

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, 2<sup>nd</sup> Floor West Wing

**PARKLAND AGREEMENT  
FOR  
TENTATIVE MAPS NO. PT07-083 AND PT07-084  
BY AND AMONG  
CITY OF SAN JOSE  
AND  
NOVELLUS SYSTEMS, INC., VISTA MONTANA PARK HOMES, LLC,  
AND EQUITY-TASMAN APARTMENTS, LLC  
AND COVENANTS AND RESTRICTIONS RELATING TO  
PRIVATE RECREATIONAL AMENITIES**

This Agreement (“Agreement”) is made and entered into by and among the CITY OF SAN JOSE, a municipal corporation of the State of California (“City”), NOVELLUS SYSTEMS, INC., a California corporation (“Novellus”), VISTA MONTANA PARK HOMES, LLC, a Delaware limited liability company authorized to transact business in the State of California (“Vista Montana”), and EQUITY-TASMAN APARTMENTS, LLC, a Delaware limited liability company authorized to transact business in the State of California (“Equity-Tasman” and together with Novellus and Vista Montana are hereinafter referred to as “Developer”). The City and Developer are each sometimes hereinafter referred to as a “Party” and collectively as the “Parties.” Novellus, Vista

Montana, and Equity-Tasman are each sometimes hereinafter referred to as a “Developer Party.” This Agreement including any and all terms, conditions, and obligations herein shall be effective on the same date the Second Amendment to the Development Agreement described in Section D below becomes effective (“Effective Date”).

### **RECITALS**

- A. Developer desires to develop a residential subdivision (the “Development”) on certain real property bounded by Vista Montana, Tasman Drive, North First Street, and Highway 237, in the City of San José, County of Santa Clara, State of California (the “Site”). Developer has filed, and City has approved, Tentative Maps Number PT07-083 and PT07-084 (collectively, the “Tentative Maps”) with the City’s Planning Department for the subdivision of the real property and has obtained Planned Development Permits PD07-082 and PD07-091 (collectively, “PD Permits”) for the Development.
  
- B. Under the current zonings approved for the Site (PDC11-006 and PDC11-007, collectively “Rezoning”) and that certain Development Agreement entered into by and among City and Novellus Systems, Inc., a California corporation, dated December 20, 2007, and recorded in the Office of the Santa Clara County Clerk-Recorder on December 21, 2007, as Document Number 19690723 (the “Development Agreement”), the Site is zoned for up to a total of 998 multi-family residential units (“Multi-Family Residential Units”). PDC11-007 authorizes the construction of up to 444 residential units and PDC11-006 authorizes the construction of up to 554 residential units as more particularly described in the Rezoning.
  
- C. The Parties entered into a First Amendment to the Development Agreement on March 9, 2010, recorded as Document Number 20633886, in order to make certain modifications to the Development Agreement, as more particularly described in the First Amendment to the Development Agreement.

- D. Simultaneously with the execution of this Agreement, City and Developer are executing a Second Amendment to the Development Agreement which provides for certain extraordinary benefits to the City under the Development Agreement consisting of the dedication by Developer to City of certain real property and interest in real property for park purposes, the construction by Developer, and dedication to City, of park improvements, and certain payments to be made by Developer to City, that are set forth in detail in this Agreement.
- E. 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 or recreational facilities, construct park or recreational improvements and/or pay in-lieu fees (“Parkland Dedication Obligation”).
- F. In order for Developer to satisfy Developer’s Parkland Dedication Obligation for the residential units permitted under the Tentative Maps, Rezoning, and the terms, conditions, and obligations in the Development Agreement, Developer and City desire to enter into this Agreement pursuant to which Developer shall satisfy its Parkland Dedication Obligation and terms, conditions, and obligations of the Development Agreement by dedicating a total of six (6) acres of real property to City for public park purposes, constructing parkland improvements, constructing private recreational improvements, and making certain payments to the City as follows:
1. Developer shall dedicate one (1) acre of parkland to City and construct parkland improvements as further described in this Agreement and shown on **Exhibit A** (hereinafter the “NEIGHBORHOOD PARK PROPERTY”); and
  2. Developer shall dedicate five (5) acres of parkland to City and construct parkland improvements as further described in this Agreement and shown on **Exhibit B** (hereinafter the “COMMUNITY PARK PROPERTY”), or pay

to City, at City's sole option, Two Million Dollars (\$2,000,000) and dedicate the five (5) acres of raw parkland without the construction of any parkland improvements, as further described in this Agreement; and

3. Developer shall construct certain private recreational improvements within the Development as shown on **Exhibit C** and in accordance with this Agreement, the Development Agreement, and PD Permits; and
4. Developer shall make annual payments to City for park maintenance and operations costs in the amount of at least Seventy-Five Thousand Dollars (\$75,000) for fourteen (14) years to be used for the NEIGHBORHOOD PARK PROPERTY and/or COMMUNITY PARK PROPERTY as further described in this Agreement; and
5. The dedication of the NEIGHBORHOOD PARK PROPERTY and/or the COMMUNITY PARK PROPERTY and construction of Park Improvements as set forth in this Agreement is a condition of approval for certain entitlements received by Developer for the Multi-Family Residential Units and contractual obligations under the Development Agreement and this Agreement for the otherwise private development of the Multi-Family Residential Units.

The COMMUNITY PARK PROPERTY and NEIGHBORHOOD PARK PROPERTY will be located in Lot 2 of the Tentative Maps as depicted on **Exhibit D**.

- G. Developer has also agreed to those certain commitments arising out of environmental matters or environmental conditions relating to the real property dedicated to City for public park purposes which are addressed by the provisions of that certain Environmental Agreement entered into by and between City and Developer simultaneously with the execution of this Agreement and attached hereto as **Exhibit E**.

- H. 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.
- I. The parties acknowledge that the Developer's obligation for park improvements for the COMMUNITY PARK PROPERTY is, at City's option, either (a) to pay City the sum of Two Million Dollars in parkland fees, or (b) to expend Two Million Dollars in the design and partial construction of the park improvements for the COMMUNITY PARK PROPERTY, as detailed in this Agreement. If the City chooses option (b), then strictly as an accommodation to the City, and not as a project requirement, the Developer will construct additional park improvements for the COMMUNITY PARK PROPERTY to be paid for with City funds. There is no City subsidy, City fee waiver or City contribution to an obligation otherwise to be performed by Developer. Under State law and City contracting policies and codes, public bidding is not required.

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, City and Developer 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 Maps and documents filed in conjunction with the Tentative Maps 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 Maps, 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.**

Developer affirms the irrevocable offer to dedicate to City, as specified in the applicable Tentative Map, (i) real property consisting of five (5) acres located on Lot 2 on Tentative Map No. PT07-084, previously described as the COMMUNITY PARK PROPERTY; (ii) real property consisting of one (1) acre located on Lot 2 on Tentative Map No. PT07-083, previously described as the NEIGHBORHOOD PARK PROPERTY (collectively, the "Park Sites"); and (iii) improvements (the "Park Improvements") consistent with the approved conceptual plans attached hereto as **Exhibits A** and **B** and the master plan approved by City Council for the Park Sites, as may be amended (collectively, the "Park Site Plans"). These real property dedications do not give the City any proprietary interest in the Multi-Family Residential Units.

A. **PARK IMPROVEMENTS.**

Developer agrees and acknowledges it will provide City with a total monetary value of at least Three Million Five Hundred Thousand Dollars (\$3,500,000) of Park Improvements and/or park benefits in accordance with the following:

1. **NEIGHBORHOOD PARK PROPERTY.**

Developer shall construct, or cause to be constructed, turnkey parkland improvements to the NEIGHBORHOOD PARK PROPERTY as depicted in **Exhibit A** and specified in the master plan approved by City Council for the NEIGHBORHOOD PARK PROPERTY, which may be amended from time to time with City Council approval.

- a. The Parties acknowledge that the exact size, dimensions, and other particular characteristics of the Park Improvements for the NEIGHBORHOOD PARK PROPERTY 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: one (1) picnic pavilion/shade structure, at least two (2) additional picnic tables, walkways, two (2) children's play structures with shaded seating, game tables, park signage, open turf area, drinking fountain, one (1) bike rack, trash receptacles, and other associated landscaping and irrigation improvements, as depicted in **Exhibit A** and specified in the master plan approved by City Council for the NEIGHBORHOOD PARK PROPERTY, which may be amended from time to time with City Council approval.
  
- b. The current cost estimate to fully construct the NEIGHBORHOOD PARK PROPERTY as depicted in **Exhibit A** and specified in the master plan for the NEIGHBORHOOD PARK PROPERTY is approximately One Million Five Hundred Thousand Dollars (\$1,500,000), which includes design costs, construction costs, and a five percent (5%) contingency amount based on the estimated construction costs. Developer acknowledges that the costs and expenses for the design, development, construction, supervision, and dedication related to the Park Improvements for the NEIGHBORHOOD PARK PROPERTY may exceed One Million

Five Hundred Thousand Dollars (\$1,500,000). Because of the benefit to the Development that will result from the Park Improvements for the NEIGHBORHOOD PARK PROPERTY and the benefit Developer has received under the Development Agreement, Developer agrees to design, develop, and fully construct the Park Improvements and dedicate to City the NEIGHBORHOOD PARK PROPERTY as specified in this Agreement, without any obligation on the part of City.

- c. The Park Improvements to be installed on the NEIGHBORHOOD PARK PROPERTY shall be completed by Developer and the NEIGHBORHOOD PARK PROPERTY shall be dedicated by Developer to City on or before the date of the three (3) year anniversary of the first building permit issued for any residential units under PDC11-006. The Park Improvements shall be deemed completed and accepted by City upon recordation of the Notice of Acceptance by Director of PW as outlined in **Exhibit F** of this Agreement. The City's Director may, at the City Director's discretion, grant extensions of the completion requirement specified in this subsection.

2. **COMMUNITY PARK PROPERTY.**

- a. With respect to the COMMUNITY PARK PROPERTY, Developer shall either (i) construct turnkey Parkland Improvements to the COMMUNITY PARK PROPERTY as depicted in **Exhibit B** and specified in the master plan approved by City Council for the COMMUNITY PARK PROPERTY, which may be amended from time to time with City Council approval, and dedicate the COMMUNITY PARK PROPERTY to the City with the completed Parkland Improvements; or (ii) pay City, at City's sole option, Two Million Dollars (\$2,000,000) and dedicate to the City the

COMMUNITY PARK PROPERTY without any Parkland Improvements, as further described herein.

- b. The Parties acknowledge that the exact size, dimensions, and other particular characteristics of the Park Improvements for the COMMUNITY PARK PROPERTY have not been determined as of the Effective Date of this Agreement. The Parties, however, agree that the full construction of Park Improvements for the COMMUNITY PARK PROPERTY shall consist of the following types of improvements: one (1) concession/restroom building and shade structure, two (2) lighted soccer fields with artificial turf and cricket pitch, one (1) full basketball court, one (1) bike rack, drinking fountain, picnic tables, trash receptacles, one (1) trash enclosure, parking lot with approximately seventy-one (71) parking spaces including required disabled accessible spaces, walkways, park signage and other associated landscaping and irrigation improvements, as depicted in **Exhibit B** and specified in the master plan approved by City Council for the COMMUNITY PARK PROPERTY, which may be amended from time to time with City Council approval.
  
