

From: [Mendez, Zacharias](#)
To: sheelajivan@google.com; [Bethany Windle](#)
Subject: SJMC Encumbrance Language + Parkland Agreement Template
Date: Friday, July 24, 2020 1:44:18 PM
Attachments: [TURNKEY AGREEMENT TEMPLATE CURRENT.doc](#)

Hello Sheela and Bethany,

As understand, there may have been some questions about the code regarding encumbrances. Here is a link to the section of code we reference in relation to this: [SJMC 19.38.330, Part B](#)

Also, @Sheela we wanted to make sure you have a chance to review the standard parkland agreement template we typically start with for a residential project. We will need to work though how this agreement and the steps associated with it are integrated into the DA, particularly for the dedication process.

Let me know if you need anything else.

Regards,
Zak

ZACHARIAS MENDEZ | Parks Planner
Parks, Recreation and Neighborhood Services
City Hall | Tel: 408.793.4171
200 East Santa Clara Street, San José, CA 95113
Building Community Through Fun
sanjoseca.gov/prns | www.vivcallesj.org

RECORDING REQUESTED
BY CITY OF SAN JOSE:

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

**PARKLAND AGREEMENT
FOR
TENTATIVE MAP NO. [REDACTED].
BETWEEN
CITY OF SAN JOSE
AND
[NAME OF DEVELOPER]
AND
RESTRICTIONS AND COVENANTS RELATING TO
PRIVATE RECREATIONAL IMPROVEMENTS**

This Agreement ("Agreement") is made and entered into by and between the CITY OF SAN JOSE, a municipal corporation of the State of California ("City"), and **[name of developer]**, a **[type of entity]** ("Developer") as of the date of City's execution ("Effective Date"). Each of City and Developer are sometimes hereinafter referred to as a "Party" and collectively as the "Parties."

RECITALS

- A. Developer desires to develop a residential subdivision ("Development") on certain real property located at **[insert location of property]**, in the City of San José, County of Santa Clara, State of California. Developer has filed Tentative Map Number **[]** (the "Tentative Map") with the City's Planning Department for the subdivision of the real property and has obtained Planned Development Permit No. **[]** ("PD Permit") for the Development.
- B. Under the provisions of Chapter 19.38 of the San José Municipal Code ("Parkland Dedication Ordinance"), developers of residential subdivisions are required to dedicate property for neighborhood and community parks, construct park or recreational improvements and/or pay in-lieu fees ("Parkland Dedication Obligation").
- C. In order for Developer to satisfy Developer's Parkland Dedication Obligation for the residential units identified on the Tentative Map, Developer and City desire to enter into this Agreement pursuant to which Developer shall satisfy Developer's Parkland Dedication Obligation as follows: **[identify/list how obligation will be satisfied, e.g., dedicate land and/or construct park improvements as outlined in Exhibit A to this Agreement ("Park Improvements") and/or pay in-lieu fees]**.
- D. **[add if applicable]** Developer shall also install certain private recreation improvements as described in **Exhibit A** ("Private Recreational Improvements") within the Development in conjunction with the construction of the Development in accordance with the requirements of the PD Permit and for which Developer is also eligible to receive credit against its Parkland Dedication Obligation as set forth in the Parkland Dedication Ordinance and this Agreement.
- E. 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.

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

SECTION 1. REPRESENTATIONS AND WARRANTIES OF DEVELOPER.

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

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

- A. Developer affirms its irrevocable offer to dedicate to City approximately _____ acres of real property located on _____ **[insert Lot #]**

("Park Site") as identified on the Tentative Map for the Development and as shown in the conceptual plan for the Park Improvements depicted on the attached **Exhibit A** ("Park Site Plan"). Developer shall be responsible for all costs incurred in the conveyance of the Park Site to City in accordance with the requirements and specifications set forth in this Agreement.

- B. Developer shall be responsible for the development of plans and specifications for, and the construction of the Park Improvements on the Park Site consistent with the Park Site Plan and as more particularly described in this Agreement. Developer shall develop plans and specifications for the Park Improvements ("Project Specifications") for the review and approval of the Director of PW, as more particularly described in the attached **Exhibit B**. Subject to **Exhibit B** of this Agreement, Developer shall construct the Park Improvements in conformance with the Project Specifications and all applicable standards and specifications in effect on the Effective Date of this Agreement.
- C. The Parties acknowledge that the exact size, dimensions, and other particular characteristics of the Park Improvements have not been determined as of the Effective Date of this Agreement. The Parties, however, agree that the Park Improvements shall consist of the following specific Park Improvements: **[list improvements – note: in some cases the improvements may be specified in the PD Permit. If so, list the improvements here and ensure that they are consistent]**, all as depicted in **Exhibit A**.
- D. Developer shall be responsible for all costs incurred for planning, design, construction, and supervision of the construction of all Park Improvements, including without limitation, City's plan review and inspection. Developer shall cause all labor and material incorporated in

the Park Improvements to be furnished in accordance with the requirements and specifications set forth in this Agreement.

