

DISPOSITION AND DEVELOPMENT AGREEMENT

By and Between

CITY OF SAN PABLO

and

**AMERICAN RECESS, LLC, AND
THE MULHOLLAND DRIVE COMPANY, LLC**

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Attachments

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DISPOSITION AND DEVELOPMENT AGREEMENT

THIS DISPOSITION AND DEVELOPMENT AGREEMENT (the "Agreement") is entered into as of the 26th day of May, 2020, by and between the CITY OF SAN PABLO (the "City") and American Recess, LLC, a Nevada limited liability company, and The Mulholland Drive Company, LLC, a California limited liability company, jointly and severally (together, the "Developer"). The City and the Developer agree as follows:

ARTICLE I. SUBJECT OF AGREEMENT

A. §101] Purpose of this Agreement

The purpose of this Agreement is to provide for the sale of a portion of certain real property previously used as the El Portal Elementary School (the "School Site") by the City to the Developer for the development of a Class A self-storage facility.

B. §102] The School Site and Development Parcel

The School Site is located at 2600 Moraga Drive in the City of San Pablo, California, and consists of approximately 8.947 acres. The City and the Developer intend that the School Site shall be divided into a southern parcel of approximately 4.08 acres to be sold to the Developer for development (the "Development Parcel") and a northern parcel of approximately 4.867 acres to be retained by the City for development of a public park (the "Park Parcel"). The Development Parcel and the Park Parcel are generally shown on the Map of the School Site (Attachment No. 1). Within 7 days after the expiration of the Contingency Period, the Developer shall cause to be prepared, at its sole cost and expense, a legal description of the Development Parcel that shall be consistent with the terms of this Agreement, compliant with applicable law and acceptable to and insurable by the Title Company. The City shall cooperate as necessary in connection with preparation of the legal description, and the legal description shall be subject to approval by the City.

C. §103] Parties to this Agreement

1. §104] The City

The City is a municipal corporation of the State of California. The office of the City is located at 13831 San Pablo Avenue, San Pablo, California 94806. "City," as used in this Agreement, includes the City of San Pablo and any assignee or successor to its rights, powers and responsibilities.

2. §105] The Developer

The Developer is and shall be jointly and severally American Recess, LLC, a Nevada limited liability company, and The Mulholland Drive Company, LLC, a

California limited liability company. The principal office of the Developer is located at 85 Keystone Avenue, Suite E, Reno, Nevada 89503. Wherever the term "Developer" is used herein, such term shall include any permitted nominee, assignee or successor in interest as herein provided.

The qualifications and identity of the Developer are of particular concern to the City, and it is because of such qualifications and identity that the City has entered into this Agreement with the Developer. No voluntary or involuntary successor in interest of the Developer shall acquire any rights or powers under this Agreement except as expressly set forth herein. This Agreement may be terminated by the City pursuant to Section 609 hereof if there is any significant change (voluntary or involuntary) in the membership, management or control of the Developer prior to the completion of the development of the Development Parcel as evidenced by the City's issuance of a Certificate of Occupancy.

Prior to the issuance of a Certificate of Occupancy, the Developer shall not assign all or any part of this Agreement without the prior written approval of the City. Any assignment by the Developer in violation of this Section 105 shall be void. Notwithstanding the foregoing, at any time during the term of this Agreement, including prior to the issuance of the Certificate of Occupancy, Developer shall be entitled, without the prior consent of the City, to transfer and assign the rights hereunder, including the right to acquire title to the Development Parcel, to a newly formed entity the majority ownership and control of which shall be held by Developer in such shares as the constituent entities comprising the Developer shall determine, provided, however, that any such transfer and assignment shall be subject to a form of assignment agreement satisfactory to the City.