- c. The current cost estimate to fully construct the COMMUNITY PARK PROPERTY in accordance with **Exhibit B** and the master plan for the COMMUNITY PARK PROPERTY is approximately Five Million Dollars (\$5,000,000), which includes design costs, construction costs, City's review and inspection costs, and a five percent (5%) contingency based on the estimated construction costs. The amount of funding available from Developer to design and construct the Park Improvements for the COMMUNITY PARK PROPERTY equals Two Million Dollars (\$2,000,000). The funding gap between said amount of funding to be provided by Developer to design and

construct the Park Improvements for the COMMUNITY PARK PROPERTY and the current cost estimate to fully construct the COMMUNITY PARK PROPERTY is approximately Three Million Dollars (\$3,000,000).

- d. On or before August 31, 2011, City, at City's sole option, shall inform Developer in writing of the following with respect to the COMMUNITY PARK PROPERTY: (i) Developer shall fully design and construct the Park Improvements for the COMMUNITY PARK PROPERTY in accordance with Exhibit B, the master plan for the COMMUNITY PARK PROPERTY as approved by City Council, which may be amended, the Development Agreement, and this Agreement, and dedicate the improved COMMUNITY PARK PROPERTY to the City, and City will reimburse Developer in an amount up to Three Million Dollars (\$3,000,000) ("City's Contribution") for the design and construction of the Park Improvements on the COMMUNITY PARK PROPERTY as further described in this Agreement ("Option 1"), which reimbursement process and requirements are set forth below; or (ii) Developer shall pay to City in the form of cashier's check or other immediately available funds, the total amount of Two Million Dollars (\$2,000,000) and dedicate the unimproved COMMUNITY PARK PROPERTY to the City and Developer shall not be required to construct any Park Improvements on the COMMUNITY PARK PROPERTY ("Option 2"). In the event that City elects Option 2, payment shall be made by Developer to City in full within thirty (30) business days of the written notice and invoice issued by City to each Developer Party under this Section 2(B)(2)(d). Notwithstanding any provision in this Agreement, City may elect Option 2 if Developer fails to receive any City approved building

permit for construction of any residential units under PDC11-007 on or before the three (3) year anniversary of the Effective Date.

e. In the event that City elects to have Developer design and construct the Park Improvements on the COMMUNITY PARK PROPERTY as set forth in Option 1 above, City and Developer agree and acknowledge each of the following:

(i) That the first Two Million Dollars (\$2,000,000) of design and construction costs expended by Developer for the Park Improvements for the COMMUNITY PARK PROPERTY shall not be subject to the City's reimbursement obligation detailed above. Thereafter, the Developer's costs shall be reimbursed subject to the terms of this Agreement, provided that in no event shall City reimburse Developer in an amount that exceeds Three Million Dollars (\$3,000,000) pursuant to Option 1 under this Agreement, unless explicitly authorized in writing by City's Director as set forth in this Section 2.A.2.e; and

(ii) That City shall not be obligated to provide any reimbursement to Developer for the design and construction of the Park Improvements for the COMMUNITY PARK PROPERTY, unless and until, Developer has performed and satisfied all terms, conditions, and obligations of this Agreement required for reimbursement; and

(iii) That Developer shall actively monitor the actual expenditures versus the planned expenditures for the Park Improvements on the COMMUNITY PARK PROPERTY to assure that the City's Contribution pursuant to this Agreement will be sufficient to pay for completion of the Park Improvements on the COMMUNITY PARK PROPERTY as set forth herein; and

(iv) That prior to commencing any construction of the Park Improvements that are eligible for reimbursement from City's Contribution, Developer shall meet with the City to (a) provide copies of invoices, receipts, cancelled checks, and other supporting documents reasonably required by City to demonstrate to City's satisfaction that Developer has expended (including any reasonable retention monies set forth in the construction contract between Developer and its construction contractor) at least two million dollars (\$2,000,000) on the design and construction for the Park Improvements on the COMMUNITY PARK PROPERTY, (b) discuss the timeline for completion of the remaining Park Improvements, (c) budget for the remaining Park Improvements, and (d) to resolve any unforeseen issues; and

(v) That Developer shall not commence construction of the Park Improvements on the COMMUNITY PARK PROPERTY eligible for reimbursement from City's Contribution until City issues a Notice to Proceed; and

(vi) That if any amount exceeding City's Contribution is required to complete the Park Improvements for the COMMUNITY PARK PROPERTY, Developer shall notify City in writing that additional funds are required and Developer shall not perform, or cause to be performed, any work beyond City's Contribution unless authorized in writing by City's Director; and

(vii) That Developer shall provide City on a monthly basis with an itemized costs and expenses report, in a format provided by City, for the COMMUNITY PARK PROPERTY, with supporting documents, such as, copies of invoices, receipts, cancelled checks, and other documents reasonably required by City to verify the

amount Developer expended for the Park Improvements on the COMMUNITY PARK PROPERTY; and

(viii) That Developer shall only be entitled to reimbursement for the Park Improvements on the COMMUNITY PARK PROPERTY after City reviews and approves the monthly costs and expenses report with supporting documents submitted by Developer substantiating the amount Developer expended on the Park Improvements; and

(ix) That Developer shall complete the Park Improvements on the COMMUNITY PARK PROPERTY and dedicate the COMMUNITY PARK PROPERTY on or before the date of the three (3) year anniversary of the first building permit issued for any residential units under PDC11-007. The Park Improvements shall be deemed completed and accepted by City upon recordation of the Notice of Acceptance by Director of PW as outlined in **Exhibit F** of this Agreement. The City's Director may, at the City's Director discretion, grant extensions of the completion requirement specified in this subsection.

- f. Subject to Section 2.A.2.e above, Developer may seek reimbursement from City's Contribution on a monthly basis for allowable costs and expenses related to the Park Improvements for the COMMUNITY PARK PROPERTY that exceeds Two Million Dollars (\$2,000,000) and only after they are incurred for the project. Developer shall include supporting documentation for all allowable costs and expenses with the monthly cost reports as set forth above and progress updates sent to City. During the term of this Agreement, the following costs and expenses exceeding Two Million Dollars (\$2,000,000) are eligible for reimbursement and shall be itemized on a quarterly cost report:

- (i) actual consultant costs with no markup for completion of the design of the Park Improvements for the COMMUNITY PARK PROPERTY; and
  - (ii) actual costs for postage, printing, shipping/mailing and reproduction of plans and documents, with no markup, for the COMMUNITY PARK PROPERTY; and
  - (iii) actual costs for the construction of the Park Improvements, with no markup for the COMMUNITY PARK PROPERTY including retention monies that are actually expended; and
  - (iv) actual costs for insurance and bonds with no markup for construction of the COMMUNITY PARK PROPERTY.
- g. Costs and expenses not listed above are not allowable and shall not be reimbursed unless previously approved in writing by the City's Director. The City's Director shall have the authority to approve additional expenses not specified above. City shall approve all eligible costs and expenses within ten (10) business days of receiving the monthly report of costs and expenses described above; any such report not objected to in writing within such ten (10) business day period shall be deemed approved. City will provide reimbursement for all eligible costs and expenses within ten (10) business days of the approval of the monthly reports and supporting documents.

- B. Developer shall be responsible for all costs incurred in the conveyance of the Park Sites to City in accordance with the requirements and specifications set forth in this Agreement. Developer shall be responsible for the development of plans and specifications for, and the construction of Park Improvements on the Park Sites consistent with the Park Site Plans 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 F**. Subject

to **Exhibit F** 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. Subject to the City's reimbursement obligations described in this Agreement, 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.

### **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 permitted under the Rezoning, the Tentative Maps, and the Development Agreement. Provided that Developer is not in material default hereunder, and provided further that Developer satisfies all other conditions and requirements associated with the Development, City shall issue all building permits necessary for the residential units allowed under the Rezoning, the Tentative Maps, and Development Agreement.
- B. City will owe no refund to Developer in the event Developer does not build the number or type of residential units allowed under the Rezoning, the Tentative Maps, and the Development Agreement.
- C. In the event there is an increase in the number of residential units to be built on the lands zoned for residential development under the Rezoning, the Tentative Maps, and the Development Agreement, from the maximum number of residential units, or a change in the type of residential units allowed under the Rezoning, the Tentative Maps, and the Development Agreement, Developer

agrees to immediately notify the City's Director and to pay such additional Parkland Fees as are required by the Parkland Dedication Ordinance.

- D. Developer agrees and acknowledges that the costs and expenses for the design, development, construction, supervision, and dedication 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 the Development that will result from the Park Improvements to the Development and the benefit Developer has received under the Development Agreement, Developer agrees to design, develop, and fully construct the Park Improvements on the Park Sites and dedicate the Park Sites as specified in this Agreement, without any obligation on the part of City except those explicitly stated herein.
- E. Each Developer Party shall be jointly and severally responsible and liable to City to fully and timely perform and satisfy any and all terms, conditions, and obligations under this Agreement. Notwithstanding anything to the contrary in this Agreement, in the event Developer fails to fully and timely perform and satisfy any and all terms, duties, and obligations under this Agreement, City explicitly reserves any and all rights it has in equity and law to enforce the Development Agreement against Novellus and require Novellus to fully and timely perform and satisfy any and all terms, conditions, and obligations set forth in the Development Agreement relating to the Parkland Dedication Obligation and extraordinary park benefits to City and enforce the Environmental Agreement against each Developer Party to fully and timely perform and satisfy any and all terms, conditions, and obligations set forth in the Environmental Agreement.

#### **SECTION 4. 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 total Review Fee for both parks based on the current cost estimate is approximately Seven Hundred and Seventy Thousand Dollars (\$770,000). The Review Fee is included as a part of the total monetary value of at least Three Million Five Hundred Thousand Dollars (\$3,500,000) of Park Improvements and/or park benefits to be provided by Developer to the City as set forth in Section 2.A of this Agreement.

- 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 deadline to complete and dedicate the Park Improvements for the NEIGHBORHOOD PARK PROPERTY pursuant to Section 2.A.1.c or COMMUNITY PARK PROPERTY pursuant to Section 2.A.2.e herein, 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 the 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. PRIVATE RECREATION IMPROVEMENTS.**

- A. The Parties acknowledge that the size, dimensions, and other particular characteristics of the Private Recreation Improvements have not been determined as of the Effective Date of this Agreement. The Parties, however, agree that the Private Recreation Improvements shall consist of the following

types of improvements: two (2) swimming pools, two (2) community recreation rooms; and picnic areas as depicted in **Exhibit C** (collectively “Private Recreation Improvements”). The Private Recreation Improvements depicted in **Exhibit C** shall be a total of at least 37,000 square feet. The Private Recreation Improvements located in zoning PDC11-007 shall be completed on or before the date of the four (4) year anniversary of the first building permits issued for any residential units located in zoning PDC11-007. The Private Recreation Improvements located in zoning PDC11-006 shall be completed on or before the date of the four (4) year anniversary of the first building permits issued for any residential units located in zoning PDC11-006.

- B. Developer acknowledges and agrees that use of the private recreation improvements shall be restricted for recreation purposes by this recorded covenant which runs with the land in favor of the future owners of the residential units located within the Development and which expressly cannot be defeated or eliminated without the consent of the City as described in the Parkland Dedication Ordinance.
- C. Developer agrees and acknowledges it waives any and all private recreation credits that it may be entitled to under the Parkland Dedication Ordinance for any Multi-Family Residential Units and further agrees acknowledges that it shall not be entitled to any private recreation credits related to the Development.

## **SECTION 6. PARK MAINTENANCE AND OPERATIONS COSTS.**

- A. Beginning on the Effective Date, Developer shall begin making annual payments to City, in the form of cashier’s checks or other immediately available funds, in the amount of Seventy-Five Thousand Dollars (\$75,000), which City shall deposit in a Gift Trust Fund. Developer shall make fourteen (14) annual payments of Seventy-Five Thousand Dollars (\$75,000), as adjusted below in Section 6(C). The fourteen (14) year period commencing with the first such payment shall be deemed the “Payment Period.” City shall be obligated to use such funds

deposited in the Gift Trust Fund only towards the maintenance and operations costs of the NEIGHBORHOOD PARK PROPERTY and/or COMMUNITY PARK PROPERTY during the term of the Payment Period and only in the event that Developer obtains the first building permit for the Multi-Family Units on or before December 21, 2013. In the event that Developer obtains the first building permit for the Multi-Family Units after December 21, 2013, City, at its sole option, may use any payments from Developer under this Section 6 for the maintenance and operations costs of any public park in the City.