- E. The Park Improvements to be installed on the Park Site shall be completed on or before the date of [REDACTED]. 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 B** of this Agreement. The City's Director may, at the City Director's discretion, grant extensions of the completion requirement specified in this subsection.
- F. The Development is eligible to receive credit for private recreation improvements pursuant to the Parkland Dedication Ordinance. The description of the private recreation improvements to be included in the Development by Developer that will receive credit pursuant to Chapter 19.38 is set forth in **Exhibit A** and **Exhibit C**. Developer shall complete the installation of the private recreation improvements described in **Exhibit A** and **Exhibit C** on or before the date of _____.
- G. With respect to any credited private recreation improvements which have not been completed within the date specified herein, the credits for the incomplete improvements shall be disallowed and Developer shall be required to pay any increase in Parkland Fees, together with additional charges as set forth in the Parkland Dedication Ordinance.
- H. 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 ("Owner") of the residential units located within the Development and which expressly cannot be defeated or eliminated without the written consent of the City as described in the Parkland Dedication Ordinance.

- I. Developer acknowledges and agrees that Developer shall not receive any credit for eligible private recreation improvements pursuant to Parkland Dedication Ordinance except those private recreation improvements that are set forth in **Exhibit A** and **Exhibit C** and constructed in full compliance with this Agreement, or as otherwise creditable to the satisfaction of the Director of Parks, Recreation, and Neighborhood Services ("PRNS Director"). Where moderate adjustments to Exhibit C remain fully creditable pursuant to Chapters 14.25 and 19.38, and have been accepted by the PRNS Director, the Developer shall provide an updated 'as built' Exhibit C within 60 days of request by the City.
- J. Developer acknowledges that pursuant to the covenants set forth in Section 2.H above, the Developer or Owner shall henceforth be required to maintain all such private recreation improvements in safe working order and provide access for regular inspections at the City's request. After any such inspection and pursuant to written request by the City, the Developer or Owner shall promptly provide for any remedial actions, replacement, and/or repair work as may be necessary to ensure that the improvements remain in safe working order for recreational use.
- K. In the event that the project contains Private Recreational areas designated for credit as 'Private Plaza', 'Private Garden', or other such spaces designated in this agreement or associated exhibits as 'publicly accessible,' the Developer or Owner agrees to maintain perpetual public access to these amenities for a minimum of 360 days per year. The Developer or Property Owner may however, post reasonable Rules and Regulations for respectful use and maintenance of the site as well as conduct occasional extended closures, subject to approval by the PRNS Director. This Section shall apply in addition to any Easements or Restrictions which may be in place providing for public access and/or appurtenant uses.

SECTION 3. COMPLIANCE WITH THE PARKLAND DEDICATION ORDINANCE.

- A. City acknowledges and agrees that Developer's performance of this Agreement shall satisfy Developer's obligations under the City's Parkland Dedication Ordinance for the residential units identified on the Tentative Map for the Development. Provided that Developer is not in material default hereunder, and provided further that Developer satisfies all other terms, conditions, and requirements associated with the Development, City shall issue all building permits necessary for the residential units identified on the Tentative Map.
- B. The Parties acknowledge and agree that the calculation of the Developer's Parkland Dedication Obligation is set forth in **Exhibit C**, including the calculation of Parkland Fees and credits for Private Recreational Improvements, if applicable. Developer shall pay to City the Parkland Fees specified in accordance with the payment instructions set forth in **Exhibit C**. All Parkland Fees shall be paid to City prior to the issuance of any building permit for residential construction in the Development, or within one year from the date of approval of the final map, whichever occurs first. Developer may be required to pay additional penalties and late fee as set forth in the Schedule of Parkland Fees adopted by the City Council if payments of Parkland Fees are not made by the date set forth in this Section 3B. City will owe no refund to Developer in the event Developer does not build the number or type of residential units identified on the Tentative Map.
- C. In the event there is an increase in the number of residential units to be built, or change in the dwelling unit type, Developer agrees to immediately notify the City's Director and to pay such additional Parkland Fees as are required by the Parkland Dedication Ordinance.

