing water.	72 hours after a storm event 0.5 inches or greater.		Remove sediment that impedes dewatering. Notify City engineer if immediate solution is not evident.
Inspect for sediment accumulation at or near the vegetation height.	Annually during dry season.		Remove and dispose of sediment. Regrade area if necessary.
Inspect for trash and debris.	At least once during each wet and dry season.		Remove trash and debris.
Perform inspection of the inlet/outlet structures for sediment accumulation and clogging.	At least once during each wet and dry season.		Remove sediment and/or source of the clog.

1. Other tasks as mutually agreed upon after each quarterly meeting between City and Association.

**IV. REPLACEMENT OF VEGETATIVE SWALES**

The Vegetative Swales are one of the best management practices to filter runoff water before it enters the City's storm drainage systems. Additionally, the approved Vegetative Swales allow Association to meet its requirements under the City's revised National Pollutant Discharge Elimination System Permit from the Regional Water Quality Control Board (City's Permit). Association expressly acknowledges and agrees under this Agreement to provide, at its sole cost and expense, all necessary maintenance, repairs, and replacement of the Vegetative Swales required under this Agreement and to meet City's Permit and applicable local, state, or federal water run-off and discharge policies and regulations.

Association also expressly acknowledges and agrees that in the event the Vegetative Swales cease to function or operate as a drain field for off-site runoff from the Project or no longer meets local, state, or federal water run-off and discharge policies and regulations, Association, at its sole cost and expense, shall fill-in the Vegetative Swales to grade level and design, engineer, construct, and maintain an alternative vegetative swales or other similar run-off system as approved by City to meet City's Permit and applicable local, state, or federal water run-off and discharge policies and regulations.

**V. Integrated Pest Management (IPM)**

IPM is a decision making process for managing pests that uses monitoring to determine pest injury levels and combines biological, cultural, physical and chemical tools to minimize health, environmental and financial risks. IPM emphasizes the use of extensive knowledge about the target pests, such as infestation thresholds, life histories, environmental requirements and natural enemies to compliment and facilitate biological and other natural control measures of pests. IPM uses the least toxic pesticides only as a last resort for controlling pests.

**A. Compliance with City IPM Policy**

Association shall obtain and comply with all requirements of the City of San José's Integrated Pest Management (IPM) policy as attached to this Agreement as Exhibit G.

**B. Best Management Practices (BMPs) and Standard Operating Procedures (SOPs)**

Association shall obtain and comply with pest specific City BMPs and SOPs (Exhibit G). If Association wishes to propose the use of other BMPs and SOPs, Association must submit a copy of the proposed BMPs and SOPs in writing to PRNS Director for review and approval. City approval of BMPs and SOPs will be based on degree of conformance with the City IPM Policy, BMPs and SOPs.

C. Use of Pesticides

Notwithstanding anything to the contrary in this Agreement, pesticides are restricted from use within the Vegetative Swales due to potential for water quality impairment.

D. Evidence of Training

Association shall demonstrate evidence of recent IPM training, to the maximum extent feasible.

E. Taxes

Association agrees to pay all applicable taxes, including sales tax on material supplied where applicable.



**EXHIBIT E  
LABOR COMPLIANCE ADDENDUM  
SAN JOSÉ PREVAILING WAGE POLICIES**

<b>AGREEMENT TITLE:</b>	<b>AGREEMENT BETWEEN THE CITY OF SAN JOSE AND MODERN ICE OWNERS ASSOCIATION AUTHORIZING RIGHT-OF-ENTRY AND MAINTENANCE OF VEGETATIVE SWALES LOCATED IN LUNA PARK</b>
<b>ASSOCIATION Name and Address:</b>	

By executing this Addendum, Association acknowledges and agrees that the work performed pursuant to the above referenced Agreement or Service Order is subject to all applicable provisions.

***Payment of Minimum Compensation to Employees.*** Association shall be obligated to pay not less than the General Prevailing Wage Rate for any and all work or services performed pursuant to the Agreement between the City of San Jose and Modern Ice Owners Association.