- B. The annual payment of Seventy-Five Thousand Dollars (\$75,000) shall be adjusted at the end of every five (5) years (“Adjustment Period”) for inflation based on the Consumer Price Index specified in Section 6(C) (“CPI”), commencing on the fifth anniversary of the date of the first such payment. In no event shall Developer pay less than the annual payment of Seventy-Five Thousand Dollars (\$75,000) during the Payment Period.
  
- C. The base for computing the adjustment shall be the CPI for All Urban Consumers (with a base year of 1982-1984 = 100), not seasonably adjusted, for the San Francisco-Oakland-San Jose area, published by the United States Department of Labor, Bureau of Labor Statistics (“Index”), the annual average which is published most immediately preceding the Adjustment Period. For example, if the compensation adjustment is effective in 2016, the compensation adjustment effective in 2016 will be based on a beginning CPI index of 2011 and an ending index of 2015 using the annual CPI average described herein. The following example demonstrates the method of how the CPI adjustment shall be calculated:

CPI – 2015 Annual Average	209.2
Less: CPI – 2011 Annual Average	202.7
Index Point Change	6.50

Divided by CPI – 2011	202.7
2016 Compensation Adjustment % Increase	3.21%

If the annual average for the Index is not available due to timing (for example, the compensation adjustment is effective January 2016, but the Index is not published until a later date), City shall compute and provide Developer written notice of the compensation adjustment as soon as the Index is published and Developer shall immediately pay to the City any retroactive compensation adjustment. If the Index is no longer published by the United States Department of Labor, the City shall select another index reasonably comparable to the Index for computing the adjustment.

**SECTION 7. BONDS AND SECURITY.**

Developer shall furnish to City the following security prior to the issuance of a Notice to Proceed and commencement of any work under 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 II(F)(3) of **Exhibit F** (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 7 shall be in the forms attached hereto as **Exhibit G**, 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 Project Specifications 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 7(A) of the Agreement for One Hundred Percent (100%) of the total estimated cost of the Park Improvements as changed.
3. Notwithstanding Section 7(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 8 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 section 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 attorneys' 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 owned 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 8. 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 Park Improvements under this Agreement;
  2. Developer's failure to timely complete construction of the Park Improvements under this Agreement; provided, however, that to the extent any such failure is attributable to the City's failure to timely approve and/or

pay requests for reimbursement of costs or expense for design or construction of the COMMUNITY PARK PROPERTY, such delay shall not constitute a default by Developer;

3. Developer's failure to timely cure any defect in the Park Improvements, if such cure is required by this Agreement;
  4. Insolvency, appointment of receiver, or the filing of any petition in bankruptcy, either voluntary or involuntary by or with respect to any Developer, which such Developer fails to discharge within thirty (30) days;
  5. Developer assigns this Agreement in violation of Section 11; or
  6. 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 8(C), 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, appliances, plans, or other property located at the Park Sites 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 8 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 and Developer's lender if such lender has provided the City with its address for notices in writing ("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 if Developer commences to cure the default within the Notice Period, and prosecutes the same to completion within a reasonable time thereafter.
- D. City's rights and remedies specified in this section shall be deemed cumulative and in addition to any rights or remedies City may have at law or in equity.

**SECTION 9. 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 owed to third parties 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 related to the activities 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. Developer's obligation hereunder shall not extend to injury or loss caused by or as a result of usage of either park by persons or entities, whether authorized or unauthorized, unless caused by, in connection with, or related to the activities performed by Developer under this Agreement. With respect to each Park separately, this Section 9 shall survive the recordation of the Notice of Acceptance, acceptance of the Park Sites, or sooner termination of this Agreement for a period of one (1) year from the date of such acceptance or termination, after which this Section 9 shall be of no further effect with respect to said Park Site.

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 9.

## **SECTION 10. 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:

To City's Director:                      City of San José  
Department of Parks, Recreation and Neighborhood  
Services  
Attn: Matt Cano, CDF Division Manager  
200 East Santa Clara Street, Tower/9<sup>th</sup> Floor  
San José, CA 95113

To Director of PW:                      City of San José  
Department of Public Works  
Attn: CFAS Division Manager  
200 East Santa Clara Street, Tower/6<sup>th</sup> Floor  
San José, CA 95113

with a copy to:

City Attorney  
City of San José  
200 East Santa Clara Street – 16<sup>th</sup> Floor Tower  
San José, CA 95113

To Developer:

Vista Montana Park Homes, LLC  
Attn: Daniel P. Globate, First Vice President  
Equity Residential  
2223 Agenda de la Playa, Suite 350  
San Diego, CA 92037

Equity-Tasman Apartments, LLC  
Attn: Daniel P. Globate, First Vice President  
Equity Residential  
2223 Agenda de la Playa, Suite 350  
San Diego, CA 92037

Novellus Systems, Inc.  
Attn: Chief Executive Officer  
400 North First Street  
San José, CA 95134

with copies to:

Novellus Systems, Inc.  
Attn: General Counsel  
400 North First Street  
San José, CA 95134

Equity Residential  
Attn: Scott J. Fenster, Esq.  
Asst. Vice President – Legal  
Two North Riverside Plaza, Suite 400  
Chicago, Illinois 60606

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 11. 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 obligations under this Agreement without the express written consent of City shall be voidable at City's sole discretion.

**SECTION 12. BINDING UPON SUCCESSORS.**

Subject to Section 11 above, this Agreement shall be binding upon and shall inure to the benefit of the Parties' respective successors, assignees, transferees, and legal representatives.

**SECTION 13. GOVERNING LAW.**

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

**SECTION 14. ENTIRE AGREEMENT.**

This Agreement, including the exhibits, attachments and appendices, the Development Agreement and Environmental Agreement, contains the entire agreement of the Parties with respect to the satisfaction of the requirements of the Parkland Dedication Ordinance for the residential units permitted under PDC 07-054 and PDC 07-055 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 15. TIME OF ESSENCE.**

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

**SECTION 16. MISCELLANEOUS PROVISIONS.**

- A. The term of this Agreement shall commence on the Effective Date hereof, and shall terminate upon the first anniversary of the later of the recording of the Notice of Acceptance for the Park Improvements for the NEIGHBORHOOD PARK or the recording of the Notice of Acceptance for the Park Improvements for the COMMUNITY PARK PROPERTY, except those provisions that survive expiration or termination.

- B. Captions and Sections of this Agreement are for convenience only and shall not be considered in resolving any questions of interpretation or construction.
- C. The Recitals and all exhibits contained in this Agreement are hereby incorporated into the terms of this Agreement.
- D. 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.
- E. 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.
- F. As used in this Agreement and when required by the context, each number (singular and plural) shall include all numbers.
- G. Each Developer Party, their respective employees, agents, representatives, contractors, and subcontractors shall comply with all local, state, and federal laws in the performance of this Agreement.
- H. Each Developer Party, their respective 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. Each Developer Party shall each 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.

- I. Each Developer Party has read each and every part of this Agreement, including without limitation, its exhibits, and each Developer Party 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.
- J. 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.
- K. 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.
- L. 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. 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 shall notify the other Parties 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 Developer to perform Developer's 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 18. BOOKS AND RECORDS.**

A. Each Developer Party shall be solely responsible to implement internal controls and record keeping procedures in order to comply with this Agreement and all applicable laws. Each Developer Party 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, each Developer Party 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 the Developer Party'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 a Developer Party'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 a Developer Party, its representatives, or its successor-in-interest.

D. Developer's obligations under this Section shall be in addition to Developer's obligations specified in **Exhibit F**, Section II(B).

**SECTION 19. AGREEMENT'S ATTACHMENTS.**

This Agreement includes the following attachments:

Exhibit A	Neighborhood Park Property Site Plan
Exhibit B	Community Park Property Site Plan
Exhibit C	Private Recreation Improvements Site Plan/Location
Exhibit D	Location of Park Sites

Exhibit E	Environmental Agreement
Exhibit F	Design and Construction Requirements
Exhibit G	Bond Forms

[SIGNATURES ON NEXT PAGE]

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: \_\_\_\_\_  
DENNIS HAWKINS, MMC  
City Clerk

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

DEVELOPER\*

VISTA MONTANA PARK HOMES, LLC, a Delaware limited liability company

By: ERP Operating Limited Partnership,  
an Illinois limited partnership, its sole member

By: Equity Residential, a Maryland real estate investment trust, its general partner

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

EQUITY-TASMAN APARTMENTS, LLC,  
a Delaware limited liability company

By: ERP Operating Limited Partnership,  
an Illinois limited partnership, its sole  
member

By: Equity Residential, a Maryland  
real estate  
investment trust, its general  
partner

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

Novellus Systems, Inc., a California  
corporation

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

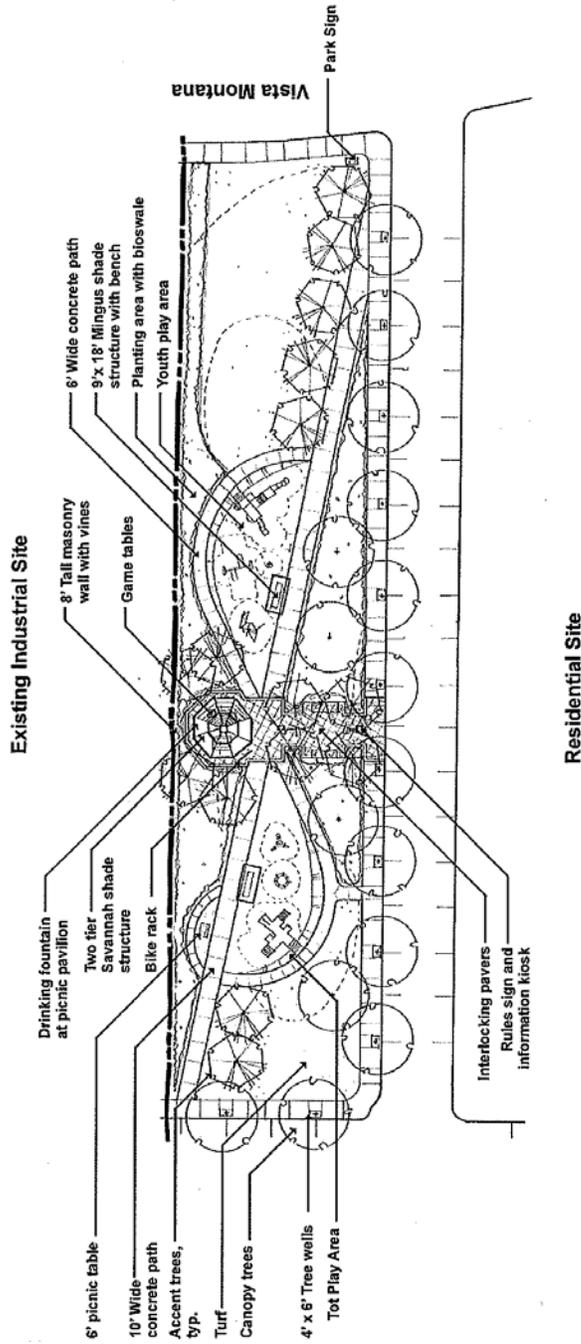
\*All signatures must be accompanied by an attached notary acknowledgement.