- D. Developer acknowledges that the costs and expenses for the design, development, construction, and supervision related to the Park Improvements, and dedication of parkland, 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 and land dedication, Developer agrees to design, develop, and construct the Park Improvements on the Park Site and dedicate the Park Site as specified in this Agreement, without any obligation on the part of City.

SECTION 4. REVIEW FEES AND CHARGES RELATED TO PARK IMPROVEMENTS.

- A. Developer shall pay to City a fee for review and approval of the Project Specifications for the Park Improvements and the inspection of the Park Improvements (collectively, "Review Fee"). City's Review Fee shall be based on the Developer's cost estimate for the Park Improvements, as approved by the Director, and shall be calculated based on the fees and charges established for City's review and inspection of like improvements then in effect at the time Developer execute this Agreement. The Review Fee is [REDACTED]. The total Review Fee shall be paid directly to City as specified in **Exhibit C** prior to, or concurrently with, the execution of this Agreement.
- B. In the event that the City's Director grants an extension of the term of this Agreement pursuant to the provisions of Section 2(E) above or if the Review Fee paid pursuant to Section 4B above is insufficient for City's review and inspection as set forth 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/or 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 reputability and reliability as determined and selected by Director of PW.

SECTION 5. BONDS AND SECURITY.

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

A. Type and Amounts.

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

B. Conditions.

1. Developer shall provide the required security on forms approved by City and from sureties authorized by the California Insurance Commissioner to

transact the business of insurance. Any bonds furnished by Developer to satisfy the security requirements in this Section 5 shall be in the forms attached hereto as **Exhibit D**, 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 Improvement Plans cause an increase of more than ten percent (10%) over the original estimated cost of the Park Improvements, Developer shall provide security as required by Section 5(A) of the Agreement for One Hundred Percent (100%) of the total estimated cost of the Park Improvements as changed.
3. Notwithstanding Section 5(B)(2) above, Developer's security shall compensate City for the actual cost of completing the required Park Improvements in the Event of Default, as defined in Section 6 below, by Developer in the performance of this Agreement, regardless of whether City's cost of completion exceeds the estimated total cost of the Park Improvements.
4. A condition of Developer's security is that any request by Developer for an extension of time for the commencement or completion of the work under this Agreement may be granted by City without notice to Developer's surety and such extensions shall not affect the validity of this Agreement or release the surety or sureties on any security given for this Agreement.
5. As a condition of granting any extension for the commencement or completion of the work under this Agreement, Director of PW may require Developer to furnish new security guaranteeing performance of this Agreement, as extended, in an increased amount to compensate for any increase in construction costs as determined by Director of PW.
6. If Developer seeks to replace any security with another security, the replacement shall: (1) comply with all the requirements for security in this

Agreement; (2) be provided by Developer to Director of PW; and (3) upon its written acceptance by Director of PW, be deemed to be a part of this Agreement. Upon Director of PW's acceptance of a replacement security, the former security may be released by City.

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

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

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

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

SECTION 6. DEFAULT.

A. Developer shall be in default hereunder upon the occurrence of any one or more of the following events ("Event of Default"):

1. Developer's failure to timely commence construction of Park Improvements under this Agreement;
2. Developer's failure to timely complete construction of the Park Improvements under this Agreement;
3. Developer's failure to timely cure any defect in the Park Improvements;
4. Developer's failure to perform substantial construction work for a period of twenty (20) calendar days after commencement of the work;
5. Developer's insolvency, appointment of receiver, or the filing of any petition in bankruptcy, either voluntary or involuntary, which Developer fails to discharge within thirty (30) days;
6. Developer assigns this Agreement in violation of Section 9;
7. Developer fails to perform or satisfy any other term, condition, or obligation under this Agreement.

B. If an Event of Default occurs and the Event of Default is not cured by Developer in accordance with Section 6(C) below, City in its sole discretion shall be entitled to terminate Developer's control over the work

described herein and hold Developer and its surety liable for all damages suffered by City as a result of the Event of Default. City shall have the right, at its sole discretion, to draw upon or use the appropriate security to mitigate City's damages in the Event of Default by Developer. Developer acknowledges and agrees that City's right to draw upon or use the security is in addition to any other remedies available at law or in equity to City. The Parties acknowledge and agree that the estimated costs and security amounts may not reflect the actual cost of construction of the Park Improvements, and therefore, City's damages in the Event of Default by Developer shall be measured by the actual cost of completing the required Park Improvements to the satisfaction of City. City may use the sums provided by the securities for the completion of the Park Improvements in accordance with the Project Specifications.

