

RECORDING REQUESTED
BY CITY OF SAN JOSE:

When Recorded, Return To:
City of San José
200 East Santa Clara Street
San José, CA 95113
Attn: City Clerk, 2nd Floor West Wing

**PARKLAND AGREEMENT
FOR
TENTATIVE MAP NO. PT07-047
BETWEEN
CITY OF SAN JOSE
AND
KB HOME SOUTH BAY INC.**

THIS AGREEMENT ("Agreement") is made and entered into by and between the CITY OF SAN JOSE, a municipal corporation of the State of California ("City"), and KB HOME SOUTH BAY INC., a California corporation ("Developer") as of the date of City's execution ("Effective Date"). Each of City and Developer are sometimes hereinafter referred to as a "Party" and collectively as the "Parties."

RECITALS

- A. Developer desires to develop a residential subdivision ("Development") on certain real property located on the southeast corner of Piercy Road and

Tennant Avenue, in the City of San José, County of Santa Clara, State of California. City has approved Planned Development Rezoning No. PDC06-102 ("PD Rezoning"), Tentative Map Number PT07-047 (the "Tentative Map"), and Planned Development Permit No. PD07-054 ("PD Permit") for the Development.

- B. Under the provisions of Chapter 19.38 of the San José Municipal Code ("Parkland Dedication Ordinance"), developers of residential subdivisions are required to dedicate property for neighborhood and community parks, construct park or recreational improvements and/or pay in-lieu fees ("Parkland Dedication Obligation").
- C. In order for Developer to satisfy Developer's Parkland Dedication Obligation for the residential units identified on the Tentative Map, Developer and City desire to enter into this Agreement pursuant to which Developer shall satisfy its Parkland Dedication Obligation as follows: (1) dedicate to City approximately 0.80 acres of real property for public park purposes; and (2) construct park improvements on the approximately 0.80 acres of real property as specified in **Exhibit A** to this Agreement and the Piercy Park Master Plan approved by City Council ("Master Plan") (collectively, "Park Improvements"). Additionally, as agreed upon in the PD Rezoning and PD Permit for the Development, Developer shall establish a Home Owners' Association ("HOA") for the residential units identified on the Tentative Map who will enter into a written agreement with the City for maintenance of the Park Improvements prior to the City's acceptance of the Park Improvements and dedication of the real property to City for public park purposes.
- D. City's Director of Parks, Recreation and Neighborhood Services ("City's Director") is charged with the administration of this Agreement in conjunction with the Director of Public Works ("Director of PW"). The Director of PW is

responsible for the review, inspection, approval, and acceptance of the Park Improvements and acceptance of the dedication of land.

NOW, THEREFORE, in consideration of the mutual covenants set forth in this Agreement and for valuable consideration, receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

SECTION 1. REPRESENTATIONS AND WARRANTIES OF DEVELOPER.

Developer represents and warrants to City that the following facts are true and correct:

- A. The statements and certificates made on the Tentative Map and documents filed in conjunction with the Tentative Map remain true and correct.
- B. Any and all documents provided to City pursuant to the terms of this Agreement, or in connection with the execution of this Agreement, are now in full force and effect and contain no inaccuracies or misstatements of fact. Developer covenants that at such time City notifies Developer of City's intention to accept the Park Improvements, if any of these documents contain inaccuracies, misstatements or have become obsolete, Developer shall notify City and provide City with the information required to render the documents accurate, complete and current.
- C. Developer has the legal ability to enter into this Agreement and Developer's signatory(ies) to this Agreement is (are) duly authorized to sign this Agreement on its behalf. In the event the Developer is not the legal owner(s) of the real property(ies) identified on the Tentative Map, the legal owner(s) shall also be required to execute this Agreement and shall be subject to all terms, conditions, and obligations of this Agreement.

SECTION 2. OFFER OF DEDICATION; DESIGN AND DEVELOPMENT OF PARK IMPROVEMENTS

- A. Developer affirms its irrevocable offer to dedicate to City approximately 32,283 square feet of real property located on the southeasterly corner of Piercy Road and Tennant Avenue and as identified as Lot A on the Tentative Map ("Park Site") for the Development and as shown in the conceptual plan for the Park Improvements depicted on the attached **Exhibit A** ("Park Site Plan"). Developer shall be responsible for all costs incurred in the conveyance of the Park Site to City in accordance with the requirements and specifications set forth in this Agreement.
- B. Developer shall be responsible for the development of plans and specifications for, and the construction of Park Improvements on the Park Site consistent with the Park Site Plan and as more particularly described in this Agreement. Developer shall develop plans and specifications for the Park Improvements ("Project Specifications") for the review and approval of the Director of PW, as more particularly described in the attached **Exhibit B**. Subject to **Exhibit B** of this Agreement, Developer shall construct the Park Improvements in conformance with the Project Specifications and all applicable standards and specifications in effect on the Effective Date of this Agreement.
- C. The Parties acknowledge that the exact size, dimensions, and other particular characteristics of the Park Improvements have not been determined as of the Effective Date of this Agreement. The Parties, however, agree that the Park Improvements shall consist of the following types of improvements: children's play lot, picnic tables, barbeques, trellis and benches (2), walkways, turf area and landscape as depicted in **Exhibit A** and the Master Plan approved by City Council for this Park Site.
- D. Developer shall be responsible for all costs incurred for planning, design, construction, and supervision of the construction of all Park Improvements, including without limitation, City's plan review and inspection. Developer shall cause all labor and material incorporated in the Park Improvements to be

furnished in accordance with the requirements and specifications set forth in this Agreement.

1. Developer shall also be responsible for all costs incurred to plan and establish a HOA for the residential units identified on the Tentative Map in accordance with applicable California laws to maintain the Park Site as specified in the PD Rezoning and PD Permit. Any documents relating to (1) the formation of the HOA, (2) the duties and responsibilities of the HOA, (3) the costs and expenses of the HOA, (4) the fees and charges of the HOA, (5) the budget of the HOA, or (6) similar types of disclosure or formation documents (collectively "HOA Documents"), shall clearly disclose and state that the HOA will be required to enter into a written agreement with the City, at the HOA's sole cost and expense, to maintain the Park Improvements until such time as the Park Site ceases to function as a public park. Additionally, the HOA Documents shall clearly disclose and provide the following: (1) projected monthly HOA fees to be charged to each HOA member, including the cost for park maintenance, (2) overall monthly/yearly cost to the HOA, including the cost of park maintenance, and (3) any other information required to be disclosed by law relating to the HOA responsibilities to maintain the Park Improvements in accordance with the PD Rezoning, PD Permit, this Agreement, and the draft park maintenance agreement attached hereto as **Exhibit D**.
- E. The Park Improvements to be installed on the Park Site shall be completed within three (3) years of the Effective Date of this Agreement. The Park Improvements shall be deemed completed and accepted by City upon recordation of the Notice of Acceptance by the Director of PW as outlined in **Exhibit B** of this Agreement. Notwithstanding the previous sentence, City will not accept the Park Improvements or Park Site until such time an HOA is created for the residential units identified on the Tentative Map and the HOA and City enters into a fully executed Park Maintenance and Right of Entry

Agreement as specified in the PD Rezoning and PD Permit and in a form substantially the same as **Exhibit D**. The City's Director may, at the City Director's discretion, grant extensions of the completion requirement specified in this subsection.

SECTION 3. COMPLIANCE WITH THE PARKLAND DEDICATION ORDINANCE.

- A. City acknowledges and agrees that Developer's performance of this Agreement shall satisfy Developer's obligations under the City's Parkland Dedication Ordinance for the residential units identified on the Tentative Map for the Development. Provided that Developer is not in default hereunder, and provided further that Developer satisfies all other terms, conditions and requirements associated with the Development, City shall issue all building permits necessary for the residential units identified on the Tentative Map.
- B. City will owe no refund to Developer in the event Developer does not build the number or type of residential units identified on the Tentative Map. In the event there is an increase in the number of residential units to be built, or change in the dwelling unit type, Developer agrees to immediately notify the City's Director and to pay such additional Parkland Fees as are required by the Parkland Dedication Ordinance.
- C. Developer acknowledges that the costs and expenses for the design, development, construction, and supervision related to the Park Improvements may exceed the Parkland Fees that the Developer would be obligated to pay under the Parkland Dedication Ordinance. Because of the benefit to Development that will result from the Park Improvements, Developer agrees to design, develop, and construct the Park Improvements on the Park Site and dedicate the Park Site as specified in this Agreement, without any obligation on the part of the City.

SECTION 4. REVIEW FEES AND CHARGES RELATED TO PARK IMPROVEMENTS

- A. Developer shall pay to City a fee for review and approval of the Project Specifications for the Park Improvements and the inspection of the Park Improvements (collectively, "Review Fee"). City's Review Fee shall be based on the Developer's cost estimate for the Park Improvements, as approved by the Director, and shall be calculated based on the fees and charges established for City's review and inspection of like improvements then in effect at the time Developer first submits any Project Specifications to City for review. The Review Fee based on the current cost estimate for the Park Improvements is approximately Fifty-Five Thousand Four Hundred and Five Dollars (\$55,405.00).
- B. The total Review Fee shall be paid to City concurrently with Developer's submittal of the first set of Project Specifications for the Park Improvements.
- C. In the event that the City's Director grants an extension of the term of this Agreement pursuant to the provisions of Section 2(E), then the Director of PW, at the Director of PW's sole discretion, shall have the right to escalate the total estimated cost of the Park Improvements, and the corresponding Review Fee. The escalation of the total estimated cost of Park Improvements shall be based on the Engineering News Record Construction Cost Index, or in the event that the Engineering News Record discontinues publication during the term of this Agreement, an index of similar repute and reliability as determined and selected by Director of PW.

SECTION 5. BONDS AND SECURITY.

Developer shall furnish to City the following security prior to the execution of this Agreement, and for the purposes, in the amounts, and under the conditions that follow:

- A. Type and Amounts.

1. Performance Security. To assure the Developer's faithful performance of this Agreement to complete the Park Improvements in an amount of One Hundred Percent (100%) of the estimated cost of the Park Improvements (hereinafter "Performance Security"); and
2. Payment Security. To secure Developer's payment to any contractor, subcontractor, person renting or supplying equipment, or furnishing labor and materials for completion of the Park Improvements in the additional amount of One Hundred Percent (100%) of the estimated cost of the improvements (hereinafter "Payment Security"); and
3. Warranty Security. To warranty the Developer's work for a period of one (1) year following recordation of the Notice of Acceptance against any defective work or labor done or defective materials furnished in the additional amount of Twenty-Five Percent (25%) of the estimated cost of the improvements (hereinafter "Warranty Security"); and
4. Landscaping Security. To secure Developer's installation and maintenance of landscaping as may be required by the Project Specifications, at such time when the drought restrictions have been rescinded as further described in Section 2(F)(3) of **Exhibit B** (hereinafter "Landscaping Security").