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



# EXHIBIT A

## NEIGHBORHOOD PARK PROPERTY SITE PLAN



### Vista Montana 1-Acre Park

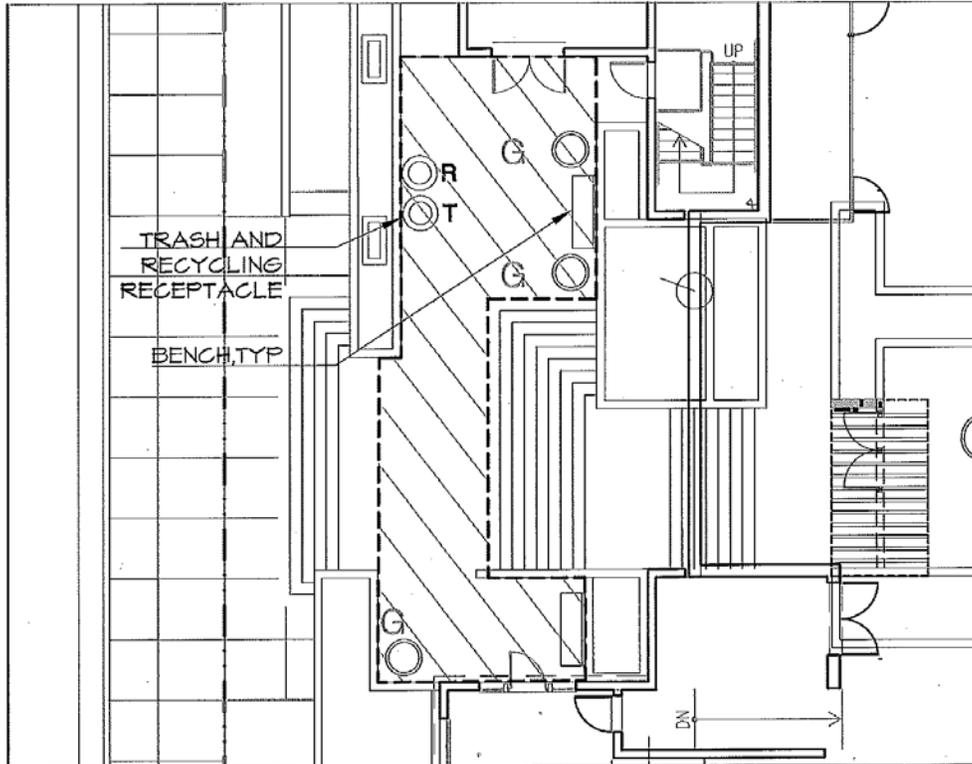
Vista Montana Park Homes, LLC.  
March 13, 2009



Callender Associates  
Landscape Architecture, Inc.  
www.callenderassociates.com



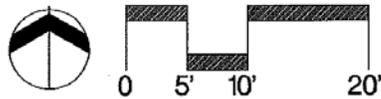




## ZONE A: Private Urban Plaza

650 sq. ft. (unit pavers as surfacing)

- bench seating
- trash and recycle receptacles



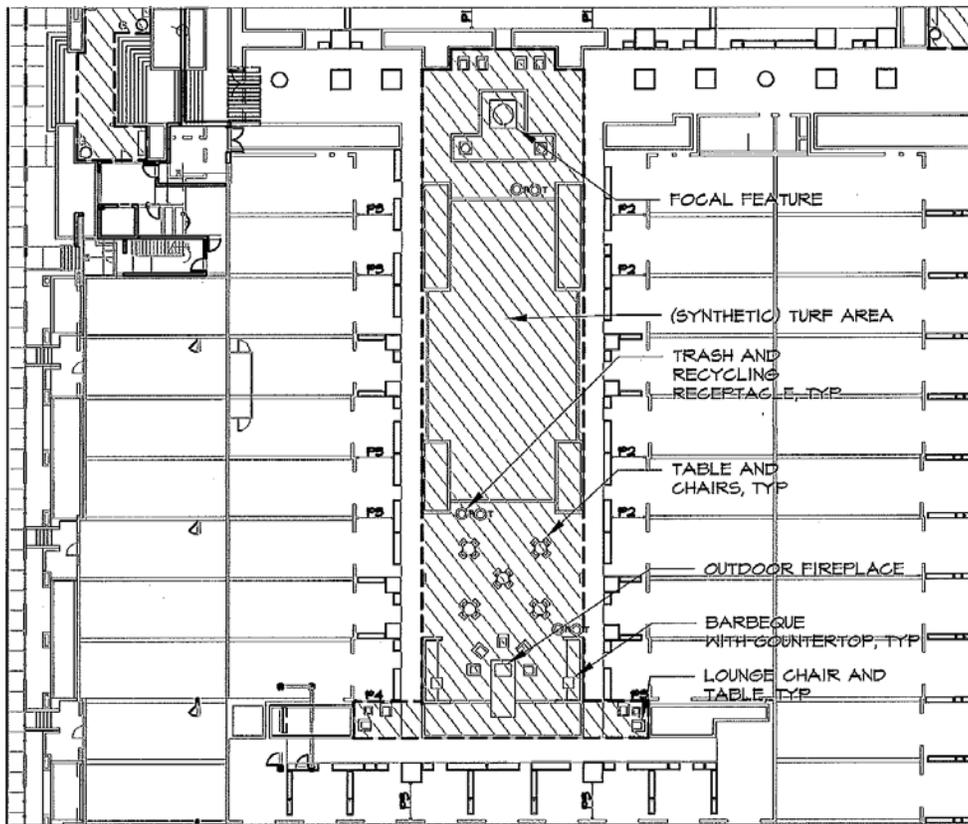
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San Mateo, CA 94401  
T 650.375.1313  
Peter Callander

PRIVATE RECREATION CREDITS EXHIBIT  
DETAIL PLAN  
VISTA MONTANA ROWHOUSES

DATE 05/16/11	SCALE AS SHOWN	DRAWN BY MM	DRAWING NO. 080 3CredExh
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## ZONE B: Picnic Area

7,050 sq. ft. (unit pavers as surfacing)

- barbeque with countertop
- lounge chair/table seating
- outdoor fire place focal feature
- tables and chairs (minimum 3 sets)
- trash and recycle receptacles
- (synthetic) turf area



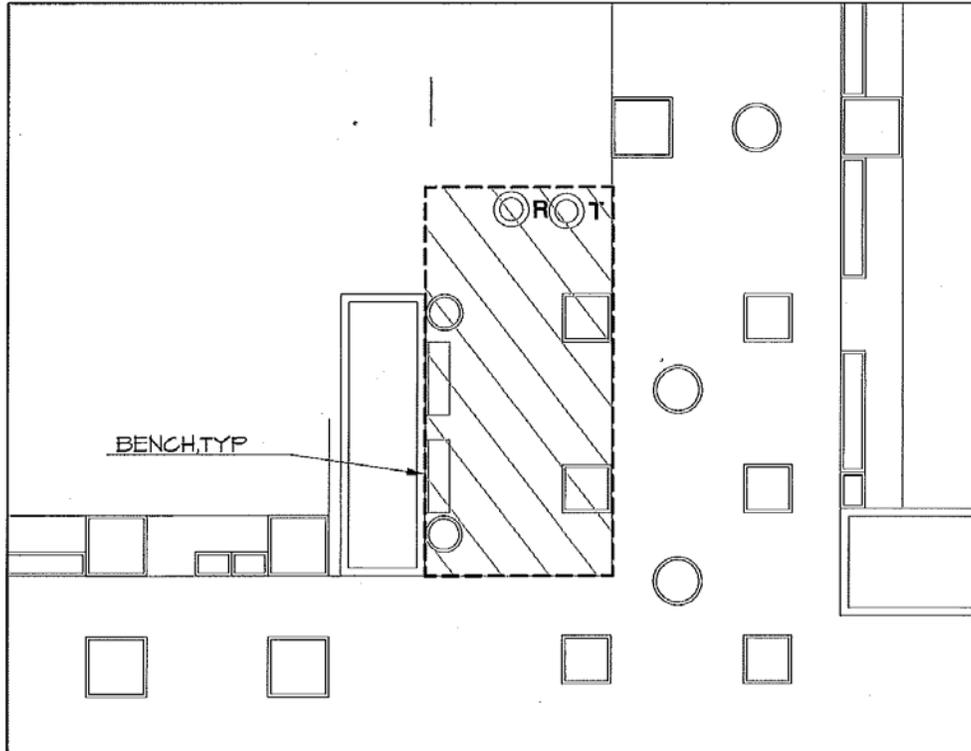
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DETAIL PLAN  
VISTA MONTANA ROWHOUSES

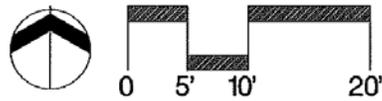
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### ZONE C: Private Urban Plaza

500 sq. ft. (unit pavers as surfacing)

- bench seating (2)
- trash and recycle receptacles



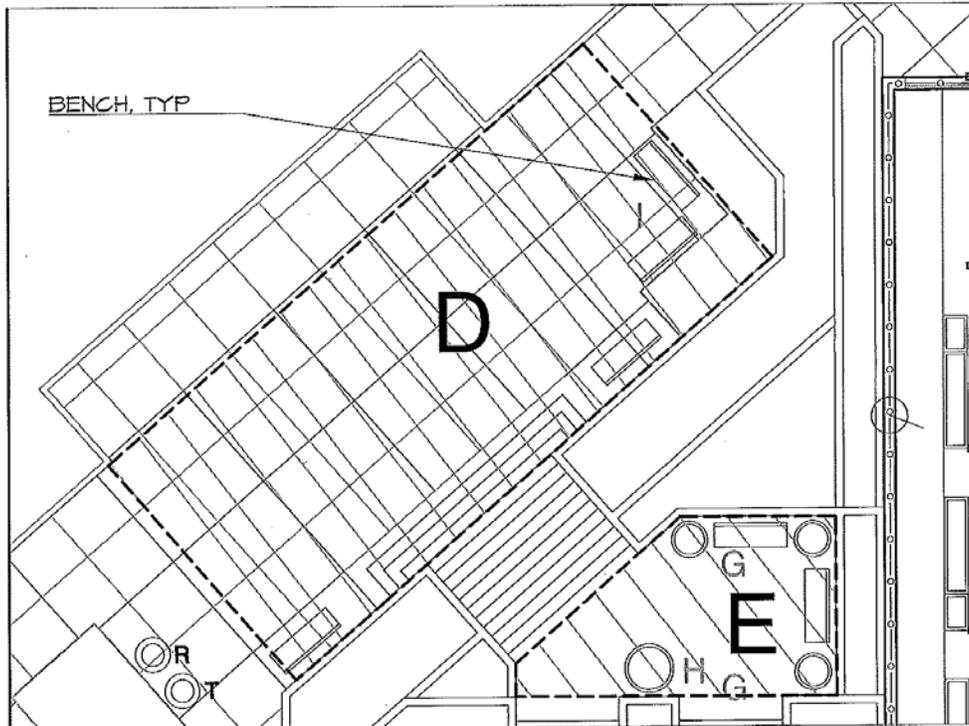
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VISTA MONTANA ROWHOUSES

DATE 05/16/11	SCALE AS SHOWN	DRAWN BY MM	DRAWING NO. 02013CredExh
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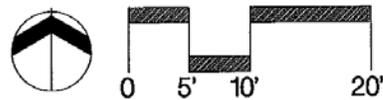


### ZONE D: Private Urban Plaza

- 1,240 sq. ft. (unit pavers as surfacing)
- bench seating
- trash and recycle receptacles