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

- C. Unless the City's Director determines that the circumstances warrant immediate enforcement of the provisions of this Section 6 in order to preserve the public health, safety, and welfare, the City's Director shall give twenty (20) working days' prior written notice of termination to Developer ("Notice Period"), which notice shall state in reasonable detail the nature of Developer's default and the manner in which Developer can cure the default. During the Notice Period, Developer shall have the right to cure any such default; provided, however, if a default is of a nature which cannot reasonably be cured within the Notice Period, Developer shall be deemed to have timely cured such default for purposes of this section if Developer commences to cure the default within the Notice

Period, and prosecutes the same to completion within a reasonable time thereafter.

- D. If an Event of Default occurs, Developer agrees to pay any and all costs and expenses incurred by City in securing performance of such terms, conditions, or obligations giving rise to the Event of Default, including but not limited to, fees and charges of architects, engineers, contractors, attorneys, and other professionals, and court costs.
- E. City's rights and remedies specified in this Section 6 shall be deemed cumulative and in addition to any rights or remedies City may have at law or in equity.

SECTION 7. INDEMNITY/HOLD HARMLESS.

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

Developer shall reimburse City for all costs and expenses, including but not limited to fees and charges of architects, engineers, attorneys, and other professionals, and court costs, incurred by City in enforcing this Section 7.

SECTION 8. NOTICES.

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

To City's Director: City of San José
Department of Parks, Recreation and Neighborhood Services
Attn: PRNS Parks Planning Division Manager
200 East Santa Clara Street, Tower-9th Floor
San José, CA 95113

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

To Developer:

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

SECTION 9. ASSIGNMENT.

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

SECTION 10. BINDING UPON SUCCESSORS.

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

SECTION 11. GOVERNING LAW.

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

SECTION 12. ENTIRE AGREEMENT.

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

SECTION 13. TIME OF ESSENCE.

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

SECTION 14. FORCE MAJEURE.

- A. "Force Majeure Event" shall be defined as any matter or condition beyond the reasonable control of a Party, including war, public emergency or calamity, fire, earthquake, extraordinary inclement weather, Acts of God, strikes, labor disturbances or actions, civil disturbances or riots, litigation brought by third parties against either the City or Developer or both, or any

governmental order or law which causes an interruption in the construction of the Park Improvements (the "Work" for purposes of this section) or prevents timely delivery of materials or supplies.

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

SECTION 15. BOOKS AND RECORDS.

- A. Developer shall be solely responsible to implement internal controls and record keeping procedures in order to comply with this Agreement and all applicable laws. Developer shall maintain any and all ledgers, books of account, invoices, vouchers, bids, cancelled checks, and other records or documents evidencing or relating to the activities performed by Developer under this Agreement, including without limitation those relating to the construction of the Park Improvements, for a minimum period of three (3) years, or for any longer period required by law, from the date of termination of this Agreement or the date of the City's acceptance of the Park Improvements, whichever is longer. Notwithstanding this previous sentence, Developer shall retain such records beyond three (3) years so long as any litigation, audit, dispute, or claim is pending.
- B. Any records or documents required to be maintained pursuant to this Agreement shall be made available for inspection or audit at no cost to City, at any time during regular business hours, upon written request by the City Attorney, City Auditor, City Manager, or a designated representative of any of these officers. Copies of such documents shall be provided to City for inspection at City Hall when it is practical to do so. Otherwise, unless an alternative is mutually agreed upon, the records shall be available at Developer's address indicated for receipt of notices in this Agreement.
- C. Where City has reason to believe that such records or documents may be lost or discarded due to dissolution, disbandment or termination of Developer's business, City may, by written request by any of the above-named officers, require that custody of the records be given to City and that the records and documents be maintained in City Hall. Access to such records and documents shall be granted to any party authorized by

Developer, Developer's representatives, or Developer's successor-in-interest.

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

SECTION 16. MISCELLANEOUS PROVISIONS.

- A. Captions. Captions and Sections of this Agreement are for convenience only and shall not be considered in resolving any questions of interpretation or construction.
- B. Incorporation of Recitals. The Recitals in this Agreement are hereby incorporated into the terms of this Agreement.
- C. Jurisdiction. In the event that suit shall be brought by any of the Parties, the Parties agree that venue shall be exclusively vested in the state courts of the County of Santa Clara, or if federal jurisdiction is appropriate, exclusively in the United States District Court, Northern District of California, San José, California.
- D. Waiver. Developer agrees that waiver by City of any breach or violation or any term, condition, or obligation of this Agreement shall not be deemed to be a waiver of any other term, condition, or obligation contained herein or a waiver of any subsequent breach or violation of the same term, condition, or obligation.
- E. Plurality. As used in this Agreement and when required by the context, each number (singular and plural) shall include all numbers.
- F. Compliance with Laws. Developer, its employees, agents, representatives, contractors, and subcontractors shall comply with all local, state and federal laws in the performance of this Agreement.
- G. Nondiscrimination. Developer, its employees, agents, representatives, contractors, and subcontractors shall not discriminate, in any way, against any person on the basis of age, sex, race, color, religion, sexual orientation, actual or perceived gender identity, disability, ethnicity, national origin, or any other recognized or protected class in connection with or related to the performance of this Agreement. Developer shall

expressly require compliance with the provisions of this Section 16(G) in all agreements with contractors and subcontractors for the performance of the improvements hereunder.