B. Conditions.

1. Developer shall provide the required security on forms approved by City and from sureties authorized by the California Insurance Commissioner to transact the business of insurance. Any bonds furnished by Developer to satisfy the security requirements in this Section 5 shall be in the forms attached hereto as **Exhibit C**, as may be amended by City from time to time.
2. A condition of the Developer's security is that any changes not exceeding ten percent (10%) of the original estimated cost of the Park Improvements shall not relieve the security. In the event that changes to the Park

Improvements cause an increase of more than ten percent (10%) over the original estimated cost of the Park Improvements, Developer shall provide security as required by Section 5(A) of the Agreement for one hundred percent (100%) of the total estimated cost of the Park Improvements as changed.

3. Notwithstanding Section 5(B)(2) above, Developer's security shall compensate City for the actual cost of completing the required Park Improvements in the Event of Default, as defined in Section 6 below, by Developer in the performance of this Agreement, regardless of whether City's cost of completion exceeds the estimated total cost of the Park Improvements.
4. A condition of Developer's security is that any request by Developer for an extension of time for the commencement or completion of the work under this Agreement may be granted by City without notice to Developer's surety and such extensions shall not affect the validity of this Agreement or release the surety or sureties on any security given for this Agreement.
5. As a condition of granting any extension for the commencement or completion of the work under this Agreement, Director of PW may require Developer to furnish new security guaranteeing performance of this Agreement, as extended, in an increased amount to compensate for any increase in construction costs as determined by Director of PW.
6. If Developer seeks to replace any security with another security, the replacement shall: (1) comply with all the requirements for security in this Agreement; (2) be provided by Developer to Director of PW; and (3) upon its written acceptance by Director of PW, be deemed to be a part of this Agreement. Upon Director of PW's acceptance of a replacement security, the former security may be released by City.

C. Release of Securities. City shall release the securities required by this Agreement as follows:

1. Performance Security. City shall release the Performance Security upon recordation of the Notice of Acceptance or as may otherwise be authorized in accordance with California Government Code Sections 66499.7(a)-(g).
2. Payment Security. City shall release the Payment Security in accordance with California Government Code section 66499.7(h).
3. Warranty Security. City shall release the Warranty Security upon expiration of the warranty period and settlement of any claims filed during the warranty period.
4. City may retain from any security released, an amount sufficient to cover costs and reasonable expenses and fees, including reasonable attorney's fees.

D. Injury to Park Improvements, Public Property or Public Utility Facilities. Until recordation of the Notice of Acceptance of the Park Improvements, Developer assumes responsibility for the care and maintenance of, and any damage to, the Park Improvements. Developer shall replace or repair all Park Improvements, public utility facilities, and surveying or subdivision monuments and benchmarks which are destroyed or damaged for any reason, regardless of whether resulting from the acts of the Developer, prior to the recordation of the Notice of Acceptance. Developer shall bear the entire cost of such replacement or repairs regardless of what entity owns the underlying property. Any repair or replacement shall be to the satisfaction, and subject to the approval, of the Director of PW.

Neither the City, nor any officer or employee thereof, shall be liable or responsible for any accident, loss, or damage, regardless of cause, occurring to the work or Park Improvements prior to recordation of the Notice of Acceptance of the work or improvements.

SECTION 6. DEFAULT.

- A. Developer shall be in default hereunder upon the occurrence of any one or more of the following events ("Event of Default"):
1. Developer's Failure to timely commence construction of the Park Improvements in accordance with this Agreement;
 2. Developer's failure to timely complete construction of the Park Improvements in accordance with this Agreement;
 3. Developer's failure to timely cure any defect in the Park Improvements in accordance with this Agreement;
 4. Developer's failure to perform substantial construction work for a period of twenty (20) calendar days after commencement of the work;
 5. Developer's insolvency, appointment of receiver, or the filing of any petition in bankruptcy, either voluntary or involuntary, which Developer fails to discharge within thirty (30) days;
 6. Developer assigns this Agreement in violation of Section 9 of this Agreement;
 7. Developer fails to perform or satisfy any other term, condition, or obligation under this Agreement.
- B. If an Event of Default occurs and the Event of Default is not cured by Developer in accordance with Section 6(C) below, City in its sole discretion shall be entitled to terminate Developer's control over the work described herein and hold Developer and its surety liable for all damages suffered by City as a result of the Event of Default. City shall have the right, at its sole discretion, to draw upon or use the appropriate security to mitigate City's damages in the Event of Default by Developer. Developer acknowledges and agrees that City's right to draw upon or use the security is in addition to any other remedies available at law or in

equity to City. The Parties acknowledge and agree that the estimated costs and security amounts may not reflect the actual cost of construction of the Park Improvements, and therefore, City's damages in the Event of Default by Developer shall be measured by the actual cost of completing the required Park Improvements to the satisfaction of City. City may use the sums provided by the securities for the completion of the Park Improvements in accordance with the Project Specifications.

City may take over the work and complete the Park Improvements, by contract or by any other method City deems appropriate, at the sole cost and expense of Developer. In such event, City, without any liability whatsoever, may complete the Park Improvements using any of Developer's materials, appliance, plans, or other property located at the Park Site and that are necessary to complete the Park Improvements.

- C. Unless the City's Director determines that the circumstances warrant immediate enforcement of the provisions of this Section 6 in order to preserve the public health, safety, and welfare, the City's Director shall give twenty (20) working days' prior written notice of termination to Developer ("Notice Period"), which notice shall state in reasonable detail the nature of Developer's default and the manner in which Developer can cure the default. During the Notice Period, Developer shall have the right to cure any such default; provided, however, if a default is of a nature which cannot reasonably be cured within the Notice Period, Developer shall be deemed to have timely cured such default for purposes of this Section 6(C) if Developer commences to cure the default within the Notice Period, and prosecutes the same to completion within a reasonable time thereafter.
- D. Developer's failure to comply with any terms, conditions, or obligations under this Agreement shall constitute Developer's consent for City, at its sole discretion, to file a notice of violation against all the lots in the subdivision, or to rescind or otherwise revert the subdivision to acreage. Developer specifically recognizes

that the determination of whether a reversion to acreage or rescission of the subdivision constitutes an adequate remedy for default by Developer shall be within the sole discretion of City.

- E. City's rights and remedies specified in this Section 6 shall be deemed cumulative and in addition to any rights or remedies City may have at law or in equity.

SECTION 7. INDEMNITY/HOLD HARMLESS.

City, or any officer, employee, or agent thereof shall not be liable for any loss or injury to persons or property occasioned by reason of the acts or omissions of Developer, its agents, employees, contractors, or subcontractors in the performance of this Agreement. Developer further acknowledges and agrees to protect, indemnify, defend and hold City, its officers, agents and employees harmless from and against any and all liability, loss, cost and obligations on account of or arising out of or resulting from any injury or loss caused directly or indirectly by any cause whatsoever in connection with or incidental to the activities to be performed by Developer under this Agreement, except to the extent such injury or harm is caused by the sole active negligence or willful misconduct of City, its officers, agents, or employees. This Section 7 shall survive the recordation of the Notice of Acceptance, acceptance of the Park Site or sooner termination of this Agreement for a period of one (1) year from the date of such acceptance or termination. Recordation of the Notice of Acceptance by City of the Park Improvements shall not constitute an assumption by City of any responsibility or liability for any loss or damages covered by this Section 7.

SECTION 8. NOTICES.

Any notice required or permitted to be given under this Agreement shall be in writing and personally served or sent by U.S. mail, postage prepaid, addressed as follows:

RD:JVP
2/26/09

To City's Director: City of San José
Department of Parks, Recreation and Neighborhood
Services
Attn: Matt Cano, Division Manager
200 East Santa Clara Street
San José, CA 95113

To Director of PW: City of San José
Department of Public Works
Attn: Division Manager, CFAS
200 East Santa Clara Street
San José, CA 95113

To Developer: KB HOME SOUTH BAY INC.
Attn: Ray Panek, Senior Vice President Forward Planning
6700 Koll Center Parkway, Suite 200
Pleasanton, CA 94566

Notice shall be deemed given upon receipt. The Parties shall notify each other of changes in either their respective addresses or their representatives subject to notification in accordance with the provisions of this section.

SECTION 9. ASSIGNMENT.

This Agreement may not be assigned or transferred in part or in whole by Developer without the express written consent of City. Any attempts to assign or transfer any terms, conditions or obligation under this Agreement without the express written consent of City shall be voidable at City's sole discretion.

SECTION 10. BINDING UPON SUCCESSORS.

Subject to Section 9, this Agreement shall be binding upon and shall inure to the benefit of the Parties' respective successors, assigns, transferees, and legal representatives.

SECTION 11. GOVERNING LAW.

This Agreement shall be governed by and construed in accordance with California law.

SECTION 12. ENTIRE AGREEMENT.

This Agreement, including the exhibits, attachments and appendices, contains the entire agreement of the Parties with respect to the satisfaction of the requirements of the Parkland Dedication Ordinance for the Tentative Map for the Development and supersedes all prior understandings or representations of the Parties, whether written or oral. Any subsequent modification of this Agreement must be made in writing and signed by all Parties hereto.

SECTION 13. TIME OF ESSENCE.

Time is of the essence in the performance of this Agreement.

SECTION 14. 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 the City or Developer or both, or any governmental order or law which causes an interruption in the construction of the Park Improvements (the "Work" for purposes of this section) 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 14 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 pertaining to the Work if such event is not defined as a Force Majeure Event under the applicable contract for the Work.
2. Negligence or failure of a Developer to perform its obligations under a contract for the Work (other than for a Force Majeure Event as defined under the applicable contract) shall not constitute a Force Majeure Event.
3. The inability of Developer for any reason to have access to funds necessary to carry out its obligations under this Agreement or the termination of any contract for the prosecution of the Work for such reason or for Developer's default under such contract shall not constitute a Force Majeure Event.

SECTION 15. BOOKS AND RECORDS.

- A. Developer shall be solely responsible to implement internal controls and record keeping procedures in order to comply with this Agreement and all applicable laws. Developer shall maintain any and all ledgers, books of account, invoices, vouchers, cancelled checks, and other records or documents evidencing or relating to the activities performed by Developer under this Agreement, including without limitation those relating to the construction of the Park Improvements, for a minimum period of three (3) years, or for any longer period required by law, from the date of termination of this Agreement or the date of the City's acceptance of the Park Improvements, whichever is longer. Notwithstanding this previous sentence, Developer shall retain such records beyond three (3) years so long as any litigation, audit, dispute, or claim is pending.
- 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, City Auditor, 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 mutually agreed upon, the records shall be available at Developer'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 Developer'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 Developer, Developer's representatives, or Developer's successor-in-interest.
- D. Developer's obligations under this Section shall be in addition to Developer's obligations specified in **Exhibit B**, Section 2(B).

SECTION 16. MISCELLANEOUS PROVISIONS.