### ZONE E: Private Urban Plaza

- 300 sq. ft. (unit pavers as surfacing)
- bench seating



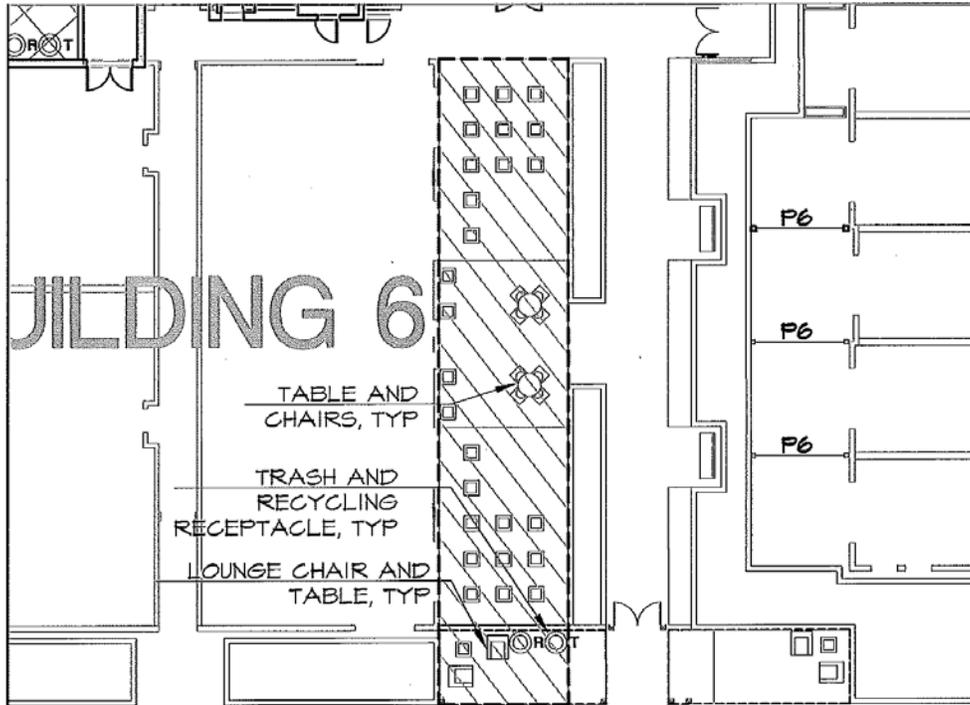
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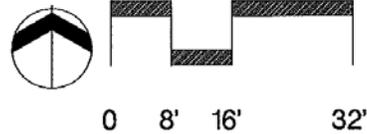
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### ZONE F: Private Urban Plaza

1,450 sq. ft. (unit pavers as surfacing)

- tables and chair seating
- lounge chair and table seating
- trash and recycle receptacles



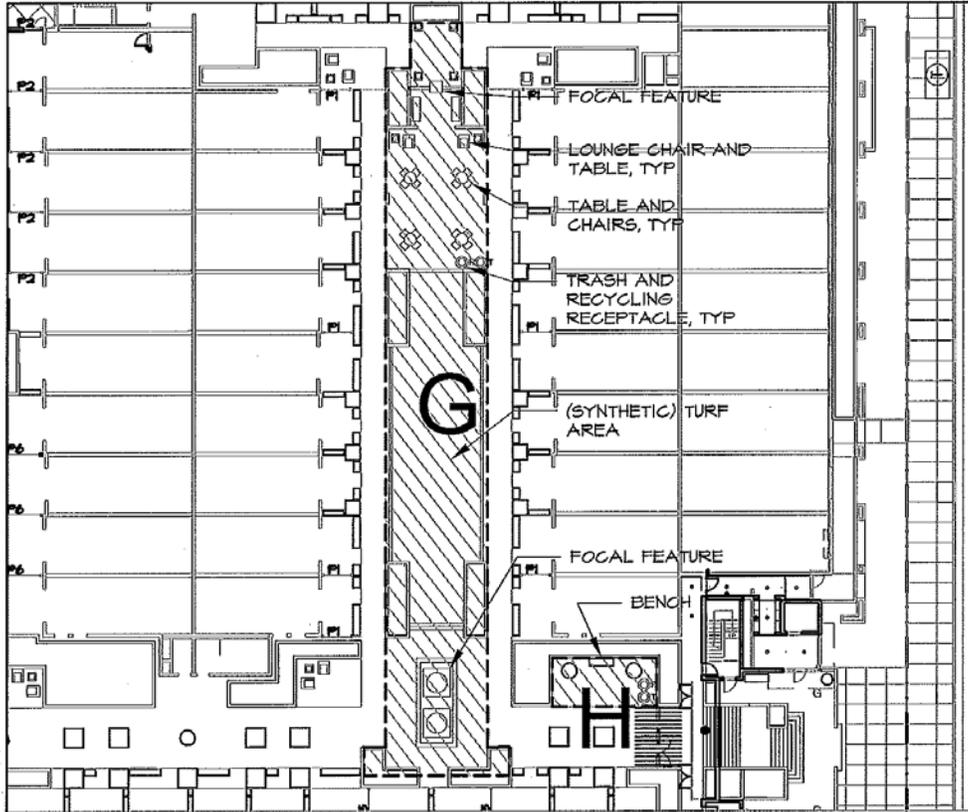
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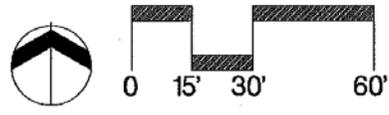


**ZONE G:**  
Private Urban Plaza

- 4,620 sq. ft. (unit pavers as surfacing)
- focal features
  - bench seating
  - lounge chair with table seating
  - tables and chairs
  - trash and recycle receptacles
  - (synthetic) turf area

**ZONE H:**  
Private Urban Plaza

- 310 sq. ft. (unit pavers as surfacing)
- bench seating
  - trash and recycle receptacles



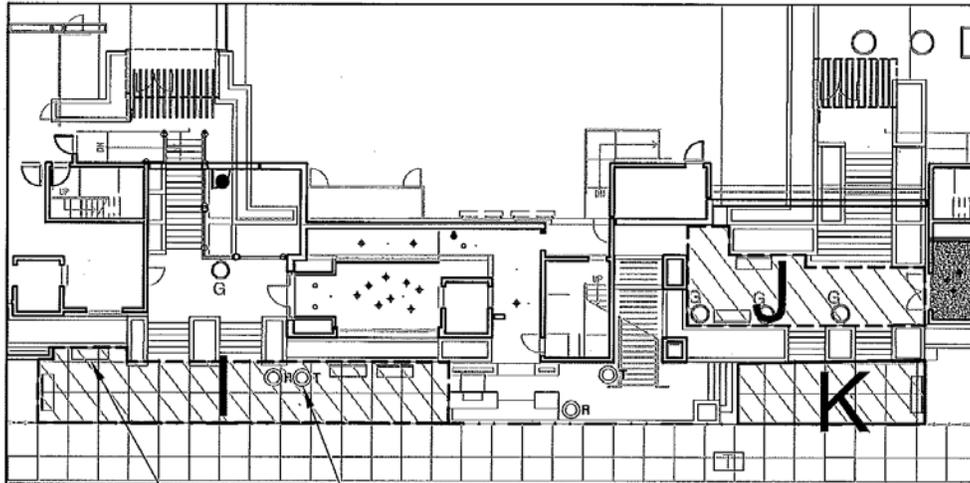
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DETAIL PLAN  
VISTA MONTANA ROWHOUSES

DATE 05/16/11	SCALE AS SHOWN	DRAWN BY MM	DRAWING NO. 08013CredExh
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BENCH, TYP. TRASH AND RECYCLING RECEPTACLE, TYP

### ZONE I: Private Urban Plaza

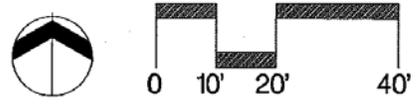
- 700 sq. ft. (unit pavers as surfacing)
- bench seating
- trash and recycle receptacles

### ZONE J: Private Urban Plaza

- 420 sq. ft. (unit pavers as surfacing)
- bench seating
- trash and recycle receptacles

### ZONE K: Private Urban Plaza

- 320 sq. ft. (unit pavers as surfacing)
- bench seating
- trash and recycle receptacles

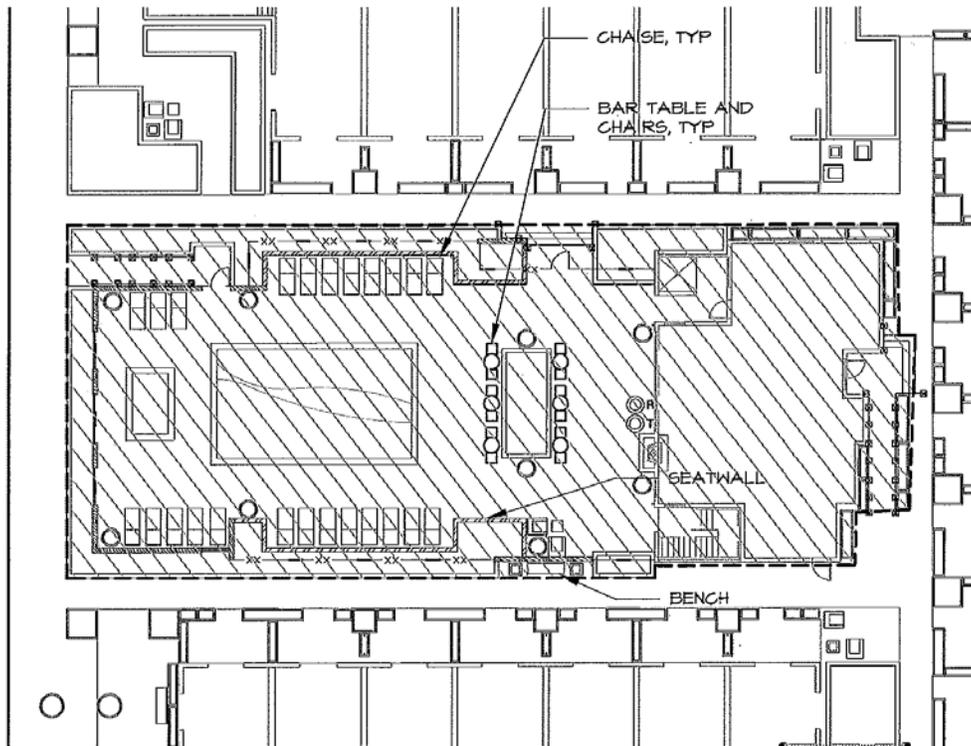


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DETAIL PLAN  
VISTA MONTANA ROWHOUSES

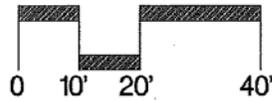
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## ZONE L: Pool/Spa/Recreation Building

7,900 sq. ft. (unit pavers as surfacing)

- chaise lounges
- bar table seating
- trash and recycle receptacles
- seatwall
- lounge chair/table seating