- H. Developer has read each and every part of this Agreement, including without limitation, its exhibits, and Developer freely and voluntarily has entered into this Agreement. This Agreement is a negotiated document and shall not be interpreted for or against any party by reason of the fact that such Party may have drafted this Agreement or any of its provisions.
- I. Whenever in this Agreement words of obligation or duty are used, such words shall have the force and effect of covenants. Any obligation imposed by either Party shall include the imposition on such Party of the obligation to pay all costs and expenses necessary to perform such obligation.
- J. Severability. If any provisions or portions of this Agreement are held to be invalid by a court of competent jurisdiction, the remaining provisions or portions of this Agreement shall remain in full force and effect unless amended or modified by mutual written consent of the Parties.
- K. This Agreement is entered into pursuant to and shall be governed by the Parkland Dedication Ordinance. If not otherwise defined in this Agreement, capitalized terms shall have the meanings set forth in Chapter 19.38 of the San José Municipal Code.

SECTION 17. AGREEMENT'S ATTACHMENTS.

This Agreement includes the following attachments:

Exhibit A	Fees and Credits Summary
Exhibit B	Park Improvements and Private Recreational Improvements Site Plans
Exhibit C	Design and Construction Requirements

Exhibit D

Bond Forms

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

APPROVED AS TO FORM:

CITY OF SAN JOSE, a municipal corporation

By: _____

TONY TABER, CMC

City Clerk

JON CALEGARI
Deputy City Attorney

Date: _____

DEVELOPER

**INSERT NAME OF DEVELOPER AND
TYPE OF ENTITY***

By: _____

Name: _____

Title: _____

OWNER

**INSERT NAME OF OWNER AND TYPE
OF ENTITY***

By: _____

Name: _____

Title: _____

* All Developer/Owner's signatures must be accompanied by an attached notary acknowledgement.

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

STATE OF CALIFORNIA)
) SS
COUNTY OF SANTA CLARA)

On _____ before me _____,
(Name, Title of officer – e.g. Jane Doe, Notary Public)

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

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

WITNESS my hand and official seal.

(Signature of Notary) (Seal)

EXHIBIT A

**PARK IMPROVEMENTS SITE PLAN
AND**

PRIVATE RECREATIONAL AMENITIES SITE PLAN

EXHIBIT B

FEES AND CREDIT SUMMARY

PAYMENT INSTRUCTIONS

Ex B-1

_TURNKEY AGREEMENT TEMPLATE_CURRENT

The City's Review Fees and Parkland Fees shall be paid directly to: City of San Jose, Department of Parks, Recreation and Neighborhood Services, 200 E. Santa Clara Street, Tower-9th Floor, San Jose, CA, 95113.

EXHIBIT C

DESIGN AND CONSTRUCTION REQUIREMENTS

SECTION 1. DESIGN AND CONSTRUCTION REQUIREMENTS.

A. Plans And Specifications.

The design for the Park Improvements must be consistent with the conceptual design for the Park Improvements as depicted in **Exhibit A**. 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"), as may be amended from time to time, and on file with 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."
2. City's Turnkey Park Standards for Park Design & Construction, dated 2001 ("Turnkey Standards"), as may be amended from time to time, and on file with City's Department of Public Works, Architectural Division. In the event that Developer does not submit the ninety percent (90%) Project Specifications (as specified in the Turnkey Standards) for City's review and approval within eighteen (18) months of the Effective Date of this Agreement and the Turnkey Standards are then revised, Developer shall design and construct the Park Improvements in accordance with the revised Turnkey Standards.
3. Public Works Standard Specifications- Section 329100 Planting Preparation. Soil specifications, survey requirements, and resulting soil amendment procedures prescribed in the above guidelines, shall be applicable to this agreement. Prior to construction of the park, this document will be made available to the Developer through Public Works.
4. City shall review the Plans, including materials, infrastructure, and design elements, for consistency with the conceptual design of Turnkey Park Improvements as contained in **Exhibit A** and the specifications and guidelines outlined above and throughout this Agreement. Pursuant to this design review process and with reasonable consideration of the cost estimates contained or referenced herein, the Plans shall be refined to the satisfaction of the Director of Parks, Recreation, and Neighborhood Services and the Director of Public Works pursuant to all terms in this Agreement.