- A. Captions and sections of this Agreement are for convenience only and shall not be considered in resolving any questions of interpretation or construction.
- B. Incorporation of Recitals and Exhibits. The Recitals and Exhibits contained in this Agreement are hereby incorporated into the terms of this Agreement.
- C. Jurisdiction. In the event that suit shall be brought by any of the Parties, the Parties agree that venue shall 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.
- D. Waiver. Developer agrees that waiver by the City of any breach or violation or any term, condition, or obligation of this Agreement shall not be deemed to be a

waiver of any other term, condition, or obligation contained herein or a waiver of any subsequent breach or violation of the same term, condition, or obligation.

- E. Plurality. As used in this Agreement and when required by the context, each number (singular and plural) shall include all numbers.
- F. Compliance with Laws. Developer, its employees, agents, representatives, contractors, and subcontractors shall comply with all local, state and federal laws in the performance of this Agreement.
- G. Nondiscrimination. Developer, its employees, agents, representatives, contractors, and subcontractors shall not discriminate, in any way, against any person on the basis of age, sex, race, color, religion, sexual orientation, actual or perceived gender identity, disability, ethnicity, national origin, or any other recognized or protected class in connection with or related to the performance of this Agreement. Developer shall expressly require compliance with the provisions of this Section 16(G) in all agreements with contractors and subcontractors for the performance of the improvements hereunder.
- H. Developer has read each and every part of this Agreement, including without limitation, its exhibits, and Developer freely and voluntarily has entered into this Agreement. This Agreement is a negotiated document and shall not be interpreted for or against any party by reason of the fact that such party may have drafted this Agreement or any of its provisions.
- I. Whenever in this Agreement words of obligation or duty are used, such words shall have the force and effect of covenants. Any obligation imposed by either party shall include the imposition on such Party of the obligation to pay all costs and expenses necessary to perform such obligation.
- J. Severability. If any provisions or portions of this Agreement are held to be invalid by a court of competent jurisdiction, the remaining provisions or portions of this

Agreement shall remain in full force and effect unless amended or modified by mutual written consent of the Parties.

K. This Agreement is entered into pursuant to and shall be governed by the Parkland Dedication Ordinance. If not otherwise defined in this Agreement, capitalized terms shall have the meanings set forth in Chapter 19.38 of the San José Municipal Code.

SECTION 17. AGREEMENT'S ATTACHMENTS.

This Agreement includes the following attachments:

- Exhibit A Park Improvements Site Plan
- Exhibit B Design and Construction Requirements
- Exhibit C Bond Forms
- Exhibit D Park Maintenance and Right-of-Entry Agreement

WITNESS THE EXECUTION HEREOF the day and year hereinafter written by City.

APPROVED AS TO FORM:

CITY OF SAN JOSE, a municipal corporation

JOHNNY V. PHAN
Deputy City Attorney

By: _____
LEE PRICE, MMC
City Clerk

Date: _____

DEVELOPER

KB HOME SOUTH BAY INC.*

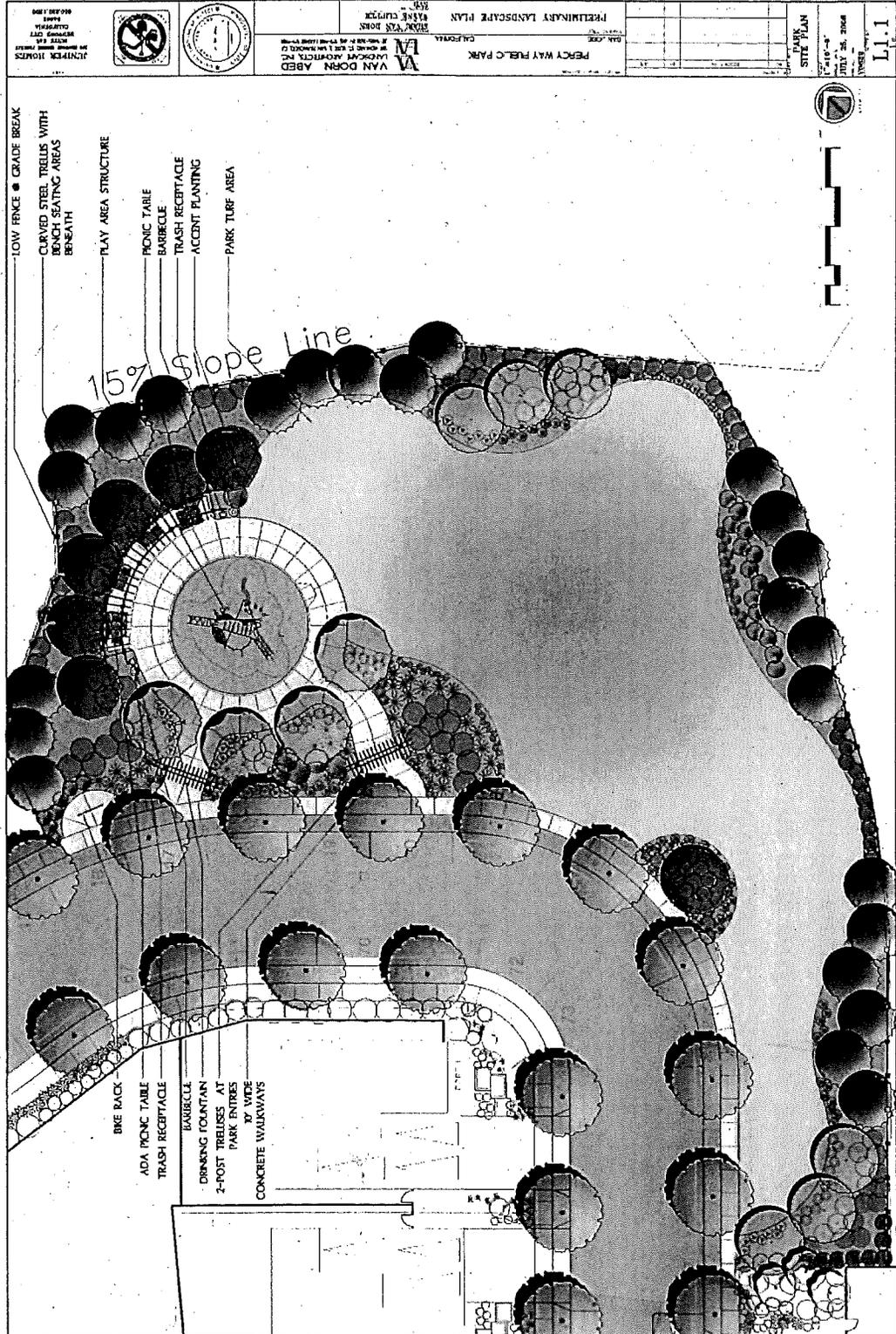
By: _____
Name: _____
Title: _____

RD:JVP
2/26/09

- All Developer's/Owner's signatures must be accompanied by an attached notary acknowledgement.
- Proof of authorization for Developer's/Owner's signatures is required to be submitted concurrently with this Agreement.

EXHIBIT A

PARK IMPROVEMENTS SITE PLAN



Ex A-1

EXHIBIT B

DESIGN AND CONSTRUCTION REQUIREMENTS

SECTION 1. DESIGN AND CONSTRUCTION REQUIREMENTS.

A. Plans And Specifications.

The design for the Park Improvements must be consistent with the conceptual design for the Park Improvements as depicted in **Exhibit A** of this Agreement and the Master Plan approved by City Council for the Park Site. Developer shall design and construct the Park Improvements in accordance with the following:

1. City's Standard Specifications and Standard Details, dated July 1992 ("City's Specifications") and on file with the City's Department of Public Works, Architectural Division. Section 1 and the Technical Provisions of the City's Standard Specifications (Section 10 through and including Section 1501) shall be applicable to this Agreement. References in the Standard Specifications to "Developer" shall be deemed to mean the "Developer." In the event that Developer does not submit the ninety percent (90%) review Project Specifications, as defined below in Section I(A)(2) of this Agreement, for City's review and approval within eighteen (18) months of the Effective Date of this Agreement and the City's Specifications are then revised, Developer shall design and construct the Park Improvements in accordance with the revised City's Specifications.
2. City's Turnkey Park Standards for Park Design & Construction, dated September 2001 ("Turnkey Standards") and on file with the City's Department of Public Works, Architectural Division. In the event that Developer does not submit the ninety percent (90%) review Project Specifications (as specified in the Turnkey Standards) for City's review and approval within eighteen (18) months of the Effective Date of this Agreement and the Turnkey Standards are then revised, Developer shall design and construct the Park Improvements in accordance with the revised Turnkey Standards.

B. Application Of Plans And Specifications.

1. City's Specifications, Turnkey Standards and the Project Specifications shall be collectively referred to as the "Plans." The Park Improvements shall be constructed in accordance with the Plans.
2. In the event of a conflict between the Turnkey Standards and the City's Specifications, the Turnkey Standards shall prevail.

3. The provisions of this Agreement supersede anything to the contrary in either the City's Specifications or the Turnkey Standards.

C. Project Specification Approval Process.

1. The Project Specifications shall be submitted in a timely manner in order to insure that the Developer completes the Park Improvements on or before the completion date specified in this Agreement. Developer shall not construct any Park Improvements unless and until the City's Director of Public Works ("Director of PW") has approved the Project Specifications in writing. The approval process for the Project Specifications is more particularly set forth in the Turnkey Standards.
2. City's approval of the Plans shall not release Developer of the responsibility for the correction of mistakes, errors or omissions contained in the Plans, including any mistakes, errors or omissions which may be the result of circumstances unforeseen at the time the Plans were developed or approved. If, during the course of construction of the Park Improvements, the Director of PW determines in the Director of PW's reasonable discretion that the public safety requires modification of, or the departure from, the Plans, the Director of PW shall have the authority to require such modification or departure and to specify the manner in which the same may be made. The parties acknowledge that the Plans, once approved by the Director of PW, shall be final and that, except as expressly provided in this subsection, no revisions to the Plans shall be permitted for any reason whatsoever.

SECTION 2. PARTICULAR CONSTRUCTION REQUIREMENTS.

A. Developer Selection.

Developer may hire and contract with one or more contractor or subcontractor, licensed to perform such work in the State of California.

B. Prevailing Wage Requirement.

1. General Requirement: For all construction work on the Park Improvements, the Developer agrees to comply with the prevailing wage requirements set forth in Sections 7-1.01A(2) through 7-1.01A(3) of the City of San Jose, Department of Public Works, Standard Specifications, dated July 1992 ("Prevailing Wage Requirement.") The Prevailing Wage Requirement is incorporated into this Agreement by reference as though set forth herein in their entirety. Developer acknowledges that it has reviewed the Prevailing Wage Requirement and is familiar with its requirements.