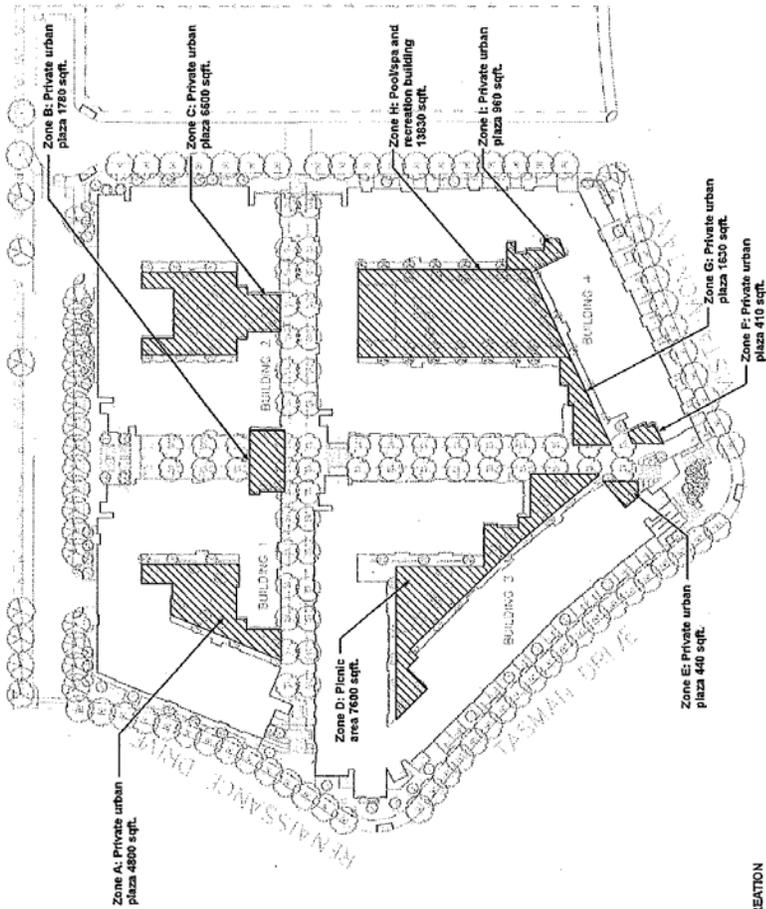
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DETAIL PLAN  
VISTA MONTANA ROWHOUSES

DATE 05/16/11	SCALE AS SHOWN	DRAWN BY MM	DRAWING NO. 02013credExh
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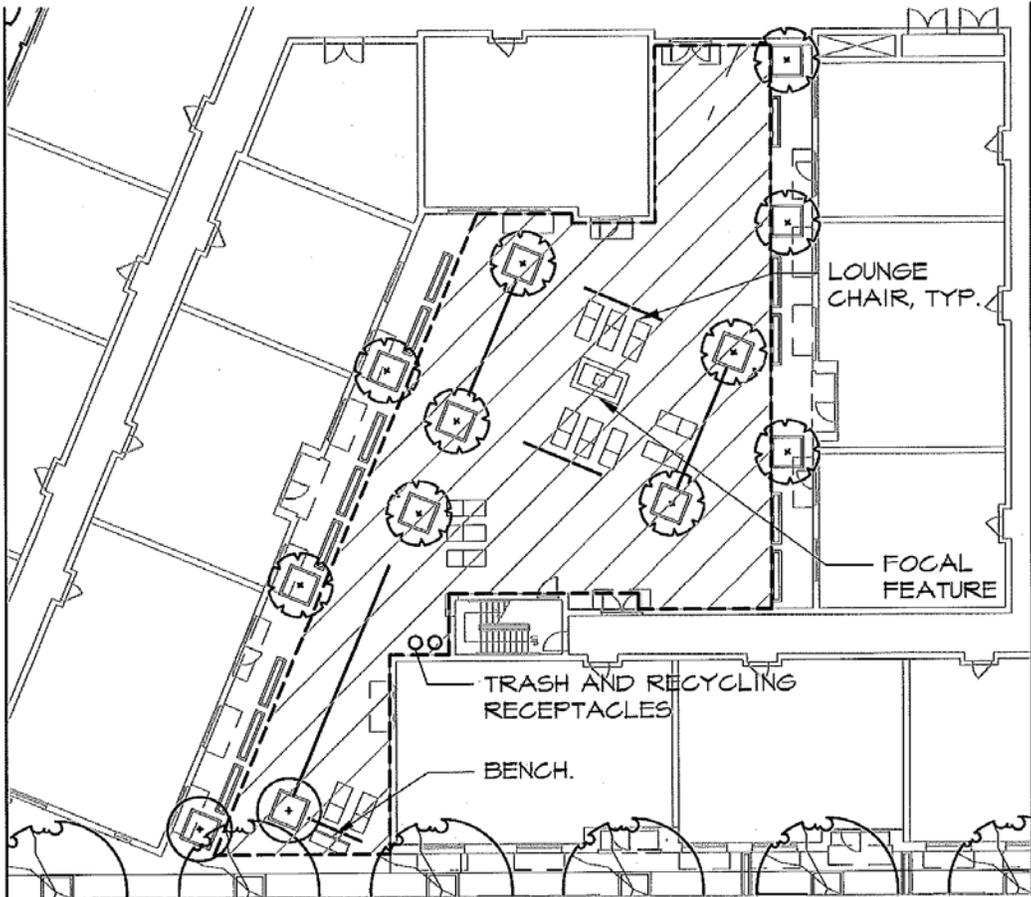
TOTAL PRIVATE RECREATION  
CREDITS FOR EXHIBIT: 38,660 S.F.



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Landscape Architecture, Inc.  
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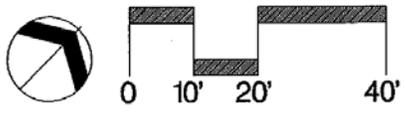
## Private Recreation Credits Exhibit

Equify Tasman Apartments  
April 12, 2009  
Revised May 16, 2011



### ZONE A: Private Urban Plaza

- 4,800 sq. ft. (unit pavers as surfacing)
- Lounge chair
  - bench seating
  - trash and recycle receptacles



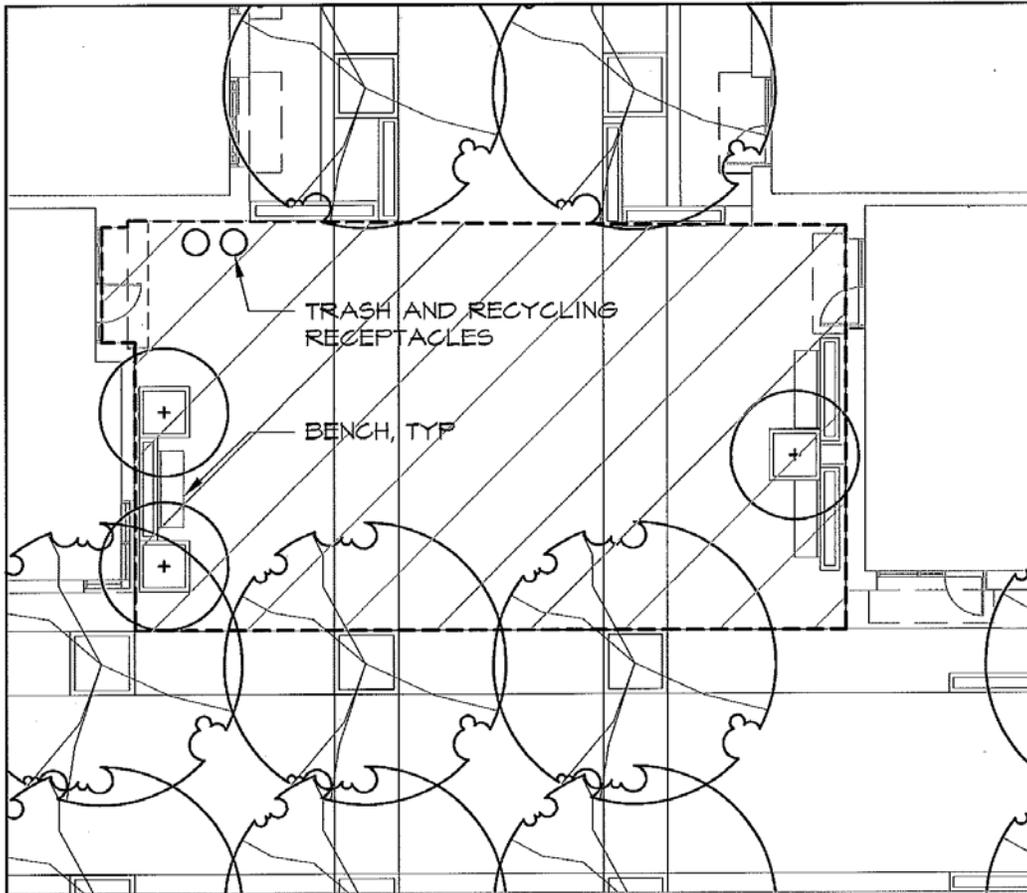
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**PRIVATE RECREATION CREDITS EXHIBIT**  
DETAIL PLAN  
EQUITY TASMAN APARTMENTS

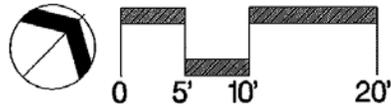
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## ZONE B: Private Urban Plaza

1,780 sq. ft. (unit pavers as surfacing)

- bench seating
- trash and recycle receptacles



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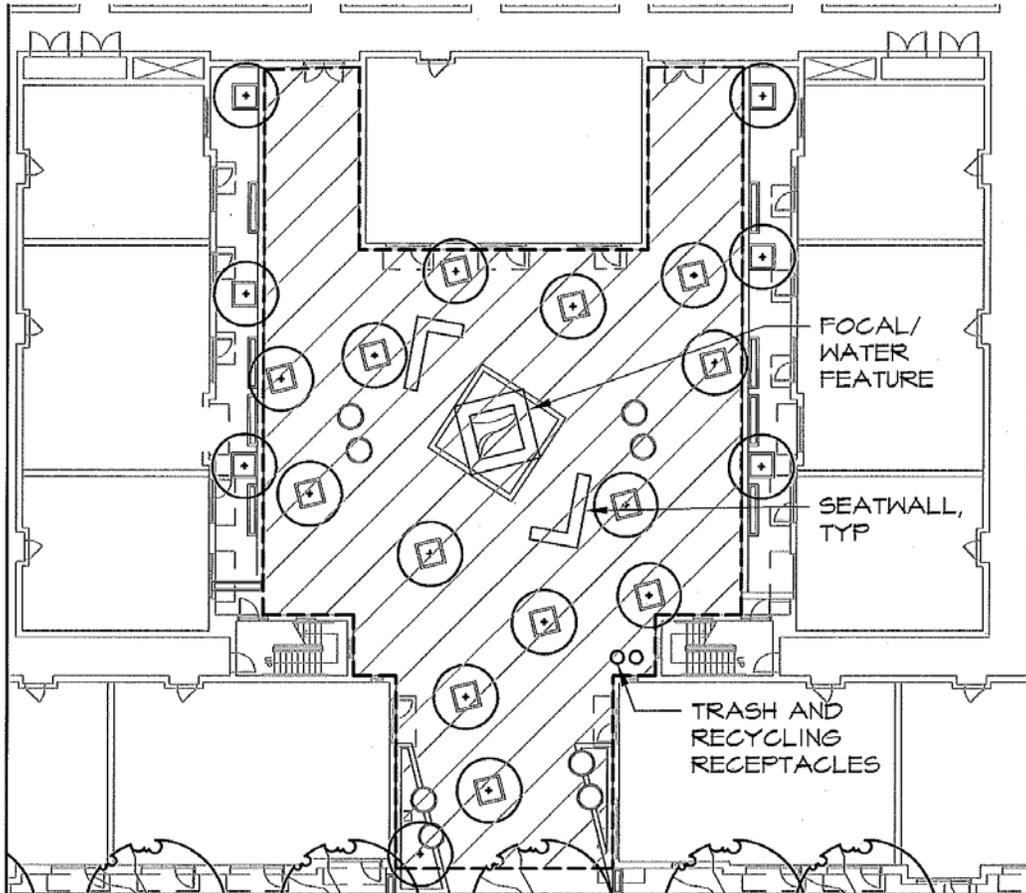
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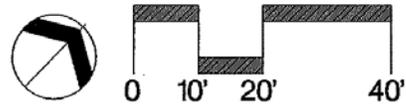
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### ZONE C: Private Urban Plaza