D. §106 Deposit

The Developer shall, within the time set forth in the Schedule of Performance (Attachment No. 2), deliver to the Escrow Agent (identified in Section 302 hereof) a deposit in the amount of THIRTY-FIVE THOUSAND DOLLARS (\$35,000.00) (the "Deposit") as security for the performance of the obligations of the Developer to be performed prior to the return of the Deposit to the Developer or its retention by the City as liquidated damages. The Deposit shall be increased as set forth in Section 202.3. in connection with each extension of the Contingency Period (defined in Section 202). Within five (5) days after expiration of the Contingency Period, the Developer shall increase the Deposit by an additional \$100,000.

Upon termination of this Agreement by the City as provided in Section 609 hereof, the Deposit (including all interest paid thereon) shall be either returned to the Developer or retained by the City as liquidated damages as provided therein.

Upon termination of this Agreement by the Developer as provided in Section 608 hereof, the Deposit (including all interest paid thereon) shall be returned to the Developer as provided therein.

If this Agreement shall not have been theretofore cancelled or terminated, the Deposit shall be applied toward the Purchase Price for the Development Parcel as provided in Section 307 hereof.

ARTICLE II. DEVELOPER'S CONTINGENCIES

A. [§201] City's Delivery of Preliminary Documents; No Shop

The City shall deliver to the Developer the documents listed below (the "Preliminary Documents") not later than fifteen (15) days after the opening of escrow pursuant to Section 302 hereof:

1. Preliminary Report. A preliminary report ("Preliminary Report") covering the Development Parcel and issued by Old Republic Title Company ("Title Company"), together with a legible copy (as reasonably obtainable) of all exceptions to title shown in the Preliminary Report, including each document, map, and survey referred to in the Preliminary Report.

2. Materials Related to Condition of the Development Parcel. Any environmental impact reports, "Phase I" or "Phase II" reports, or environmental site assessments concerning hazardous materials on the Development Parcel, complaints or notices of the presence of hazardous materials on the Development Parcel, geological surveys, soil tests, engineering reports, inspection results, complaints, or notices received regarding the safety of the Development Parcel, to the extent that such matters exist and are in the possession of the City or subject to the City's control.

3. No Other Competitive Bids or Negotiations. During the Contingency Period, as the same may be extended, City agrees to neither engage in any negotiations with other prospective developer(s) nor market, solicit, nor entertain any offers on the Development Parcel after the execution of this Agreement.

B. [§202] Developer's Approval of Preliminary Documents and Physical Condition of Development Parcel; Entitlements

1. Approval of Title. The Developer's obligation to purchase the Development Parcel is expressly conditioned on the Developer's approval of the condition of title to the Development Parcel. If the Developer objects to an exception shown in the Preliminary Report (the "Developer's Title Objection"), the Developer shall notify the City in writing within fifteen (15) days after receipt of the Preliminary Report. The City shall have fifteen (15) days after receipt of the Developer's Title Objection to notify the Developer in writing whether the City will remove or cure the Developer's Title Objection. If the City does not give notice to the Developer within said 15-day period, the City shall be deemed to have elected not to remove or cure the Developer's Title Objection. If the City elects (or is deemed to have elected) not to remove or cure the Developer's Title Objection, the Developer will have ten (10) days thereafter to give notice to the City that it will (a) proceed with the purchase of the Development Parcel, waive the Developer's Title Objection, and

accept the exception shown in the Preliminary Report, or (b) terminate this Agreement. If the Developer fails to give such notice to the City within said 10-day period, the Developer will be deemed to have elected to terminate this Agreement.

2. Approval of Physical Condition. The Developer's obligation to purchase the Development Parcel is expressly conditioned on its approval, in its sole discretion, of the condition of the Development Parcel and all other matters concerning the Development Parcel, including without limitation economic, financial, and accounting matters relating to or affecting the Development Parcel or its value, and the physical and environmental condition of the Development Parcel. Subject to extension as provided below, the Developer will have one hundred fifty (150) days from the effective date of this Agreement (the "Contingency Period") to conduct such investigations as the Developer may choose to determine, in its sole discretion, whether this contingency is met. On or before the expiration of the Contingency Period, the Developer will deliver written notice to the City accepting the Development Parcel or terminating this Agreement. If the Developer fails to give such notice on or before the expiration of the Contingency Period, the Developer will be deemed to have elected to terminate this Agreement.