2. Contractors And Subcontractors: Developer shall expressly require compliance with the Prevailing Wage Requirement in all agreements it enters into with contractors and subcontractors for construction work on the Park Improvement. The Developer acknowledges and agrees that it is responsible for compliance by its contractors and subcontractors of the Prevailing Wage Requirement.
3. Reporting Obligations: Notwithstanding anything to the contrary contained herein, the Developer is not obligated to submit to the City copies of payroll records, or any other records required to be maintained pursuant to the Prevailing Wage Requirement, until the City requests such records. Developer shall provide to the City, at no cost to the City, a copy of any and all such records within ten (10) working days of the City's Office of Equality Assurance request for such records. In responding to a request by the Office of Equality Assurance, Developer agrees that it is responsible for submitting the records of any and all of its contractors and subcontractors.
4. Indemnity: Developer shall indemnify the City for any claims, costs or expenses which the City incurs as a result of Developer's failure to pay, or cause to be paid, prevailing wages.

C. Remedies For Developer's Breach Of Prevailing Wage Requirements.

1. General: Developer 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. Pay workers a wage that enables them not to live in poverty is beneficial to the health and welfare of all citizens of San Jose 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 Jose.
 - d. It increases competition by promoting a more level playing field among contractors with regard to the wages paid to workers.

2. Remedies: City and Developer recognize that Developer's breach of the Prevailing Wage Requirement set forth above will cause damage to the City by undermining City's goals in assuring timely payment of prevailing wages, and will cause City additional expenses in obtaining compliance and conducting audits, and that such damage would not be remedied by Developer's payment of restitution to the worker paid less than the prevailing wage. Developer and City agree 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. City and Developer further recognize the delays, expense and difficulty involved in proving City's actual losses in a legal proceeding, and mutually agree that making a precise determination of the amount of City's damages as a result of Developer's breach of the Wage Provision would be impracticable and/or extremely difficult. Accordingly, City and Developer agree that:
 - a. For each day after ten (10) working days that the Developer fails to completely respond to a request by the City to provide records as required under Section 2(B) of Exhibit B of this Agreement, Developer shall pay to City as liquidated damages the sum of TWO HUNDRED FIFTY DOLLARS (\$250.00); and
 - b. For each instance where City has determined that the Prevailing Wage Requirements were not met, Developer shall pay to City as liquidated damages the sum of three (3) times the difference between the actual amount of wages paid and the prevailing wages which should have been paid.
3. 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 the 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 Developer's address indicated for receipt of notices in this Agreement.
4. Remedies Cumulative: The remedies set forth in this provision of the Agreement are cumulative and in addition to any other remedies set forth in the Prevailing Wage Requirements or otherwise permitted by law.

D. Conduct Of Work.

1. Appearance. Developer shall maintain a neat and clean appearance to the work at the Park Site. When practicable, broken concrete and debris

developed during clearing and grubbing shall be disposed of concurrently with its removal. If stockpiling of disposable material is necessary, the material shall be retained in an area not readily visible to the public in a manner meeting the reasonable satisfaction of the Director of PW.

2. Condition. Developer shall maintain the Park Site in a neat, clean, and good condition prior to City's acceptance of the Park Improvements. Developer shall not dispose or cause the disposal of any Hazardous Substances on any of the Park Site. Additionally, Developer shall take reasonable precautions to prevent the disposal of Hazardous Substances by third parties on any of the Park Site. The term "Hazardous Substances" is defined in Section 3 (A)(2) of this Exhibit.
3. Emergencies. In an emergency affecting the safety of persons or property, Developer shall act reasonably to prevent threatened damage, injury or loss. Developer shall immediately notify the City by telephone at the telephone number as directed by City's Director of PW and in writing of such actions.

E. Access For Inspection.

1. Access. The Director of PW and the Director of PW's designated representatives, including without limitation, staff from other City departments, shall at all times during the progress of work on the Park Improvements have free access to such improvements for inspection purposes. If the Director of PW determines that all or any portion of the work done on the Park Improvements is not in compliance with the Plans, the Director of PW shall notify Developer of the same and Developer shall promptly cure such defect to the Director of PW's reasonable satisfaction. Such notifications shall be made to the Developer and his on-site representatives to not unduly interfere with ongoing construction work.
2. Representatives.
 - a. Prior to commencement of work on the Park Improvements, Developer shall designate in writing an authorized representative who shall have the authority to represent and act for Developer. When work is not in progress and during periods when work is suspended, arrangements acceptable to the Director of PW shall be made for any emergency work which may be required. In addition, Developer shall provide Director of PW with the names and telephone numbers of at least two (2) individuals in charge of or responsible for the work who can be reached personally in case of emergency twenty-four (24) hours a day, seven (7) days a week.

- b. The Director of PW shall also designate one (1) or more authorized representatives who shall have the authority to represent the Director of PW. Developer's authorized representative shall be present at the site of the work at such reasonable times as designated by the Director of PW. Prior to commencement of the work, the Parties shall mutually agree to an inspection schedule, which schedule may be adjusted from time to time by mutual agreement.
- c. Whenever the Developer or its authorized representative is not present on any particular part of the work where it becomes necessary to give direction for safety reasons, the Director of PW shall have the right to give such orders which shall be received and obeyed by the superintendent or foreman who may have charge of the particular work in reference to which the orders are given. Any order given by the Director of PW will on request of the Developer be given or confirmed by the Director of PW in writing.
- d. City's rights under this Agreement shall not make the Developer an agent of the City, and the liability of the Developer for all damages to persons or to public or private property arising from Developer's execution of the work, shall not be lessened because of the exercise by City of its rights.

F. Acceptance of Park Improvements.

The Park Improvements shall be completed in accordance with the provisions of this Agreement to the reasonable satisfaction of the Director of PW.

- 1. City agrees to inspect and prepare a punchlist for the Park Improvements within ten (10) business days of notification by Developer that the Developer considers the construction of the Park Improvements to be complete. City further agrees to perform its final inspection within ten (10) business days of notification by Developer that all punchlist work has been completed.
- 2. City will process acceptance documentation (Notice of Acceptance) within ten (10) business days of the date of City's final inspection or the date upon which the Developer returns to City the appropriate signed acceptance documentation, whichever is later, provided that:
 - a. City finds that all punchlist work has been satisfactorily completed; and
 - b. Developer has performed and satisfied any and all terms, conditions, and obligations required under this Agreement prior to acceptance of the Park Improvements, including but not limited to,

the requirements for dedication of the Park Site as outlined in Section 2(G) of this Exhibit below; and

- c. Developer has provided the Director of PW with three (3) sets of the Plans ("record plans") corresponding copies of any and all warranties, and the like (such warranties shall be in the name of the City), and corresponding copies of any and all operating manuals for equipment installed as part of Park Improvements; and
 - d. City and HOA has entered into a fully executed Park Maintenance and Right-of-Entry Agreement in substantially the same form as **Exhibit D.**
3. The Parties acknowledge that City's restrictions on the installation of landscaping because of future drought conditions may delay Developer's installation of the landscaping contemplated by this Agreement. If, due to drought restrictions, Developer is unable to install the landscaping in time to be inspected by the Director for the purposes of accepting the completed Park Improvements, Developer shall post a bond or other form of security as set forth in Section 5 (A)(4) of this Agreement.
 4. At the discretion of the Director of PW, the City may accept a designated portion of the Park Improvements. Acceptance of a designated portion will be as provided by Section 7-1.166 of the City's Specifications.

G. Park Site.

1. Developer shall provide the following to the Director of PW, subject to the approval of the Director of PW, prior to City's acceptance of the Park Site and Park Improvements:
 - a. A preliminary title report for the Park Site by a reputable title company currently doing business for City's PW Real Estate Division. Developer shall coordinate with City's PW Real Estate Division and provide a preliminary title report at least ninety (90) days prior to execution of this Agreement and an updated title report at least ninety (90) days prior to the anticipated completion of the Park Improvements.
 - b. A Grant Deed for the Park Site containing the legal description of the Park Site, as approved by City Surveyor, properly executed and acknowledged, subject only to the exceptions to title, if any, approved by City's Manager pursuant to which a fee simple estate in Park Site shall be conveyed to City. Title to the Park Site shall be vested in City free and clear of all title defects, liens, encumbrances, conditions, covenants, restrictions, and other

adverse interests of record or known to Developer, subject only to those exceptions affecting the Park Site approved by City's Manager, in writing, or listed in this Exhibit ("Permitted Exceptions"). The Grant Deed, subject to approval of City, for the Park Site shall be delivered to the City's PW Real Estate Division at least ninety (90) days prior to the anticipated completion of the Park Improvements.

- c. Developer shall also cause to be provided to City, concurrently with the conveyance of the Park Site to City, a C.L.T.A. owner's form policy of title insurance issued by a reputable title company currently doing business with City's PW Real Estate Division with City named as the insured, in the amount of One Million Sixty-Seven Thousand Five Hundred Dollars (\$1,067,500.00) insuring the title of City to the Park Site is subject to only the Permitted Exceptions.
- d. Any and all reports related to the condition of the Park Site and the lands adjacent to the Park Site caused to be performed by the Developer or in the Developer's possession or control. Developer shall also provide to City, at the Developer's sole cost, a report, prepared or updated no earlier than twelve (12) months before the proposed acceptance of the Park Improvements by a qualified consultant analyzing the condition of the Park Site with respect to the presence of hazardous materials on or adjacent to the Park Site ("Hazardous Materials Report"). The definition of Hazardous Materials for purposes of this Agreement is set forth in Section 3 (A)(2) of this Exhibit. The scope of the Hazardous Materials Report shall, at minimum, contain the elements set forth below in Section 4.
- e. In the event that the Hazardous Materials Report(s) disclose(s) the presence of Hazardous Materials on any of the Park Site in excess of generally accepted environmental screening limits for the park land uses, (e.g. Environmental Screening Limits and California Human Health Screening Limits) and/or in violation of any hazardous materials/waste laws, the Director shall have the right to require Developer, as a condition of acceptance, to remediate the condition, including without limitation, removal of the Hazardous Materials. The type of remediation required for the Park Site shall be at no cost to the City and be subject to the review and approval of the Director.
- f. The Environmental Warranty specified in Section 3 of this Exhibit.

- g. Documents evidencing the authority of the signatory(ies) to execute any agreement or other legal binding documents on behalf of Developer.
2. Upon the Director of PW's acceptance of the Park Site and Park Improvements, Developer shall have no further obligations in connection with the Park Site except for the terms, conditions or obligations of this Agreement that explicitly survives acceptance or termination.