- 6,600 sq. ft. (unit pavers as surfacing)
- seatwall
  - focal/water feature
  - trash and recycle receptacles



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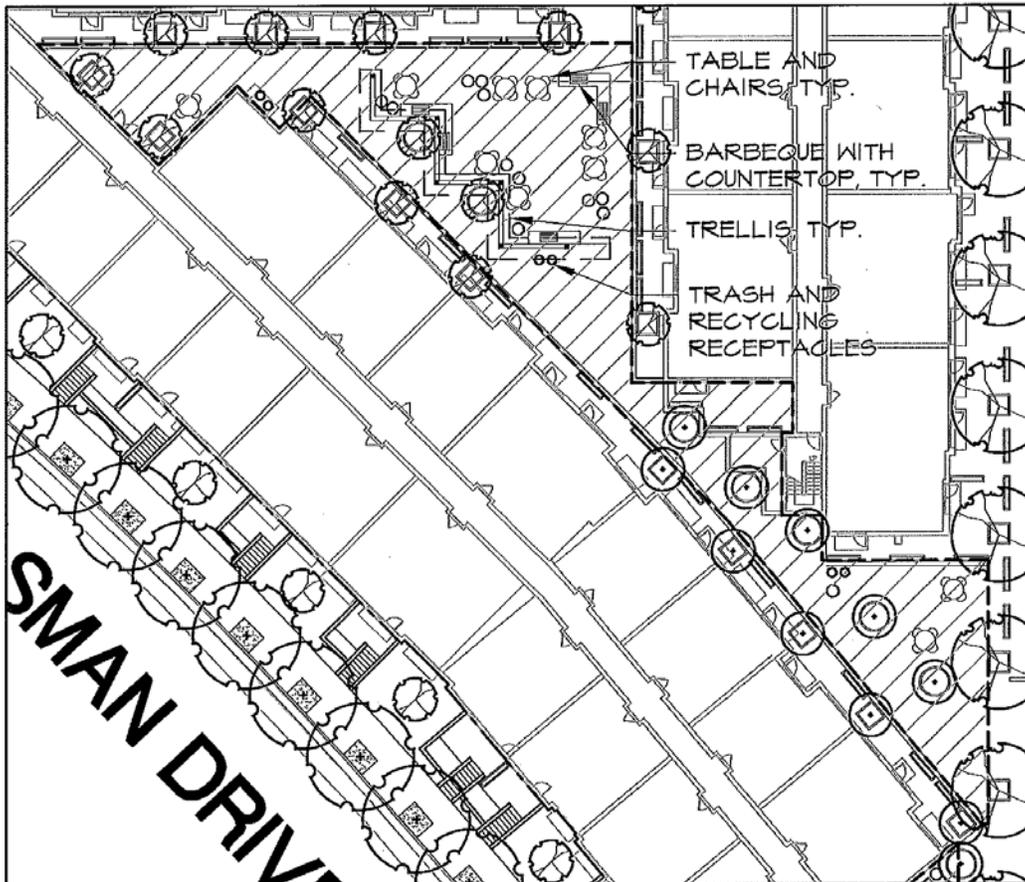


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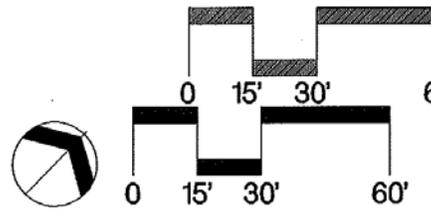
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### ZONE D: Picnic Area

- 7,600 sq. ft. (unit pavers as surfacing)
- barbeques with countertop
  - tables and chairs (3 sets minimum)
  - trash and recycle receptacles



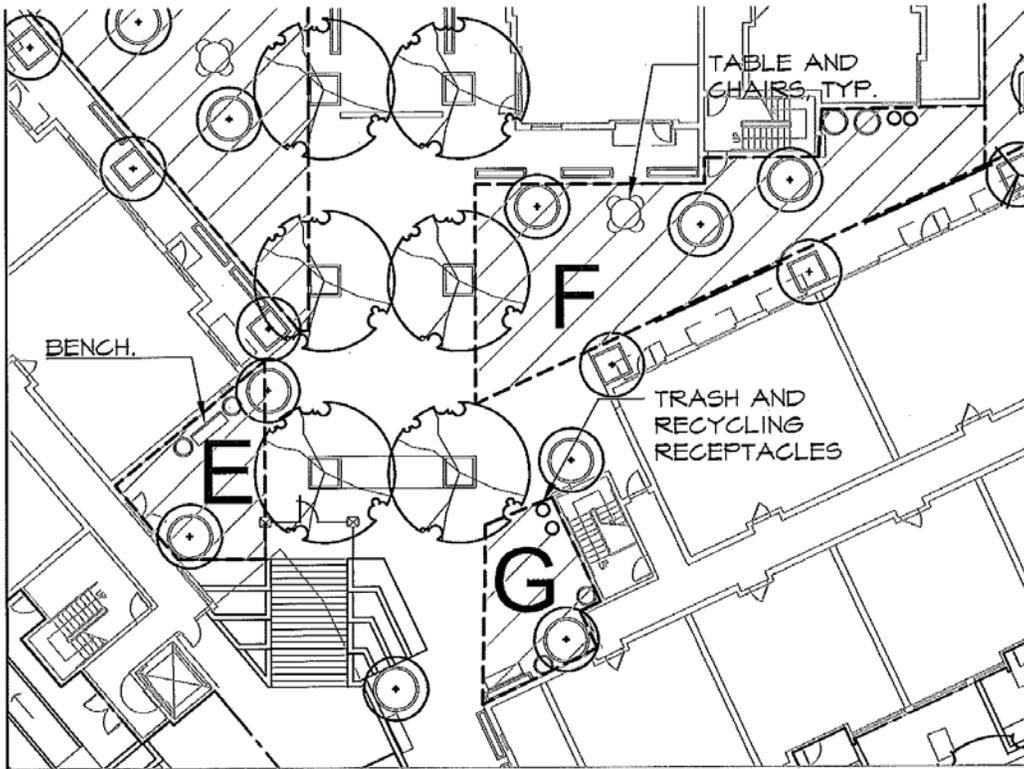
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**ZONE E: Private Urban Plaza**

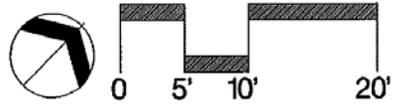
440 sq. ft. (unit pavers as surfacing)  
 - bench seating

**ZONE F: Private Urban Plaza**

1,630 sq. ft. (unit pavers as surfacing)  
 - table and chair seating

**ZONE G: Private Urban Plaza**

410 sq. ft. (unit pavers as surfacing)  
 - bench seating



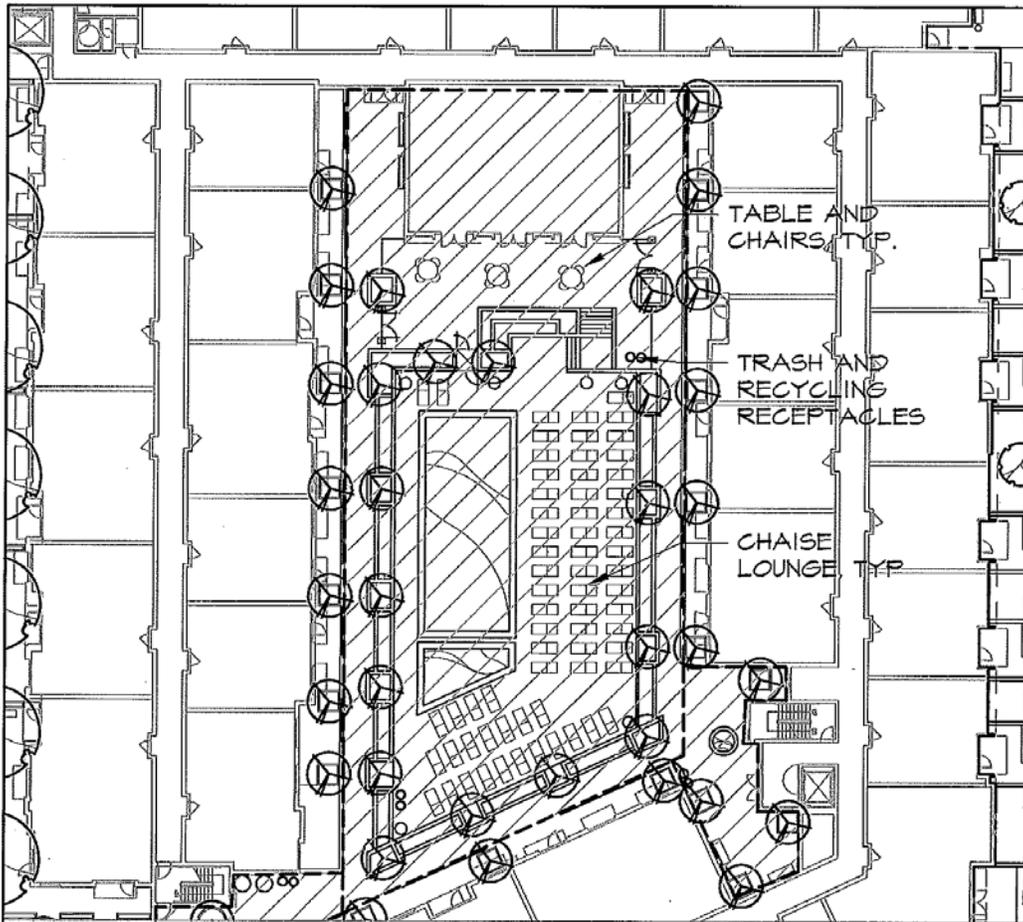
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## ZONE H: Pool/Spa/Recreation Building

13,830 sq. ft. (unit pavers as surfacing)

- chaise lounge
- tables and chairs
- trash and recycle receptacles



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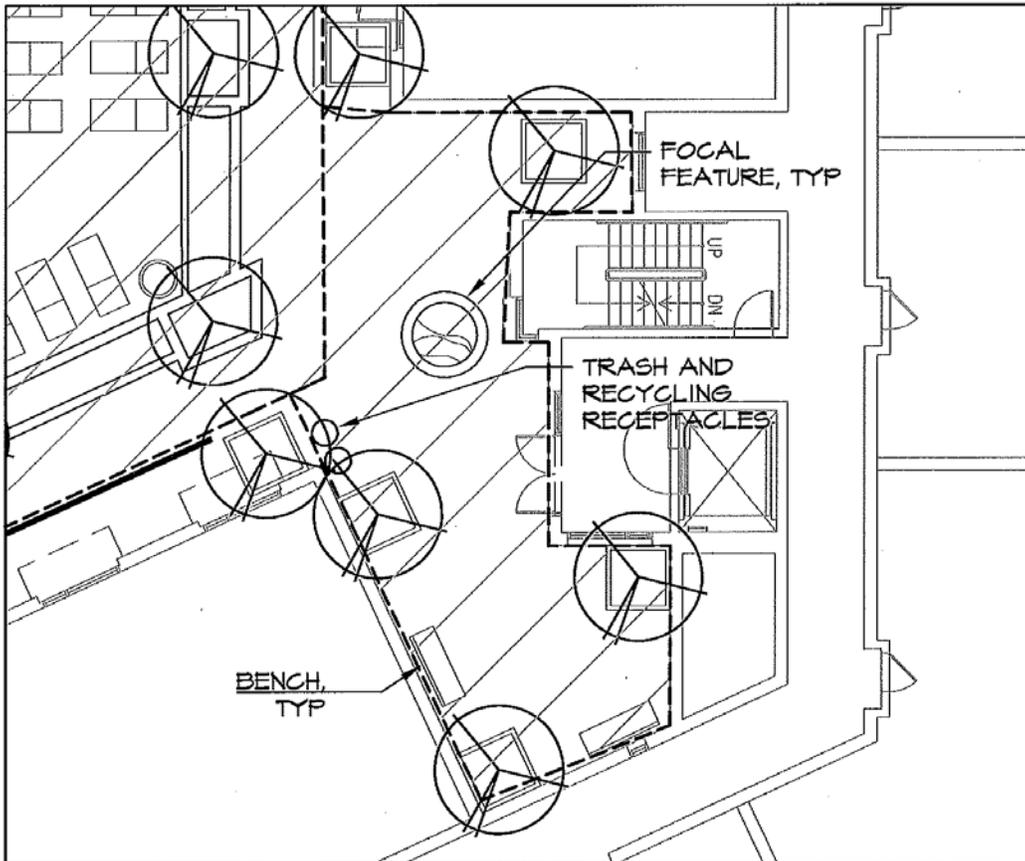
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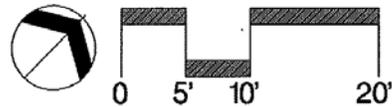
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## ZONE I: Private Urban Plaza