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. Prior to acceptance of the Plans and/or construction of the Park, the Developer shall provide the City with original copies of all soil surveys along with recommended soil amendments. The City, may at its sole discretion, require inspection of the Park Site for construction debris before construction may commence.
3. 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.
3. For reference and public information purposes, Developer will provide the City with a tentative schedule of construction prior to the commencement of development for any of the Turnkey Park Improvements. Such schedule may be amended at the Developer's discretion provided that all Improvements are completed by the completion dates specified in this Agreement. At the City's request the Developer shall provide the City with an updated schedule that reflects amended milestones and anticipated completion dates.

SECTION 2. PARTICULAR CONSTRUCTION REQUIREMENTS.

A. Developer Selection.

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

B. Prevailing Wage Requirement.

1. General Requirement: For all construction work on the Park Improvements, 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”), as may be amended from time to time. 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. Developer acknowledges and agrees that it is responsible for compliance by its contractors and subcontractors of the Prevailing Wage Requirement.
3. Reporting Obligations: Notwithstanding anything to the contrary contained herein, Developer is not obligated to submit to City copies of payroll records, or any other records required to be maintained pursuant to the Prevailing Wage Requirement, until City requests such records. Developer shall provide to City, at no cost to City, a copy of any and all such records within ten (10) working days of 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 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 City has determined that the Prevailing Wage Requirement promotes each of the following (collectively “Goals”):
 - a. It protects City job opportunities and stimulates 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 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 Developer fails to completely respond to a request by City to provide records as required under Section 2(b), of Exhibit B of this Agreement, Developer shall pay to City as liquidated damages the sum of TWO HUNDRED FIFTY DOLLARS (\$250.00); and
 - b. For each instance where City has determined that the Prevailing Wage Requirements were not met, Developer shall pay to City as liquidated damages the sum of three (3) times the difference between the actual amount of wages paid and the prevailing wages which should have been paid.
- 3. Audit Rights. All records or documents required to be kept pursuant to this Agreement to verify compliance with the Prevailing Wage Requirement shall be made available for audit at no cost to City, at any time during regular business hours, upon written request by 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 and clean appearance to the work at the Park Site. When practicable, broken concrete and debris developed during clearing and grubbing shall be disposed of concurrently with its removal. If stockpiling of disposable material is necessary, the material shall be retained in an area not readily visible to the public in a manner meeting the reasonable satisfaction of the Director of PW.
2. Condition. Developer shall maintain the Park Site in a neat, clean, and good condition prior to City's acceptance of the Park Improvements. Developer shall not dispose or cause the disposal of any Hazardous Substances on any of the Park Site. Additionally, Developer shall take reasonable precautions to prevent the disposal of Hazardous Substances by third parties on any of the Site. The term "Hazardous Substances" is defined in Section 3 (A)(2) of this Exhibit.
3. Emergencies. In an emergency affecting the safety of persons or property, Developer shall act reasonably to prevent threatened damage, injury, or loss. Developer shall immediately notify the City by telephone at the telephone number as directed by City's Director of PW and in writing of such actions.

E. Access For Inspection.

1. Access. The Director of PW and the Director of PW's designated representatives, including without limitation, staff from other City departments, shall at all times during the progress of work on the Park Improvements have free access to such improvements for inspection purposes. If the Director of PW determines that all or any portion of the work done on the Park Improvements is not in compliance with the Plans, the Director of PW shall notify Developer of the same and Developer shall promptly cure such defect to the Director of PW's reasonable satisfaction. Such notifications shall be made to the Developer and his on-site representatives to not unduly interfere with ongoing construction work.
2. Representatives.
 - a. Prior to commencement of work on the Park Improvements, Developer shall designate in writing an authorized representative who shall have the

authority to represent and act for Developer. When work is not in progress and during periods when work is suspended, arrangements acceptable to the Director of PW shall be made for any emergency work which may be required. In addition, Developer shall provide Director of PW with the names and telephone numbers of at least two (2) individuals in charge of or responsible for the work who can be reached personally in case of emergency twenty-four (24) hours a day, seven (7) days a week.

- b. The Director of PW shall also designate one or more authorized representative 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.