H. Compliance With Laws/Permits.

1. Developer shall keep fully informed of all existing and future local, State and Federal laws and county and municipal ordinances and regulations which in any manner affect those engaged or employed in the work on the Park Improvements, or the materials used in the Park Improvements, or which in any way affect the conduct of the work on the Park Improvements, and of all such orders and decrees of bodies or tribunals having any jurisdiction or authority over the same. In the performance of any work pursuant to this Agreement, the Developer shall at all times observe and comply with, and shall cause all the Developer's employees, agents, representatives, contractors, and subcontractors to observe and comply with all such existing and future laws, ordinances, regulations, orders and decrees of bodies or tribunals having any jurisdiction or authority over the work. If any discrepancy or inconsistency is discovered in the plans, drawings, specifications, or contract for the work in relation to any such law, ordinance, regulation, order or decree, Developer shall promptly report the same to the Director.
2. Developer shall, at its sole cost and expense, obtain all governmental reviews and approvals, licenses and permits which are, or may be, required and necessary to construct and complete the Park Improvements in accordance with the provisions of this Agreement, including, but not limited to, site development reviews, development permits and environmental review. Developer shall comply with all conditions, restrictions or contingencies imposed upon, or attached to, such governmental approvals, licenses, and permits. If Developer for any reason fails to comply with any of City's requirements, or any other legal requirement concerning Developer's construction of the Park Improvements, then City shall have the right to require Developer to alter, repair, or replace any improvements or perform any other action to the satisfaction of the Director as reasonably required to correct any non-compliance of the Park Improvements with legal requirements or this Agreement and at no cost to City. Developer's failure to effect the cure as required by the Director shall constitute an Event of Default in accordance with Section 6 of this Agreement.

SECTION 3. ENVIRONMENTAL WARRANTY.

- A.** By executing this Agreement Developer warrants and agrees that, prior to the City's acceptance of the Park Improvements and dedication of the Park Site:
1. Neither the Park Site nor Developer are in violation of any environmental law, and neither the Park Site nor the Developer are subject to any existing, pending or threatened investigation by any federal, state or local governmental authority under or in connection with the environmental laws relating to the Park Site.
 2. Neither Developer nor any other person with Developer's permission to be upon the Park Site shall use, generate, manufacture, produce, or release, on, under, or about the Park Site, any Hazardous Substance except in compliance with all applicable environmental laws. For the purposes of this Agreement, the term "Hazardous Substances" or "Hazardous Materials" shall mean any substance or material which is capable of posing a risk of injury to health, safety or property, including all those materials and substances designated as hazardous or toxic by any federal, state or local law, ordinance, rule, regulation or policy, including but not limited to, all of those materials and substances defined as "Toxic Materials" in Sections 66680 through 66685 of Title 22 of the California Code of Regulations, Division 4, Chapter 30, as the same shall be amended from time to time, or any other materials requiring remediation under federal, state or local laws, ordinances, rules, regulations or policies.
 3. Developer has not caused or permitted the release of, and has no knowledge of the release or presence of, any Hazardous Substance on the Park Site or the property on which the Park Improvements are to be constructed, or the migration of any Hazardous Substance from or to any other property adjacent to, or in the vicinity of, the Park Site.
 4. Developer's prior and present use of the Park Site has not resulted in the release of any Hazardous Substance on, under, about, or adjacent to the Park Site.
 5. Neither the Park Site nor Park Improvements located on the Park Site shall be subject to any monitoring, reporting, or restrictions whatsoever by any governmental authority with jurisdiction over the Park Site, including but not limited to, the California Department of Toxic Substances Control and California Regional Water Quality Control Board.
 6. Subject to Section 2(G)(1)(b) of this Exhibit, neither the Park Site nor Park Improvements located on the Park Site shall be subject to any burden,

easements, covenants, or restrictions recorded against any part of the Park Improvements or Park Site.

B. Developer shall give prompt written notice to City of:

1. Any proceeding or investigation by any federal, state or local governmental authority with respect to the presence of any Hazardous Substance on the Park Site or the migration thereof from or to any other property adjacent to, or in the vicinity of, the Park Site; and
2. Any claims made or threatened by any third party against Developer, City or the Park Site relating to any loss or injury resulting from any Hazardous Substance; and
3. Developer's discovery of any occurrence or condition on any property adjoining or in the vicinity of the Park Site that could cause the Park Site or any part thereof to be subject to any restrictions on its ownership, occupancy, use for the purpose for which it is intended, transferability or suit under any environmental law.

SECTION 4. HAZARDOUS MATERIALS REPORT.

A. Scope of Hazardous Materials Report.

The Hazardous Materials Report shall be in two phases, Phase I Environmental Site Assessment ("ESA") and, if necessary, Phase II ESA. The Phase I ESA shall be conducted utilizing standards of All Appropriate Inquiry and ASTM 1527-05 which, in general, provide the information identified below regarding the condition of the Park Site with respect to the presence or likely presence of any Hazardous Materials on, under, above, or about the Park Site, including the past, current, or possible release of any Hazardous Materials on, under, above, or about the Park Site.

1. The historical usage of the Park Site and adjacent parcels dating back to the Park Site's first developed use (including any agricultural use) or 1940, whichever is earlier.
2. Results of the site visits pertaining to the current condition of the Park Site, including without limitation, observed storage, handling, or release of any evidence indicating possible past or current storage, handling, or release of any Hazardous Materials on, under, above, or about the Park Site.
3. Results of the review of all reasonably available historical documents and records of regulatory agencies concerning the storage, handling, or release of any Hazardous Materials and/or contamination of any or all of the Park Site.

4. Based on the findings of items 1 - 3 above, additional investigation, including without limitation, soil and/or groundwater sampling and chemical analysis could be required by the City. The sampling and analysis plan, which includes the number and depths of soil borings that might be required shall be subject to the review and approval of the City.
5. A written report shall be prepared by a licensed environmental professional presenting results of the Phase I ESA. The report shall include any chemical analysis completed during the survey along with chain of custody documentation, soil boring logs if required and recommendations for any further investigation and remediation/source control necessary on the site.

B. Phase II ESA (if necessary).

A definitive scope of services for the Phase II ESA cannot be determined until completion of the Phase I ESA, as the extent and type of further investigation will be determined by the Phase I ESA findings. The following tasks serve only as preliminary guidelines for potential Phase II investigation and are subject to revision upon City's review and approval of the Phase I ESA (Hazardous Materials Report). It is possible that no Phase II investigation will be necessary.

1. Soil and Groundwater Sampling and Analysis.

Depending on the results of the Phase I ESA, it may be necessary to sample and analyze the soil and/or groundwater on-site. If such analysis is necessary, a sampling and analysis plan shall be prepared and approved by City that shall define a sufficient number of samples to be collected and analyzed to allow for an adequate characterization of the environmental condition of the Park Site. Soil and/or groundwater samples shall be analyzed for petroleum hydrocarbons, selected metals, volatile organic compounds, or any other potential contaminant of concern as identified in the Phase I ESA.

A soil and/or groundwater sample shall be collected utilizing typical professional protocols and submitted to an EPA certified laboratory for analysis.

2. Report Preparation.

A written report shall be prepared presenting the results of the Phase II investigation. The report shall include results from any chemical analysis completed during the investigation, along with chain-of-custody documentation, boring logs of sampling locations or from any monitoring

wells completed, and recommendations for any further investigation and remediation/source control necessary on the site.

3. Report on any Remediation Work.

A written report shall be prepared presenting the results of any remediation work resulting from a Phase II investigation. The report shall include results from any chemical analysis completed during the survey, along with chain-of-custody documentation, boring logs of sampling locations or from any monitoring wells completed, and that any recommendations for any further investigation and remediation/source control necessary on the Park Site have been completed.

SECTION 5. INSURANCE REQUIREMENTS.

Developer and/or its contractors and consultants shall procure and maintain for the duration of the Agreement insurance against claims for injuries to persons or damages to property which may arise from, or in connection with, the performance of the Development hereunder by the Developer, its agents, representative employees, contractors 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 also be included for all owned, non-owned and hired autos; and
3. Workers' Compensation insurance as required by the California Labor Code and Employers Liability insurance; and
4. Professional Liability Errors and Omissions Insurance for all professional services; and
5. Builder's Risk insurance providing coverage for "All Risks" of loss; and
6. Pollution Liability insurance, including coverage for all operations, completed operations and professional services (without exclusion for asbestos or lead).

There shall be no endorsement reducing the scope of coverage required above unless approved by the City's Risk Manager in writing.

B. Minimum Limits of Insurance.

Developer shall maintain limits no less than:

1. Commercial General Liability: Five Million Dollars (\$5,000,000) 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; and
2. Automobile Liability: One Million Dollars (\$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 One Million Dollars (\$1,000,000) per accident; coverage shall be endorsed to state carrier waives its rights of subrogation against the City, its officers, employees, agents, and contractors; and
4. Professional Liability Errors and Omissions: One Million Dollars (\$1,000,000) per claim/One Million Dollars (\$1,000,000) aggregate limit; and
5. Builders' Risk: completed value of the Project; and
6. Pollution Liability: Two Million Dollars (\$2,000,000) per occurrence/Two Million Dollars (\$2,000,000) aggregate limit.

C. Deductibles and Self-Insured Retentions.

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

D. Provisions of Policies.

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

1. Regarding Commercial General Liability and Automobile Liability and Pollution Liability Coverages.
 - a. The City, its officials, employees, agents and contractors are to be covered as an additional insured as respects: liability arising out of activities performed by, or on behalf of, the Developer; products and completed operations of the Developer, premises owned, leased or used by the Developer; or automobiles owned, leased, hired or borrowed by the Developer. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officials, employees, agents and contractors; and
 - b. The Developer's insurance coverage shall be primary insurance as respects the City, its officials, employees, agents and contractors. Any insurance or self-insurance maintained by the City, its officials, employees, agents and contractors shall be excess of the Developer's insurance and shall not contribute with it; and
 - c. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the City and the City, its officials, employees, agents or contractors; and
 - d. Coverage shall state that the Developer'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; and
 - e. Coverage shall contain a waiver of subrogation in favor of City, its officials, agents, and contractors.
2. Workers' Compensation and Employers Liability Coverages shall contain a waiver of subrogation in favor of City, its officials, employees, agents, and contractors.
3. Builders' Risk policies shall contain the following provisions:
 - a. City shall be named as loss payee.
 - b. Coverage shall contain a waiver of subrogation in favor of City, its officials, employees, agents, and contractors.
4. All Coverages.

Each insurance policy required by this Agreement shall be endorsed to state that coverage shall not be suspended, voided, cancelled or reduced in limits except after thirty (30) days' prior written notice has been give to

the City's Risk Manager, except that ten (10) days' prior written notice shall apply in the event of cancellation for non-payment of premium.

E. Duration.

1. Commercial General Liability (including, without limitation, products and completed operations coverage), Professional Liability and Pollution Liability coverages shall be maintained continuously for a minimum of five (5) years after completion of the work under this Agreement.
2. If any of such coverages are written on a claims-made basis, the following requirements apply:
 - a. The policy retroactive date must precede the date the work commenced under this Agreement.
 - b. If the policy is cancelled or non-renewed and coverage cannot be procured with the original retroactive date, Developer must purchase an extended reporting period equal to or greater than five (5) years after completion of the work under this Agreement.