***A. Prevailing Wage Requirements.*** California Labor Code and/or Resolutions of the San Jose City Council require the payment of not less than the general prevailing rate of per diem wages and rates for holiday and overtime and adherence to all labor standards and regulations. The General Prevailing Wage Rates may be adjusted throughout the term of this Agreement. Notwithstanding any other provision of this Agreement, Association shall not be entitled to any adjustment in compensation rates in the event there are adjustments to the General Prevailing Wage Rates.

***B. Reports.*** Association shall file a completed and executed copy of this Addendum with the Department of Parks, Recreation & Neighborhood Services who shall provide Association with compliance documents to be completed and returned (with supporting documentation) to the Office of Equality Assurance. **These documents must be returned within 10 days of receipt.** Association shall not perform on site work on this contract until labor compliance documents are filed. Association shall also report additional information, including certified payrolls, as requested by Office of Equality Assurance to assure adherence to the Policy.

***C. Coexistence with Any Other Employee Rights.*** These provisions shall not be construed to limit an employee's ability to bring any legal action for violation of any rights of the employee.

**D. Audit Rights.** All records or documents required to be kept pursuant to this Agreement to verify compliance with the Prevailing Wage Requirement shall be made available for audit at no cost to City, at any time during regular business hours, upon written request by the City Attorney, City Auditor, City Manager, or a designated representative of any of these officers. Copies of such records or documents shall be provided to City for audit at City Hall when it is practical to do so. Otherwise, unless an alternative is mutually agreed upon, the records or documents shall be available at Association's address indicated for receipt of notices in this Agreement.

**E. Enforcement.**

1. **General.** Association acknowledges it has read and understands that, pursuant to the terms and conditions of this Agreement, it is required to comply with the Prevailing Wage Requirement and to submit certain documentation to the City establishing its compliance with such requirement ("Documentation Provision"). Association further acknowledges the City has determined that the Prevailing Wage Requirement promotes each of the following (collectively "Goals"):

- a. It protects City job opportunities and stimulates the City's economy by reducing the incentive to recruit and pay a substandard wage to labor from distant, cheap-labor areas.
- b. It benefits the public through the superior efficiency of well-paid employees, whereas the payment of inadequate compensation tends to negatively affect the quality of services to the City by fostering high turnover and instability in the workplace.
- c. Paying workers a wage that enables them not to live in poverty is beneficial to the health and welfare of all citizens of San José because it increases the ability of such workers to attain sustenance, decreases the amount of poverty and reduces the amount of taxpayer funded social services in San José.
- d. It increases competition by promoting a more level playing field among contractors with regard to the wages paid to workers.

2. **Remedies for Association's Breach of Prevailing Wage Provisions.**

- a. **RESTITUTION:** Association agrees that in the event of a breach of its obligations it will pay any amounts underpaid in violation of the required payments and City's administrative costs and liquidated damages and, in the case of financial assistance, to refund any sums disbursed by the City.
- b. **LIQUIDATED DAMAGES FOR BREACH OF PREVAILING WAGE PROVISION:** Association agrees its breach of the Prevailing Wage Requirement would cause the City damage by undermining the Goals, and City's damage would not be remedied by Association's payment of restitution to the workers who were paid a substandard wage. Association further agrees that such damage would increase the greater the number of

employees not paid the applicable prevailing wage and the longer the amount of time over which such wages were not paid. The City and Association mutually agree that making a precise determination of the amount of City's damages as a result of Association's breach of the Prevailing Wage Requirement would be impracticable and/or extremely difficult. **THEREFORE, THE PARTIES AGREE THAT, IN THE EVENT OF SUCH A BREACH, ASSOCIATION SHALL PAY TO THE CITY AS LIQUIDATED DAMAGES THE SUM OF THREE (3) TIMES THE DIFFERENCE BETWEEN THE ACTUAL AMOUNT OF WAGES PAID AND THE AMOUNT OF WAGES THAT SHOULD HAVE BEEN PAID.**

- c. **ADDITIONAL REMEDIES:** Association agrees that in addition to the remedies set forth above City retains the right to suspend or terminate the Agreement for cause and to debar Association or its subcontractors from future City contracts and/or deem the recipient ineligible for future financial assistance.