- 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 2(G) of this Exhibit below; and
 - c. Developer has provided the Director of PW with three (3) sets of the Plans (“record plans”) corresponding copies of any and all warranties, and the like (such warranties shall be in the name of the City), and corresponding copies of any and all operating manuals for equipment installed as part of the Park Improvements. The aforementioned documents shall also be provided by Developer in an appropriate electronic format (.dwg, .pdf, etc.) as requested by the Director of Public Works or Parks, Recreation, and Neighborhood Services.
3. The Parties acknowledge that City's restrictions on the installation of landscaping because of future drought conditions may delay Developer's installation of the landscaping contemplated by this Agreement. If, due to drought restrictions, Developer is unable to install the landscaping in time to be inspected by the Director for the purposes of accepting the completed Park Improvements, Developer shall post a bond or other form of security as set forth in Section 5 (A)(4) of this Agreement.
4. At the discretion of the Director of PW, City may accept a designated portion of the Park Improvements. Acceptance of a designated portion will be as provided by Section 7-1.166 of the City’s Specifications.

G. Park Site.

1. Developer shall provide 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 Site and Park Improvements:
 - a. A preliminary report for the Park Site by a reputable title company currently doing business for 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 Site containing the legal description of the Park Site, as approved by City Surveyor, properly executed and acknowledged, subject only to the exceptions to title, if any, approved by City’s Manager or the Manager’s designee pursuant to which a fee simple estate in Park Site shall be conveyed to City. Title to the Park Site shall be vested in

City free and clear of all title defects, liens, encumbrances, conditions, covenants, restrictions, and other adverse interests of record or known to Developer, subject only to those exceptions affecting the Park Site approved by City's Manager or the Manager's designee, in writing or listed in this Exhibit ("Permitted Exceptions"). The Grant Deed, subject to approval of City, for the Park Site shall be delivered to the City's Real Estate Division at least ninety (90) days prior to the anticipated completion of the Park Improvements.

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

2. All soils on site shall be provided to the City free and clear of all construction debris and shall be amended in accordance with recommendations from the soil reports and agricultural soil surveys, or as otherwise directed by the City's Director or Designees. Additional amendments including, but not limited to, mycorrhizal inoculum or organic fertilizers may be required by the City or provided at the Developers discretion in consultation with the City.
3. Upon the Director of PW's acceptance of the Park Site and Park Improvements, Developer shall have no further obligations in connection with the Park Site except for the terms, conditions, or obligations of this Agreement that explicitly survives acceptance or termination.

H. Compliance With Laws/Permits.

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

SECTION 3. ENVIRONMENTAL WARRANTY.

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

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

SECTION 4. HAZARDOUS MATERIALS REPORT.

A. Scope of Hazardous Materials Report.

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

1. The historical usage of the Park Site and adjacent parcels dating back to the Park Site's first developed use (including any agricultural use) or 1940, whichever is earlier.
2. Results of the site visits pertaining to the current condition of the Park Site, including without limitation, any observed storage, handling, or release of any Hazardous Materials on, under, above, or about the Park Site, or evidence indicating possible past or current storage, handling, or release of any Hazardous Materials on, under, above, or about the Park Site.
3. Results of the review of all reasonably available historical documents and records of regulatory agencies concerning the storage, handling, or release of any Hazardous Materials and/or contamination of any or all of the Park Site.
4. Based on the findings of items 1 - 3 above, additional investigation, including without limitation, soil and/or groundwater sampling and chemical analysis could be required by City. The sampling and analysis plan, which includes the number and depths of soil borings that might be required, shall be subject to the review and approval of City.

5. A written report shall be prepared by a licensed environmental professional presenting results of the Phase I ESA. The report shall include any chemical analysis which may have been completed during the survey along with chain of custody documentation, soil boring logs if required and recommendations for any further investigation and remediation/source control necessary on the Park Site.

B. Phase II ESA (if necessary).

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

1. Soil and Groundwater Sampling and Analysis.

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

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

2. Report Preparation.

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

3. Report on any Remediation Work.

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

SECTION 5. INSURANCE REQUIREMENTS.

Developer and/or its contractors and consultants shall procure and maintain for the duration of the Agreement insurance against claims for injuries to persons or damages to property which may arise from, or in connection with, the performance of the Development hereunder by the Developer, its agents, representative employees, contractors, or subcontractors.

A. Minimum Scope of Insurance.

Coverage shall be at least as broad as:

1. The coverage provided by Insurance Services Office Commercial General Liability coverage ("occurrence") Form Number CG 0001; and
2. The coverage provided by Insurance Services Office Form Number CA 0001 covering Automobile Liability. Coverage shall also be included for all owned, non-owned and hired autos; and
3. Workers' Compensation insurance as required by the California Labor Code and Employers Liability insurance; and
4. Professional Liability Errors and Omissions insurance for all professional services; and
5. Builder's Risk insurance providing coverage for "all risks" of loss; and
6. Pollution Liability insurance, including coverage for all operations, completed operations and professional services (without exclusion for asbestos or lead).