F. ACCEPTABILITY OF INSURERS.

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

G. VERIFICATIONS OF COVERAGES.

Developer shall furnish the City (in the manner provided below) with certificates of insurance and with original endorsements affecting coverage required by this Agreement. 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 City's Risk Manager:

City of San José – Human Resources
Risk Management
200 East Santa Clara Street, 2nd Floor Wing
San José, CA 95113-1905

- H.** Developer or its contractors shall include all subcontractors as insureds under its policies or shall obtain separate certificates and endorsements for each subcontractor.

EXHIBIT C

BOND FORMS

Bond No. _____

Premium _____

FAITHFUL PERFORMANCE BOND

WHEREAS, the CITY OF SAN JOSE, a municipal corporation of the State of California ("City"), and ***[insert name of Developer or Contractor, type of entity, and state of incorporation if applicable]*** as principal ("Principal") have entered into an agreement entitled ***[insert title of turnkey agreement and identifying development permit number, tract map or tentative map number or some other identifier unique to this project]***, incorporated herein by reference and referred to as the "Contract," which requires Principal to dedicate real property for neighborhood and community parks, construct park or recreational improvements and/or pay parkland in-lieu fees; and,

WHEREAS, under the terms of the Contract and prior to commencing any work under the Contract, Principal is required to furnish a bond to City for faithful performance of the Contract;

NOW, THEREFORE, we the Principal and ***[insert full name of Surety]***, a corporation duly authorized and admitted to transact business and issue surety bonds in the State of California ("Surety"), are held firmly bound unto the City in the sum of ***[insert bond amount]***, for the payment of which sum well and truly to be made, we the Principal and Surety bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally.

The condition of this obligation is such that, if the Principal, Principal's heirs, executors, administrators, successors, or assigns shall in all things stand to and abide by, and well and truly keep and perform all covenants, conditions, and agreements required to be kept and performed by Principal in the Contract and any changes, additions, or alterations made thereto, to be kept and performed at the time and in the manner therein specified, and in all respects according to their true intent and meanings, and shall indemnify and save harmless City, its officers, employees, and agents, as therein provided, then this obligation shall be null and void; otherwise, it shall be and remain in full force and effect.

As a part of the obligation secured hereby and in addition to the sum specified above, there shall be included all costs, expenses, and fees, including attorney's fees,

reasonably incurred by City in successfully enforcing such obligation, all to be taxed as costs and included in any judgment rendered.

The Surety, for value received, hereby stipulates and agrees that no change, extension of time, alteration, or addition to the terms of the Contract or to the work to be performed thereunder or to the specifications accompanying the same shall in any way affect its obligations on this bond, and it does hereby waive notice of any such change, extension, alteration, or addition.

IN WITNESS WHEREOF, this instrument has been duly executed by authorized representatives of the Principal and Surety. SIGNED AND SEALED on _____, 20____.

PRINCIPAL:

SURETY:

(Principal name) (Seal)

(Surety name) (Seal)

BY: _____
(Signature)

BY: _____
Signature)

(Print name and title)

(Print name and title)

Principal address and telephone:

Surety address and telephone:

Affix Corporate Seals

Attach Notary Acknowledgments for All Signatures

Attach Power-of-Attorney if executed by Attorney-in-Fact

Bond No: _____

Premium _____

PAYMENT (LABOR AND MATERIALS) BOND

WHEREAS, the CITY OF SAN JOSE, a municipal corporation of the State of California ("City"), and *[insert name of Developer or Contractor, type of entity, and state of incorporation if applicable]*, as principal ("Principal") have entered into an agreement entitled *[insert title of turnkey agreement and identifying development permit number, tract map or tentative map number or some other identifier unique to this project]*, incorporated herein by reference and referred to as the "Contract," which requires Principal to dedicate real property for neighborhood and community parks, construct park or recreational improvements and/or pay parkland in-lieu fees; and,

WHEREAS, under the terms of the Contract and prior to commencing any work under the Contract, Principal is required to furnish a good and sufficient payment bond to the City to secure the claims to which reference is made in Title 15 (commencing with Section 3082) of Part 4 of Division 3 of the California Civil Code.

NOW, THEREFORE, we the Principal and *[insert full name of Surety]*, a corporation duly authorized and admitted to transact business and issue surety bonds in the State of California ("Surety"), are held firmly bound unto the City, and unto all contractors, subcontractors, suppliers, laborers, materialmen and other persons employed in the performance of the Contract and referred to in the aforesaid Civil Code, as obligees, in the sum of *[insert bond amount]*, on the condition that if Principal shall fail to pay for any materials or equipment furnished or used or for any work or labor thereon of any kind, or for amounts due under the Unemployment Insurance Act with respect to such work or labor, or for any amounts required to be deducted, withheld, and paid over to the Employment Development Department from the wages of employees of the Principal and all subcontractors with respect to such work or labor, then the Surety shall pay the same in an amount not exceeding the sum specified above. If suit is brought upon this bond, Surety shall pay, in addition to the above sum, all costs, expenses, and fees, including attorney's fees, reasonably incurred by any obligee in successfully enforcing the obligation secured hereby, all to be taxed as costs and included in the judgment rendered. Should the condition of this bond be fully performed, then this obligation shall become null and void; otherwise, it shall be and remain in full force and effect, and shall bind Principal, Surety, their heirs, executors, administrators, successors, and assigns, jointly and severally.

IT IS HEREBY EXPRESSLY STIPULATED AND AGREED that this bond shall inure to the benefit of all persons, companies, corporations, political subdivisions, and State agencies entitled to file claims under Title 15 (commencing with Section 3082) of Part 4 of Division 3 of the Civil Code, so as to give a right of action to them or their assigns in any suit brought upon this bond. The Surety, for value received, hereby

stipulates and agrees that no change, extension of time, alteration or addition to the terms of the Contract or to the work to be performed thereunder or the specifications accompanying the same shall in any way affect its obligations on this bond, and it does hereby waive notice of any such change, extension, alteration or addition.

IN WITNESS WHEREOF, this instrument has been duly executed by authorized representatives of the Principal and Surety. SIGNED AND SEALED on _____, 20____.

PRINCIPAL:

SURETY:

Principal name)

(Seal)

(Surety name)

(Seal)

BY: _____

(Signature)

BY: _____

(Signature)

Print name and title)

Principal address and telephone:

Print name and title)

Surety address and telephone:

Affix Corporate Seals

Attach Notary Acknowledgments for All Signatures

Attach Power-of-Authority if executed by Attorney-in-Fact

Bond No. _____
Premium. _____

WARRANTY BOND

WHEREAS, the City of San Jose, a municipal corporation of the State of California ("City") and ***[insert name of Developer/Contractor, type of entity, and state of incorporation if applicable]*** as principal ("Principal") have entered into an agreement entitled ***[insert title of turnkey agreement and identifying development permit number, tract map or tentative map number or some other identifier unique to this project]***, incorporated herein by reference and referred to as the "Contract," which requires Principal to dedicate real property for neighborhood and community parks, construct park or recreational improvements and/or pay parkland in-lieu fees; and,

WHEREAS, under the terms of the Contract, Principal is required to furnish a bond to City to make good and protect the City against the results of any work or labor done or materials or equipment furnished which are defective or not in accordance with the terms of the Contract having been used or incorporated in any part of the work so contracted for, which shall have appeared or been discovered, within the period of one (1) year from and after the completion and final acceptance of the work done under the Contract.

NOW, THEREFORE, we the Principal and ***[insert full name of Surety]***, a corporation duly authorized and admitted to transact business and issue surety bonds in the State of California ("Surety"), are held firmly bound unto the City in the sum of ***[insert bond amount – 25% of Faithful Performance Bond]***, for the payment of which sum well and truly to be made, we the Principal and Surety bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally.

The condition of this obligation is such that, if the Principal shall well and truly make good and protect the City against the results of any work or labor done or materials or equipment furnished which are defective or not in accordance with the terms of the Contract having been used or incorporated in any part of the work performed under the Contract, which shall have appeared or been discovered within said one-year period from and after completion of all work under the Contract and final acceptance by City of said work, then this obligation shall be null and void; otherwise, it shall be and remain in full force and effect.

The Surety, for value received, hereby stipulates and agrees that no change, extension of time, alteration or addition to the terms of the Contract or to the work to be performed thereunder or the specifications accompanying the same shall in any way affect its obligations on this bond, and it does hereby waive notice of any change, extension of time, alteration or addition.

IN WITNESS WHEREOF, this instrument has been duly executed by authorized representatives of the Principal and Surety. **SIGNED AND SEALED** on _____, 20____.

PRINCIPAL:

SURETY:

(Principal name) (Seal)

(Surety name) (Seal)

BY: _____
(Signature)

BY: _____
(Signature)

(Print name and title)

(Print name and title)

Principal address and telephone:

Surety address and telephone:

Affix Corporate Seals
Attach Notary Acknowledgments for All Signatures
Attach Power-of-Attorney if executed by Attorney-in-Fact

EXHIBIT D
PARK MAINTENANCE AGREEMENT

Ex C-7

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

RD:JVP
2/26/2009

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 Jose – Public Works - Real Estate
200 E. Santa Clara Street, 5th Floor
San Jose, 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 Jose 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 Jose, and
- _____

Signature of Declarant

**AGREEMENT
BETWEEN
THE CITY OF SAN JOSE
AND
_____ OWNERS ASSOCIATION
AUTHORIZING RIGHT-OF-ENTRY AND MAINTENANCE
OF PIERCY PARK**

This Agreement for Right-of-Entry and Maintenance of the Piercy Park site ("Agreement") is entered into this ____ day of _____, 2009 ("Effective Date"), by the CITY OF SAN JOSE, a municipal corporation of the State of California (hereinafter "City"), and _____ 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, KB HOME SOUTH BAY INC., a California corporation (hereinafter "Developer"), is the owner and developer of the Piercy Road development located on certain real property on the southeasterly corner of Tennant Avenue and Piercy Road in the City of

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

WHEREAS, City has approved (i) Planned Development Rezoning No. PDC06-102 ("PD Rezoning"), (ii) Tentative Map Number PT07-047 (the "Tentative Map"), and (iii) Planned Development Permit No. PD07-054 ("PD Permit") for the Project; and

WHEREAS, Developer 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 or recreational facilities, and/or pay in-lieu fees ("Parkland Dedication Obligation"); and

WHEREAS, in order for Developer to satisfy its Parkland Dedication Obligation for the Project, Developer entered into a parkland agreement with City entitled "Parkland Agreement for Tentative Map No. PT 07-047 Between City of San Jose and KB HOME SOUTH BAY, INC." (hereinafter "Parkland Agreement") to construct park improvements and dedicate to City approximately 0.80 acres of real property adjacent to the Project for a public park, commonly referred to as "Piercy Park", as more particularly described in **Exhibit B** attached hereto ("Park Property"); and

WHEREAS, Developer, voluntarily agreed, as a part of the PD Rezoning and PD Permit for this Project to create a homeowners association for maintenance of the Park Property and other common areas located within the Project; and

WHEREAS, the City and Association desire to enter into this Agreement to satisfy the condition in the PD Rezoning and PD Permit whereby upon City's acceptance of the Park Property pursuant to the Parkland Agreement, Association shall be responsible for the maintenance of all park improvements located within the Park Property as set forth in this Agreement; 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 exhibits which are incorporated herein fully by reference:

Exhibit A	Legal Description of Project
Exhibit B	Legal Description of Park Property
Exhibit C	Conceptual Plan of Park Property
Exhibit D	Park Property: Scope of Services and Maintenance Specifications
Exhibit E	Wage Policy
Exhibit F	Insurance Requirements

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.