City

Association

By \_\_\_\_\_  
Name  
Title:  
Date: \_\_\_\_\_

By \_\_\_\_\_  
Name:  
Title:  
Date: \_\_\_\_\_

**EXHIBIT F**  
**INSURANCE REQUIREMENTS**

Association and/or its subcontractor, at Association's sole cost and expense, shall procure and maintain for the duration of this Agreement insurance against claims for injuries to persons or damages to property which may arise from, or in connection with, the performance of the Maintenance Services hereunder, by Association and on behalf of Association, its agents, representatives, employees or subcontractors.

**A. Minimum Scope of Insurance**

Coverage shall be at least as broad as:

1. The coverage provided by Insurance Services Office Commercial General Liability coverage ("occurrence") Form Number CG 0001; and
2. The coverage provided by Insurance Services Office Form Number CA 0001 covering Automobile Liability. Coverage shall be included for allowed, non-owned and hired automobiles; and
3. Workers' Compensation insurance as required by the California Labor Code and Employers Liability insurance.

There shall be no endorsement reducing the scope of coverage required above.

**B. Minimum Limits of Insurance**

Association and/or Association's Subcontractor shall maintain limits no less than:

1. Commercial General Liability: \$2,000,000 per occurrence for bodily injury, personal injury, and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.
2. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage; and
3. Workers' Compensation and Employers Liability: Workers' Compensation limits as required by the California Labor Code and Employers Liability limits of \$1,000,000 per accident.

**C. Deductibles and Self-Insured Retentions**

Any deductibles or self-insured retentions must be declared to, and approved by City's Risk Manager. At the option of City, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects City, its officers, employees, agents and Association; or Association shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses in an amount specified by the City's Risk Manager.

**D. Other Insurance Provisions**

The policies are to contain, or be endorsed to contain, the following provisions:

1. Commercial General Liability and Automobile Liability Coverages.
  - a. The City of San José, its officers, employees, agents and contractor are to be covered as additional insureds as respects: Liability arising out of activities performed by or on behalf of, Association and/or Association's Subcontractors; products and completed operations of Association and/or Association's Subcontractors; premises owned, leased or used by Association and/or Association's Subcontractors; and automobiles owned, leased, hired or borrowed by Association and/or Association's Subcontractors. The coverage shall contain no special limitations on the scope of protection afforded to City, its officers, employees, agents and contractors.
  - b. Association's and/or Association's Subcontractors insurance coverage shall be primary insurance as respects City, its officers, employees, agents and contractors. Any insurance or self-insurance maintained by City, its officers, employees, agents or contractor shall be in excess of Association's and/or Association's Subcontractors insurance and shall not contribute with it.
  - c. Any failure to comply with reporting provisions of the policies by Association shall not affect coverage provided City, its officers, employees, agents, or contractors.
  - d. Coverage shall state that Association's and Association's Subcontractor's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
  - e. Coverage shall contain a waiver of subrogation in favor of the City, its officials, employees, agents and contractors.
2. Workers' Compensation and Employers' Liability.

Coverage shall be endorsed to state carrier waives its rights of subrogation against the City, its officials, employees, agents and contractors.

3. All Coverages

Each insurance policy required by this Agreement shall be endorsed to state that coverage shall not be suspended, voided, canceled, or reduced in limits except after thirty (30) days' prior written notice has been given to City, except that ten (10) days' prior written notice shall apply in the event of cancellation or non-payment of premium.

E. Acceptability of Insurers

Insurance is to be placed with insurers acceptable to City's Risk Manager.