960 sq. ft. (unit pavers as surfacing)

- bench seating
- focal feature
- trash and recycling receptacles



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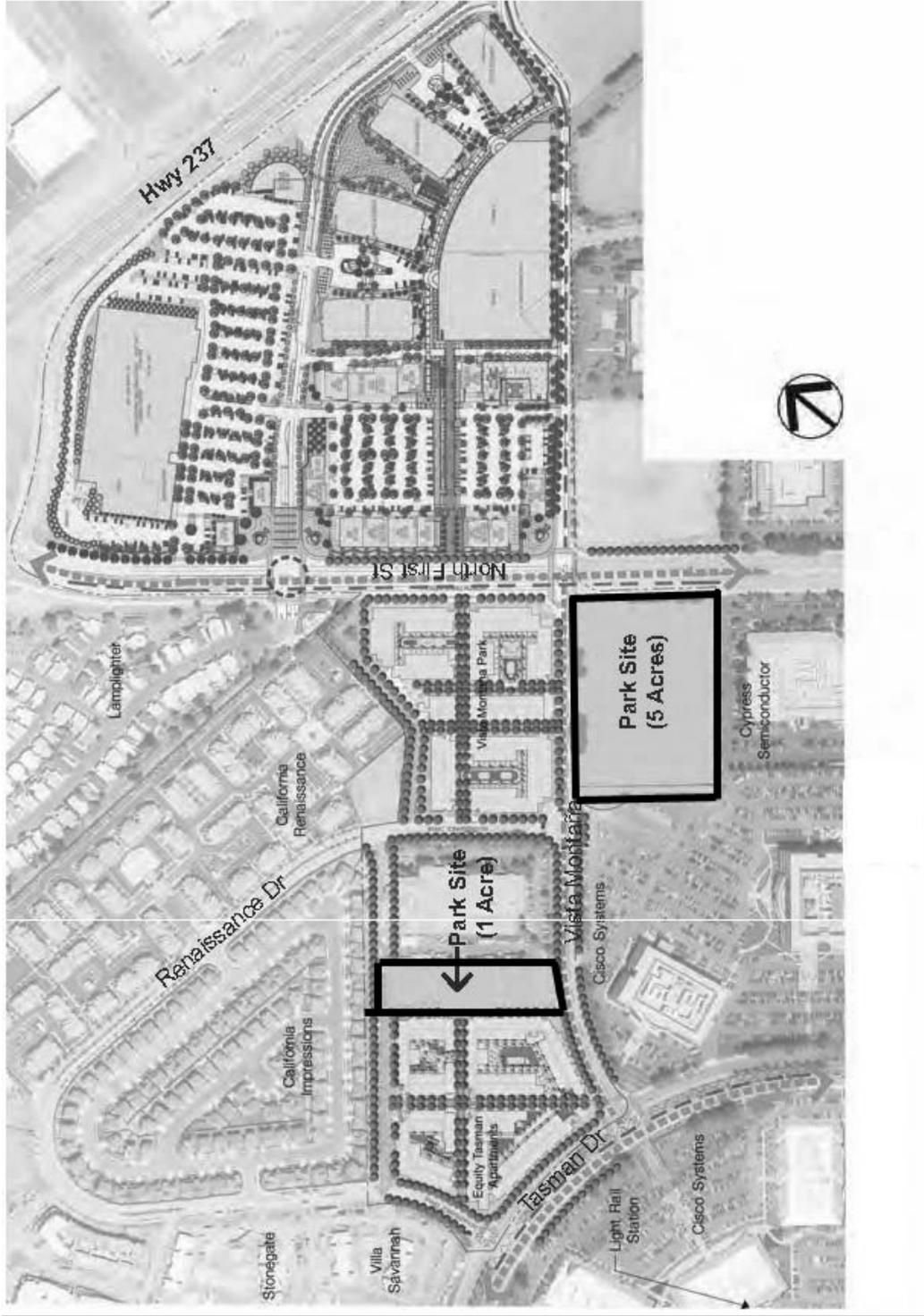
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**EXHIBIT D**

**LOCATION OF PARK SITES**



**EXHIBIT E**  
**ENVIRONMENTAL AGREEMENT**

## **EXHIBIT F**

### **DESIGN AND CONSTRUCTION REQUIREMENTS**

#### **I. 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** and **Exhibit B** and the master plan approved by City Council, which may be amended from time to time with City Council approval. 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 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 "Developer." In the event that Developer does not submit the ninety percent (90%) Project Specifications (as specified below) for City's review and approval within eighteen (18) months of the execution 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 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 execution 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.

## **II. 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 Improvements. The Developer acknowledges and agrees that it is responsible for compliance by contractors and subcontractors of the Prevailing Wage Requirement.
3. Reporting Obligations: Notwithstanding anything to the contrary contained herein, 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 II(B) of **Exhibit F** 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.

Developer Initial: \_\_\_\_\_

City Initial: \_\_\_\_\_

**D. Conduct Of Work.**

- 1. Appearance. Developer shall maintain a neat appearance to the work at the Park Sites. 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 Sites 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 Sites. Additionally, Developer shall take reasonable precautions to prevent the disposal of Hazardous Substances by third parties on any of the Sites. The term "Hazardous Substances" is defined in Section IV (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 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) persons 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 satisfaction of the Director of PW. The following provisions shall apply separately to each park.

- 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 Sites as outlined in Section II(G) of this Exhibit below; and

- c. Developer has performed and satisfied any and all terms, conditions and obligations required by any governmental entity with jurisdiction over the Park Sites, such as the California Department of Toxic Substances Control and California Regional Water Control Board; and
  - d. Developer has performed and satisfied any and all terms, conditions and obligations required under the Environmental Agreement prior to acceptance of the Park Improvements; and
  - e. 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.
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 7(A)(4) of this Agreement, and City will accept the Park Improvements as set forth herein.
  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 Sites.**

1. Developer shall provide each of the following to the Director of PW, subject to the approval of the Director of PW, prior to City's acceptance of the Park Sites and Park Improvements:
  - a. A preliminary title report for the Park Sites by a reputable title company approved by the City's Real Estate Division. Developer shall coordinate with City's 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 Sites containing the legal description of the Park Sites, 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 Sites shall be conveyed to City. Title to the Park Sites 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 Sites approved by City's Manager, in writing, listed in this Exhibit, or the Environmental Agreement ("Permitted Exceptions"). The Grant Deed, subject to approval of City, for the Park Sites 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. The following are Permitted Exceptions:

- c. Developer shall also cause to be provided to City, concurrently with the conveyance of the Park Sites to City, a C.L.T.A. owner's form policy of title insurance issued by a reputable title company, approved by City's PW Real Estate Division, with City named as the insured, in the amount of Two Million Four Hundred Thousand Dollars (\$2,400,000) for the NEIGHBORHOOD PARK PROPERTY and Twelve Million Dollars (\$12,000,000) for the COMMUNITY PARK PROPERTY insuring the title of City to the Park Sites is subject to only the Permitted Exceptions, if any.
- d. Any and all reports related to the condition of the Park Sites and the lands adjacent to the Park Sites 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 Sites with respect to the presence of hazardous materials on or adjacent to the Park Sites ("Hazardous Materials Report"). The definition of Hazardous Materials for purposes of this Agreement is defined in the Environmental Agreement. The scope of the Hazardous Materials Report shall, at minimum, contain the elements set forth below in Section III.
- e. In the event that the Hazardous Materials Report(s) disclose(s) the presence of Hazardous Materials on any of the Park Sites in excess of generally accepted environmental screening limits for 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 Sites shall be at no cost to the City and be subject to the review and approval of the Director.

- f. The Environmental Agreement executed by Developer and City.
  - g. Written certification from the California Department of Toxic Substances Control (“DTSC”) that all remedial work performed by Developer at the Park Sites satisfies the “Final Removal Action Workplan” dated May 9, 2009, prepared by TRC on behalf of Vista Montana Park Homes LLC and ERP Operating Limited Partnership or any amendments thereto, approved by DTSC on May 9, 2008, and the Park Sites are safe for use as a public park.
  - h. Documents evidencing the authority of the signatory(ies) to execute any agreement or other legal binding documents on behalf of Developer.
  - i. A copy of the deed restriction, mutually approved by City and DTSC, to be recorded by Developer against the Park Sites as part of the requirement by DTSC for the “Final Removal Action Workplan” dated May 9, 2009, prepared by TRC on behalf of Vista Montana Park Homes LLC and ERP Operating Limited Partnership or any amendments thereto, approved by DTSC on May 9, 2008.
2. Upon the Director of PW's acceptance of the Park Sites and Park Improvements, Developer shall have no further obligations in connection with the Park Sites 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 8 of this Agreement.

### **III. HAZARDOUS MATERIALS REPORT.**

City acknowledges receipt of the "Final Removal Action Workplan" dated May 9, 2009, prepared by TRC on behalf of Vista Montana Park Homes LLC and ERP Operating Limited Partnership, approved by DTSC on May 9, 2008 and "Notice of Determination" by DTSC dated May 9, 2009 approving the Final Remedial Action Workplan, and hereby concurs that these documents satisfy City's requirements for the Hazardous Materials Report under this Agreement.

### **IV. 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, nonowned 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. Self-Insured Retentions.**

Any deductibles or self-insured retentions must be declared to, and approved by, the City's Risk Manager. 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's Risk Manager.

**D. OTHER INSURANCE PROVISIONS.**

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

1. Regarding Commercial General Liability, Automobile Liability and Pollution Liability Coverages.
  - a. City, its officials, employees, agents and contractors are to be covered as additional insureds 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; automobiles owned, leased, hired or borrowed by Developer. The coverage shall contain no special limitations on the scope of protection afforded to City, its officials, employees, agents and contractors; and
  - b. 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 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 City, its officials, employees, agents and contractors; and
  - d. Coverage shall state that 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, employees, 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 given to 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, Professional Liability and Pollution Liability coverages shall be maintained continuously for a minimum of five (5) years after completion of 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 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 work under this Agreement.

**F. ACCEPTABILITY OF INSURERS.**

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

**G. VERIFICATION OF COVERAGES.**

Developer shall furnish 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:

The City of San Jose – Human Resources  
Risk Management  
200 East Santa Clara Street, 2<sup>nd</sup> Floor Wing  
San Jose, CA 95113-1905

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

**EXHIBIT G**

**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-Authority 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-Authority if executed by Attorney-in-Fact***