The Parkland Agreement and 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 of this Agreement, this Agreement shall be effective on the date that City accepts the dedication of the Park Property pursuant to Sections 2(F) and 2(G) of Exhibit B of the Parkland Agreement and shall remain in effect until the date that the Park Property ceases to function or operate as a public park ("Maintenance Term").

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 the Park Property that is necessary for access, ingress, egress, and all activities related to the maintenance of the park improvements located within the Park Property during the Maintenance Term 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, and any and all other tools and manpower necessary to maintain the Park Property in accordance with this Agreement.

- B. Association shall be fully and solely responsible for all maintenance of the Park Property. Association shall provide the following general maintenance of the Park Property: (1) inspection of the Park Property to ensure clean, safe, and attractive condition according to those adopted standards supplied to Association by City; (2) removal of all trash and debris in and around Park Property; (3) mowing the turf areas within the Park Property; (4) turf maintenance; (5) cleaning all drain inlets and outlets of surface silt; (6) cleaning of any subsurface pipes leading to and from the Park Property to the public drain system; (7) trimming, pruning, and cutting of shrub, hedges, and trees; (8) weed abatement; (9) maintenance of all landscape including plants, flowers, hedges, and shrubs; (10) maintenance of irrigation system; (11) removal of graffiti; (12) pest control; (13) vector control; (14) provide reports to PRNS; and (15) any and all necessary maintenance, subject to Exhibit D of this Agreement, to maintain the life of the park improvements located within Park Property as required by PRNS Director. The maintenance described in this Section 4B 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.
- D. In the event of an imminently dangerous condition at the Park Property, City, at its sole discretion, shall retain all rights to take any corrective action City deems necessary to address the immediate health and safety concerns at the Park Property. City shall have the right to send Association an invoice for any such work required by City under this Section 4(D) where the imminently dangerous condition at the Park Property was created or caused by Association's failure to perform and satisfy any Maintenance Services required under this Agreement. Any such invoice issued by City to Association shall be paid by Association to City within ten (10) calendar days of date of issuance of the invoice.
- E. Association shall not store any equipment, materials, or supplies in, on, or upon the Park Property.
- F. Association agrees and acknowledges that the Park Property 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 the Park Property. If Association believes that any area of the Park Property 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.
- G. Association shall complete and submit to City a weekly site inspection form provided by City.
- H. Association and City shall meet on a quarterly basis at the Park Property to inspect the park site 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.
- C. Association shall comply with all City rules, regulations, and policies relating to park use, park hours, and special permitted park activities at the Park Property. Nothing herein shall give the Association to alter, revise, or otherwise restrict the public use of the Park Property.

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 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 subcontractor's name. The clothing worn by Association's personnel shall be appropriate for the work assigned and shall give Association's staff a neat and professional appearance. Association's vehicles shall have appropriate identification as approved by the PRNS Director. Association's vehicles will not be allowed on the Park Property without the appropriate parking permit displayed on the dashboard.

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, national origin, or any other protected class in connection with or related to the performance of this Agreement.

SECTION 10. GIFTS.

- A. Association acknowledges that Chapter 12.08 of the San Jose 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 Jose 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 solely responsible for, and will pay, any excise, taxes, fees, contributions, or charges applicable to the conduct of its business or which may be levied on the Maintenance Services hereunder.

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 or entity except as authorized in writing by City, or as required by law ("Confidential Information"). Association, its respective agents, directors, officers, employees, consultants, contractors, and subcontractors shall hold the Confidential Information in strict confidence and not use on its own behalf or disclose such Confidential Information to any third party, unless 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 is authorized to hire appropriately qualified contractors and/or subcontractors to perform the Maintenance Services under this Agreement. Any attempt by Association to assign or transfer this Agreement in violation of this Section 15 of the Agreement will be voidable at City's sole discretion.

Any contractor and/or subcontractor retained by Association to perform and satisfy any terms, conditions or obligations under this Agreement shall receive a copy of this Agreement and be required to comply with this Agreement. Association shall be responsible for all contractors or subcontractors retained by Association, or on its behalf, to perform any Maintenance Services under this Agreement.

SECTION 16. ALTERATIONS.

Association may not make any improvements, alterations, additions, or changes to the Park Property other than normal maintenance 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 Park Property may be required to be approved in advance by City Council. Alterations which are non-structural changes to the Park Property may be approved by PRNS Director.

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") 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. In addition, either Party may terminate this Park Maintenance Agreement upon written notice to the other in the event casualty or natural disaster damages or destroys any of the improvements for which Association has maintenance responsibility under this Agreement.
- B. City's PRNS Director is authorized to terminate this Agreement on City's behalf under this Section 19 or Section 20 of this Agreement.
- C. In the event of termination, Association shall immediately deliver to City copies of all reports, documents, and other work performed by Association under this Agreement.

SECTION 20. DEFAULT AND TERMINATION.

- A. Each of the terms, conditions, or obligations under this Agreement shall be deemed material. If Association fails to perform any of the terms, conditions, or obligations under this Agreement, City may terminate this Agreement upon thirty (30) days advance written notice ("Notice Period") to Association, 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 Jose, 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, 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, South Region
(408) 277-5764

To Association: Board of Directors
_____ Owners Association
c/o _____, or successor
[Address & Phone]

Notice will be effective on the date personally delivered 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 Park Property (i) requiring the filing of a police report, (ii) resulting in the Park Property or related improvements being in an unsafe condition, (iii) otherwise materially affecting the operation of the Park Property, or (iv) non-life threatening emergency should occur on, in or around the Park Property (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 Park Property emergencies occurring on weekdays between the hours of 7a.m. and 3 p.m.	Contact Park Maintenance District 2 Supervisor: Office (408) 277-5108 Cell (408) 858-2508
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. 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 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, and the Parkland Agreement, 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.

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

APPROVED AS TO FORM:

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

JOHNNY V. PHAN
Deputy City Attorney

Lee Price
City Clerk

Date: _____

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 FOR PROJECT

Lots _____, inclusive, as shown on that certain final subdivision map for Tract _____ filed for record on _____ in Book _____ of Maps at Pages ____ through ____, inclusive, in the Official Records of the County of Santa Clara, State of California.

DRAFT

T

EXHIBIT B
LEGAL DESCRIPTION FOR PIERCY PARK

Lot ___ on the final map of Tract ___ recorded on _____ in Book ___ of Maps of Pages ___ through ___ in the Official Records of Santa Clara County, State of California.

DRAFT

**EXHIBIT C
PARK SITE PLAN**

DRAFT

PARK IMPROVEMENTS SITE PLAN

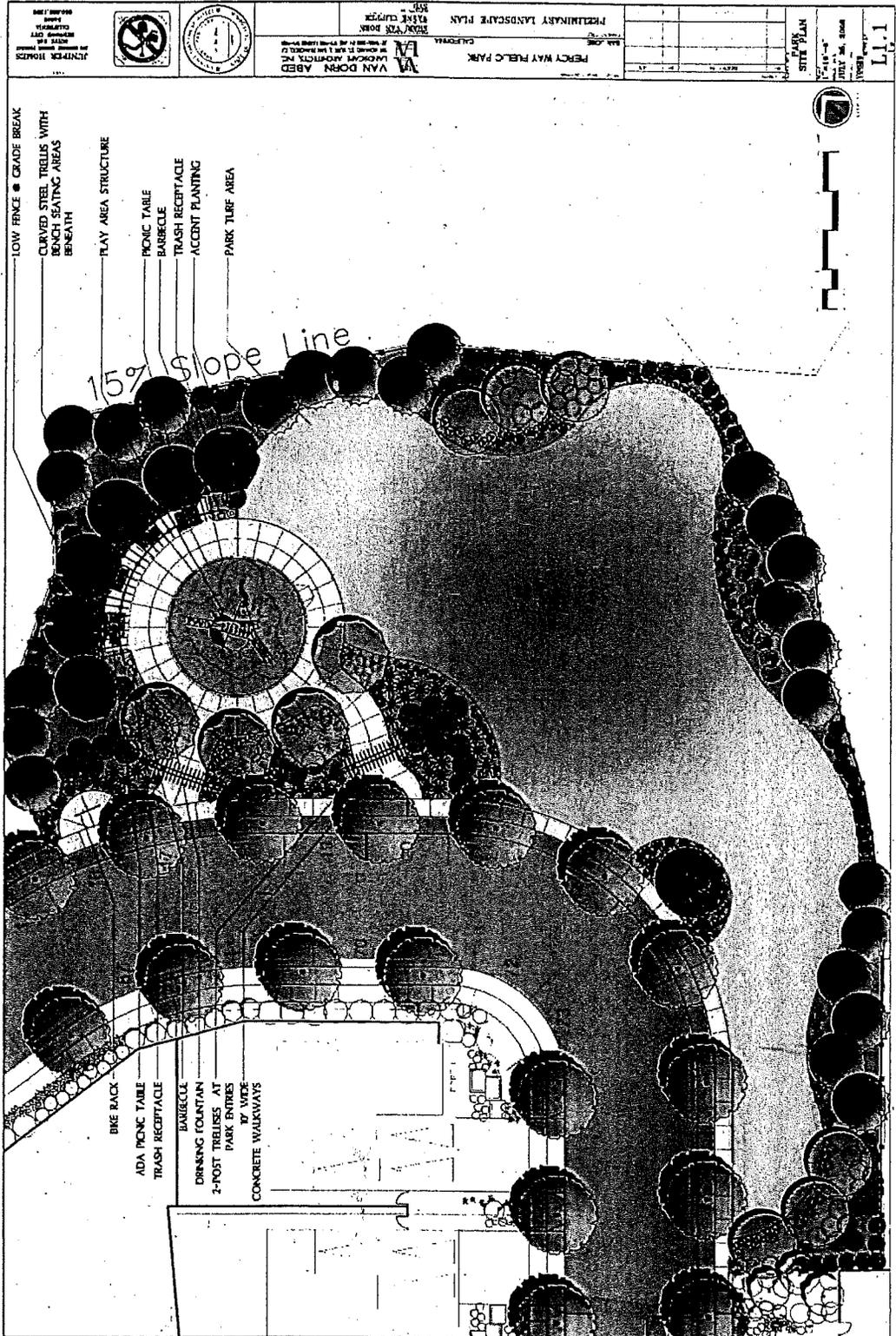


EXHIBIT D

PARK PROPERTY: SCOPE OF SERVICES AND MAINTENANCE SPECIFICATIONS

I. GENERAL

A. Scope of Work

Association shall furnish all supervision, labor, material, equipment and transportation required to maintain the Park Property, including the park improvements located within the Park Property, in a safe, clean, functional, and attractive condition throughout the Maintenance Term. 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 any park improvements, applicable maintenance standards of the park improvements, City park maintenance standards, and in conformance with all applicable laws and regulations relating to maintenance and repairs of the park improvements.