F. Verification of Coverage

Association shall furnish City with certificates of insurance and with original endorsements affecting coverage required by this Agreement through its Subcontractor. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

Proof of insurance shall be mailed to the following address or any subsequent address as may be directed in writing by the Risk Manager:

CITY OF SAN JOSE – Human Resources  
Risk Management  
200 East Santa Clara Street, 2nd Floor Wing  
San Jose, California 95113-1905

G. Subcontractors

Association shall include all contractors or subcontractors as insured under its policies or shall obtain separate certificates and endorsements for each subcontractor.

**EXHIBIT G**  
**CITY OF SAN JOSÉ'S INTEGRATED PEST MANAGEMENT (IPM) POLICY**

RESOLUTION NO. 71691

**A RESOLUTION OF THE COUNCIL OF THE CITY OF  
SAN JOSE APPROVING THE REVISED CITY COUNCIL  
POLICY FOR POLLUTION PREVENTION**

**WHEREAS**, the existing Pollution Prevention Policy of the City of San José ("City") was approved by the San José City Council on May 24, 1994, to keep the City's operations consistent with Congress' hierarchy of management options for pollution prevention and the United States Environmental Protection Agency's national policy for hazardous waste management; and

**WHEREAS**, in February 2001, the San Francisco Bay Regional Water Quality Control Board ("Regional Board") adopted the City's current Stormwater National Pollutant Discharge Elimination System ("NPDES") Permit which requires the City to adopt policies related to specific pollutants, including mercury-containing products and urban pesticides; and

**WHEREAS**, on March 1, 2002, the Santa Clara Valley Urban Runoff Pollution Prevention Program ("Program") submitted a mercury pollution prevention plan to the Regional Board pursuant to the Program NPDES permit which provides for the adoption of a City policy to eliminate or reduce to the greatest extent practicable the use of mercury-containing products; and

**WHEREAS**, on March 1, 2002, the City submitted a Pesticide Management Plan ("PMP") to the Regional Board pursuant to the Program NPDES permit, which includes as the first performance standard the adoption of a City policy requiring the use of Integrated Pest Management ("IPM") operational techniques and the minimization of pesticide use; and

**WHEREAS**, the revised Pollution Prevention Council Policy incorporates the more recent stormwater permit requirements, addresses the use of mercury-containing products and IPM in City operations, and provides for other health and economic benefits resulting from the prevention and reduction of pollutants; and

RD:MD:JAA  
6/19/2003

Res. No. 71691

**WHEREAS**, this Council desires to adopt the revised Pollution Prevention Council Policy designed to reduce from City operations the use of pollutant-containing products, the generation of hazardous waste, and the release of pollutants that could lead to water quality impairment and air pollution;

**NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SAN JOSE THAT:**

The revised Council Policy entitled, "Pollution Prevention," which is attached hereto as Exhibit A and incorporated by reference as if fully set forth herein, is hereby approved and shall replace current Council Policy Number 4-5 that was approved by this Council on May 24, 1994.

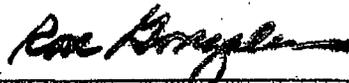
ADOPTED this 24<sup>th</sup> day of June, 2003, by the following vote:

AYES: CAMPOS, CHAVEZ, CHIRCO, CORTESE, DANDO,  
GREGORY, REED, WILLIAMS, YEAGER; GONZALES

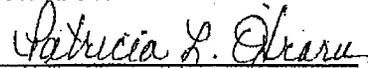
NOES: NONE

ABSENT: LeZOTTE

DISQUALIFIED: NONE

  
\_\_\_\_\_  
RON GONZALES  
Mayor

ATTEST:

  
\_\_\_\_\_  
PATRICIA L. O' HEARN  
City Clerk

71691

**EXHIBIT A**

**REVISED COUNCIL POLICY**  
**FOR POLLUTION PREVENTION**

EXHIBIT A

*City of San José, California***COUNCIL POLICY**

<b>TITLE:</b> POLLUTION PREVENTION	<b>PAGE</b> 1 of 3	<b>POLICY NUMBER</b> 4-5
	<b>EFFECTIVE DATE</b> 5/24/94	<b>REVISED DATE</b> 6/24/03