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

B. Minimum Limits of Insurance.

Developer shall maintain limits no less than:

1. Commercial General Liability: Five Million Dollars (\$5,000,000) per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit; and
2. Automobile Liability: One Million Dollars (\$1,000,000) combined single limit per accident for bodily injury and property damage; and

3. Workers' Compensation and Employers' Liability: Workers' Compensation limits as required by the California Labor Code and Employers Liability limits of One Million Dollars (\$1,000,000) per accident; coverage shall be endorsed to state carrier waives its rights of subrogation against the City, its officers, employees, agents, and contractors; and
4. Professional Liability Errors and Omissions: One Million Dollars (\$1,000,000) per claim/One Million Dollars (\$1,000,000) aggregate limit; and
5. Builders' Risk: Completed value of Project; and
6. Pollution Liability: Two Million Dollars (\$2,000,000) per occurrence/Two Million Dollars (\$2,000,000) aggregate limit.

C. Deductibles and Self-Insured Retentions.

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

D. Provisions Of Policies.

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 an additional insured as respects: liability arising out of activities performed by, or on behalf of, the Developer; products and completed operations of the Developer; premises owned, leased or used by the Developer; or automobiles owned, leased, hired or borrowed by Developer. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officials, employees, agents and contractors; and
 - b. The Developer's insurance coverage shall be primary insurance as respects the City, its officials, employees, agents and contractors. Any insurance or self-insurance maintained by City, its officials, employees, agents and contractors shall be excess of the Developer's insurance and shall not contribute with it; and

- c. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the City and the City, its officials, employees, agents 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 the City's Risk Manager, except that ten (10) days' prior written notice shall apply in the event of cancellation for non-payment of premium.

E. Duration.

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

period equal to or greater than five (5) years after completion of the work under this Agreement.

F. Acceptability of Insurers.

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

G. 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 either emailed in pdf format to: Riskmgt@sanjoseca.gov, or mailed to the following postal address or any subsequent email or postal 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, 2nd Floor Wing
San Jose, CA 95113-1905

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

EXHIBIT D

BOND FORMS

Bond No. _____

Premium _____

FAITHFUL PERFORMANCE BOND

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

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

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

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

As a part of the obligation secured hereby and in addition to the sum specified above, there shall be included all costs, expenses, and fees, including attorney's fees, reasonably incurred by City in successfully enforcing such obligation, all to be taxed as costs and included in any judgment rendered.

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

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

PRINCIPAL:

SURETY:

(Principal name)

(Seal)

(Surety name)

(Seal)

BY: _____
(Signature)

BY: _____
Signature)

(Print name and title)

(Print name and title)

Principal address and telephone:

Surety address and telephone:

Affix Corporate Seals

Attach Notary Acknowledgments for All Signatures

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

Bond No. _____

Premium _____

PAYMENT (LABOR AND MATERIALS) BOND

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

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

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

IT IS HEREBY EXPRESSLY STIPULATED AND AGREED that this bond shall inure to the benefit of all persons, companies, corporations, political subdivisions, and State agencies entitled to file claims under Title 15 (commencing with Section 3082) of Part 4 of Division 3 of the Civil Code, so as to give a right of action to them or their assigns in any suit brought upon this bond. The Surety, for value received, hereby stipulates and agrees that no change, extension of time, alteration or addition to the terms of the Contract or to the work to be performed thereunder or the specifications accompanying the same shall in any way affect its

obligations on this bond, and it does hereby waive notice of any such change, extension, alteration or addition.

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

PRINCIPAL:

SURETY:

Principal name)

(Seal)

(Surety name)

(Seal)

BY: _____

(Signature)

BY: _____

(Signature)

Print name and title)

Principal address and telephone:

Print name and title)

Surety address and telephone:

Affix Corporate Seals

Attach Notary Acknowledgments for All Signatures

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

Bond No. _____

Premium _____

WARRANTY BOND

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

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

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

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

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

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

PRINCIPAL:

SURETY:

(Principal name) (Seal)

(Surety name) (Seal)

BY: _____
(Signature)

BY: _____
(Signature)

(Print name and title)

(Print name and title)

Principal address and telephone:

Surety address and telephone:

Affix Corporate Seals

Attach Notary Acknowledgments for All Signatures

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