B. Work Force

Association shall designate one (1) qualified representative with experience in park and facility management to (1) meet with the City on a monthly basis at the Park Property, (2) be available by telephone for any emergency; (3) schedule and coordinate maintenance and repairs required under this Agreement; (4) coordinate and prepare pesticide and incident reports submitted to City; (5) prepare and submit weekly inspection reports to City; and (6) address and respond to any questions or concerns that may arise during the performance of this Agreement.

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

C. Days and Hours of Services

Maintenance Services shall be performed on Monday, Tuesday, Wednesday, Thursday, and Friday between 6:30 a.m. and 4:00 p.m., unless in an emergency or approved in writing by City.

D. Materials

All materials shall be approved in advance by PRNS Director. Association will meet all Agricultural licensing and reporting requirements.

II. HEALTH AND SAFETY

Association shall ensure the park improvements and Park Property are clean, safe, functional and attractive by performing the following tasks:

1. Conduct health and safety inspections of the park improvements and Park Property within the first two (2) hours of the opening of the Park Property on Monday, Tuesday, Wednesday, Thursday, and Friday. Association shall promptly report to City any conditions at the Park Property that may pose a health and safety risk to the public within four (4) hours of the inspection.
2. Removing all trash, debris and other articles on the Park Property.
3. Identify and notify PRNS in writing of any required removal and/or repairing of park improvements.
4. Identify and immediate removal and/or repairing of any potentially dangerous conditions or safety hazards, i.e. broken glass.
5. Removal of all trash and debris from trash receptacles and replacing garbage bags every Monday, Tuesday, Wednesday, Thursday and Friday – all garbage bags from the trash receptacles shall be transferred to City provided trash dumpsters.
6. Immediate removal of graffiti by washing, cleaning or repainting affected areas.
7. Other tasks as required after each monthly meeting between City and Association.

III. LANDSCAPE AND TURF MAINTENANCE

Association shall perform the following scheduled landscape maintenance of the Park Property:

1. Provide all necessary care to maintain healthy, resilient and aesthetically landscaping and turf as approved by City.
2. Mow all turf at least once each week between March 1st through October 31st and if weather permits, every other week between November 1st and February 28th.
3. Trim and edge turf within twenty-four (24) hours of mowing.
4. Provide turf maintenance services, including but not limited, twice per year aeration, fertilization, filling low spots and over seeding bare spots.

5. Weekly cleaning of hard courts by blowing dirt, debris and articles from hard courts, pathways and other hardscape areas.
6. Weekly removal of debris, leaves and litter from landscaping and turf areas (after mowing).
7. Power washing of all hard courts, pathways, hardscapes, picnic tables, BBQ pits and any other hard surface or improvement four (4) times per year.
8. Seasonal leaf removal as required.
9. Perform weed abatement, including but not limited to, broadleaf weed spraying twice per year, handwork and spraying tree basins and dirt surfaces to remove weeds and unwanted growth using Best Management Practices (BMP) once each year (must receive City approval each calendar year prior to using any pesticides).
10. Pruning and trimming of trees and shrubs, as required, to maintain appealing, healthy, and growing trees and shrubs as approved by City. All pruning shall be performed by qualified, professional personnel using industry recognized and approved methods and techniques.
11. Tree stakes are to be inspected twice per year in the Spring and Fall as conditions require and adjusted as necessary.
12. Ivy and selected groundcover shall be trimmed to a height of six (6) to eight (8) inches each winter for rejuvenation as approved by City.
13. Fertilize trees and ground cover plantings once a year or as individually if plant health condition requires.
14. Plants or turfs that are in a state of decline or dead shall be brought to City's attention immediately and replaced according to "as built construction plans and specification".
15. Other tasks as required after each monthly meeting between City and Association.

IV. IRRIGATION SYSTEM OPERATION AND MAINTENANCE

Association shall provide the following irrigation and system operation and maintenance at the Park Property:

1. Maintain an irrigation schedule that provides adequate moisture for optimal growth and plant health as approved by City. Controller programs will be checked and adjusted semi-monthly to account for changing climate and use conditions. Any watering shall be done at night in multiple, staged applications in order to avoid standing water longer than twelve (12) hours in general turf

areas and two (2) hours on sports fields with exception of designed storm detention facilities.

2. Conduct monthly visual inspections of controller and sprinklers in operation during normal working hours and perform any maintenance of the controller and sprinkler system necessary to ensure all the controllers and sprinklers are operating.
3. Association shall be responsible to maintain a functional irrigation system to include valves, irrigation heads, lateral and main irrigation lines. Any repairs or replacement of irrigation heads shall be completed within three (3) calendar days, repairs to valves, lateral and main lines shall be made within ten (10) calendar days. Association shall be responsible for any repairs under this Section IV(3) of this Exhibit if the parts for such repairs, as approved by City, are less than Five Hundred (\$500.00).
4. Vandalism or accidental damage to any controller or sprinkler shall be reported promptly to City.
5. Faulty water meters and backflow preventors shall be reported promptly to City.
6. Association shall schedule controllers and shall be instructed by City on how to turn off the system in case of emergency.
7. Other tasks as required after each monthly meeting between City and Association.

V. OTHER MISCELLANEOUS SERVICES INCLUDED IN THIS CONTRACT

1. Association shall be responsible for inspecting all plumbing, electrical and gas infrastructure from the meter into and throughout the Park Property. In the event any maintenance or repairs are required for the plumbing, electrical, and gas infrastructure as described in this section, Association shall promptly notify the City in writing.

VI. 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. Association shall apply all pesticides with extreme care to avoid any hazard to persons, pets, property and the environment.

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

Association shall obtain and comply with pest specific City BMPs and SOPs (ExhibitD-1). 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

Association shall comply with all federal, state and local rules and regulations that govern the use of pesticides, including the City of San José's IPM Policy. Pesticides utilized for control of pests on City property shall have current EPA registration and be applied in strict accordance with label directions. All pesticide use on City property shall be subject to advance approval by PRNS Director.

D. Pesticide Approval and Application

- a. As required by law, each person performing pest control activities shall be certified by the State of California.
- b. All recommendations for pest control must be in compliance with the current Integrated Pest Management policies and guidelines of City of San José.
- c. All pesticide applications shall receive advance approval from the PRNS Director.
- d. Association shall provide written recommendations from a licensed California pest control advisor (PCA) for any pesticides approved for use on City of San José property.
- e. Any Association employee or subcontractor who applies Class I pesticides shall possess a qualified applicator certificate (QAC) from the State. This certification (silver card) and written pesticide recommendations shall be with the employee/subcontractor while applying any pesticides.
- f. Any Association personnel who oversee the application of pesticides shall possess a qualified application license (QAL) from the State. This license (brown card) and written pesticide recommendations shall be with the employee while supervising any pesticide application on City property.

E. Pesticide Use Reporting

Association shall submit monthly pest management reports to the City. The report shall contain the following information:

- o Date and time of pesticide application or service*
- o Site of the pesticide application* (and Project ID/Purchase order, if applicable)
- o Manufacturer and name/formulation of product applied*
- o Pesticide EPA registration number*
- o Targeted Pest*
- o Amount of product applied*
- o City Generated Contract Reference Number (City contract tracking number)

- Date and time of receipt of request
- Name of site contact
- Prevention and other non-chemical methods of control used*
- Recommendations for future prevention*
- Recommendation for continued treatment based on IPM (including cause of problem, source of pest entry to facility, etc.)
- Square footage of area serviced (* Indicates required field for Stormwater tracking purposes)
- Reports shall be supplied in Microsoft Excel, Access or other approved format.
- The report shall include information for San José municipal property only.

F. Evidence of Training

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

G. Restricted Pesticides

Before Association or its subcontractor can apply a California Restricted Material on a City of San José site, Association or its subcontractor must first obtain a copy of the City of San José's Restricted Use Materials Permit that will be provided by the contract manager. Before the application can be made, the operator must notify PRNS Director twenty-four (24) hours in advance of the application. Association or its subcontractor must provide PRNS Director with a copy of the notice of intent per site. This should correlate to the monthly usage report also provided by Association.

H. Licenses and Permits

Association or Association's approved subcontractor, is to maintain a State Landscape Contractor's license and a valid Pest Control Operator's License. Association will comply with all other license and permit requirements of the City, State and Federal Governments, as well as all other requirements of law. Association shall provide a copy of all such licenses to City prior to the commencement of any Maintenance Services under this Agreement and Association shall provide City with updated copies of such licenses on or before January 30th of every year.

I. Taxes

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

EXHIBIT D-1
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 24th day of June, 2003, by the following vote:

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

NOES: NONE

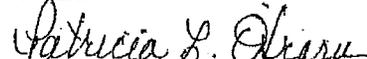
ABSENT: LeZOTTE

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**

TITLE: POLLUTION PREVENTION	PAGE 1 of 3	POLICY NUMBER 4-5
	EFFECTIVE DATE 5/24/94	REVISED DATE 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.

71691

TITLE: POLLUTION PREVENTION	PAGE 3 of 3	POLICY NUMBER 4-5
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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).



EXHIBIT E
LABOR COMPLIANCE ADDENDUM
SAN JOSÉ PREVAILING WAGE POLICIES

AGREEMENT TITLE:	RIGHT OF ENTRY AND PARK MAINTENANCE AGREEMENT BETWEEN THE CITY OF SAN JOSE AND _____ OWNERS ASSOCIATION
CONTRACTOR Name and Address:	

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 Park Maintenance Agreement between the City of San Jose and _____ 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, Contractor shall not be entitled to any adjustment in compensation rates in the event there are adjustments to the General Prevailing Wage Rates.

B. Reports. Contractor 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 Park Maintenance 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 Contract.

E. Enforcement.

1. **General.** Association acknowledges it has read and understands that, pursuant to the terms and conditions of this Park Maintenance 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 Jose 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 Jose.
 - 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, CONTRACTOR 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.

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 Contractor or subcontractors from future City contracts and/or deem the recipient ineligible for future financial assistance.

City

Contractor

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 owned, 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 unless approved in writing by City's Risk Manager.

B. Minimum Limits of Insurance

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

1. Commercial General Liability: Two Million Dollars (\$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: One Million Dollars (\$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 One Million Dollars (\$1,000,000) per accident. Coverage shall be endorsed to state carrier waives its

rights of subrogation against the City, its officials, employees, agents and contractors.

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 Jose, its officers, employees, agents and contractors 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 contractors shall be 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. 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.