APPROVED BY

**BACKGROUND**

Pollution prevention is a key element of environmental protection. In addition to compliance with regulatory requirements, implementation of measures to prevent and reduce pollutants that can cause water quality impairment, air pollution, and the generation of hazardous waste can have the following beneficial effects:

- Improving the protection of human health and the environment;
- Improving air and water quality;
- Reducing or eliminating inventories and possible releases of hazardous materials;
- Enhancing organizational reputation and image;
- Enhancing City's role as model for local businesses;
- Minimizing quantities of hazardous waste generated, thereby reducing waste disposal and compliance costs;
- Possibly decreasing future Superfund and RCRA liabilities, as well as future toxic tort liabilities.

**PURPOSE AND SCOPE**

It is the purpose of this policy to protect water and air quality by minimizing the release of pollutants and the generation of hazardous wastes through the reduced use, recycling, and proper disposal of materials from City operations.

**POLICY**

It is the policy of the City of San Jose to minimize the release of pollutants into the water and air and reduce the generation of hazardous wastes by adopting the following practices:

1. Whenever feasible, the use of hazardous materials will be minimized at the source.
2. The City will seek, in its procurement processes, to eliminate the unnecessary use of

TITLE: POLLUTION PREVENTION	PAGE 2 of 3	POLICY NUMBER 4-5
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hazardous substances and toxic chemicals. The City will take into account factors such as risk; the availability, cost, and performance of substitutes and process changes; and life-cycle costs including final disposal costs.

3. The City will practice pollution prevention, which is defined as source reduction and other practices that reduce the amount of pollutants entering a waste stream prior to out-of-process recycling, treatment, or disposal. Prevention includes improvements in processes, such as the substitution with less- or non-toxic materials, redesign of products to reduce environmental impacts, in-process recycling, modification of equipment, and housekeeping measures such as improved maintenance. It encompasses increased efficiency in the use of energy and water, and other practices that can protect natural resources through conservation.
4. The City will seek to minimize the use of pesticides in City operations to the maximum extent practicable. In particular, the City will use organophosphate and copper-based pesticides only when their use is justified and adverse water quality impacts are minimized. The City will reduce, phase-out, and ultimately eliminate the use of pesticides that cause impairment of surface waters. To minimize the use of pesticides, the City will incorporate Integrated Pest Management (IPM) techniques into City operations. IPM is an ecosystem-based strategy that focuses on long-term prevention of pests or their damage through a combination of techniques such as biological control, habitat manipulation, modification of cultural practices, and the use of resistant varieties. IPM techniques include limiting the use of pesticides to situations where monitoring indicates that they are needed; selecting least toxic pest control materials; and applying these materials in a manner that minimizes risk to human health, beneficial and non-target organisms, and the environment.
5. The City will seek to eliminate the use of mercury-containing products and subsequent releases of mercury to the environment, to the maximum extent practicable. Where elimination is not feasible due to technological, safety, or economic factors, the City will seek to reduce use of and properly handle and dispose of mercury products, to minimize the potential for release to the environment. To achieve this goal, the City will evaluate pollution prevention opportunities to eliminate mercury from municipal activities, and ensure proper handling and disposal of those mercury-containing products that cannot be eliminated.
6. Hazardous wastes that cannot be prevented will be recycled in an environmentally safe manner. Disposal or other release into the environment will be employed only as a last resort and will be conducted in an environmentally safe manner and in accordance with all applicable regulations.

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**RESPONSIBILITY**

All City departments that procure and/or dispose of products and materials, or are involved in activities with the potential to cause water quality impairment, air pollution, or generation of hazardous wastes, will be responsible for implementing the provisions of this policy to the maximum extent practicable. In addition, products and services will be procured in accordance with the City's Environmentally Preferable Procurement Policy (Council Policy 4-6).