3. Entitlements. As used herein, "Entitlements" means all land use approvals legally required by the City in its Governmental Capacity (as defined in Section 705 hereof) or any other governmental authority as a condition of development of the Development Parcel and shall include any and all entitlements, licenses, permits or other approvals required by the City in its Governmental Capacity or any other governmental authority as a condition to the subdivision of the School Site and/or development of the Development Parcel, including any General Plan Amendment, any conditional use permit, and any demolition, grading and building permits. During the Contingency Period, the Developer shall apply for, and exercise all commercially diligent and reasonable efforts to obtain all Entitlements, and remit corresponding fees charged by the City or such other governmental authority for such Entitlements on a timely basis. The Developer's application for the Entitlements shall be consistent with the Scope of Development (Attachment No. 3) and the terms and conditions of this Agreement. If the Developer fails to obtain the Entitlements on or before the expiration of the Contingency Period, and the Developer fails to extend this Agreement as provided below, the Developer will be deemed to have elected to terminate this Agreement. The City agrees that the Developer shall have not less than two (2) three-month options and a final 30-day option to extend the Contingency Period solely with respect to obtaining the Entitlements, subject to the following conditions: (a) Developer shall have proceeded with due diligence and acted in good faith to obtain the Entitlements; and (b) Developer shall have increased the Deposit by an additional \$35,000 prior to the expiration of the then-current Contingency Period with respect to obtaining the Entitlements. The increased Deposit shall be applied to the Purchase Price or refunded to Developer as otherwise provided in this Agreement. Notwithstanding the foregoing, Developer shall not be required to increase the Deposit as provided above if such extension is required solely as a result of the City's failure to issue the Entitlements not resulting from Developer's delay in making application therefor or responding to comments and/or conditions for the issuance thereof.

4. Termination for Failure of a Contingency. If this Agreement is terminated or deemed to be terminated under the circumstances set forth in this Article II, then immediately on written notice from the Developer, the Escrow Agent must refund the Deposit to the Developer, without offset for any charges or claims. Any cancellation fee or other costs of the Escrow Agent or the Title Company resulting from this termination will be borne by the Developer, and each party will otherwise pay its own expenses. Upon any termination of this Agreement by the City due to a default of the Developer, the Developer shall deliver to the City any and all plans and data, including but not limited to reports, designs, and studies, concerning the Development Parcel, and the City shall be free to use such plans and data for any reason whatsoever without cost or liability therefor to the Developer or any other person.

ARTICLE III. DISPOSITION OF THE DEVELOPMENT PARCEL

A. §301 Sale and Purchase

In accordance with and subject to all the terms, covenants and conditions of this Agreement, the City agrees to sell, and the Developer agrees to purchase for development, the Development Parcel for the sum of FIVE MILLION ONE HUNDRED TWENTY-FIVE THOUSAND DOLLARS (\$5,125,000.00) (the "Purchase Price").

B. §302 Escrow

The City agrees to open an escrow with Old Republic Title Company, as escrow agent (the "Escrow Agent"), within the time established in the Schedule of Performance (Attachment No. 2). This Agreement constitutes the joint escrow instructions of the City and the Developer, and a duplicate original of this Agreement shall be delivered to the Escrow Agent upon the opening of escrow. The City and the Developer shall provide such additional escrow instructions as shall be necessary and consistent with this Agreement. The Escrow Agent hereby is empowered to act under this Agreement, and, upon indicating its acceptance of the provisions of this Section 302 in writing, delivered to the City and the Developer within five (5) days after the opening of the escrow, shall carry out its duties as Escrow Agent hereunder.

The Developer shall pay in escrow to the Escrow Agent the following fees, charges and costs promptly after the Escrow Agent has notified the Developer of the amount of such fees, charges and costs, but not earlier than ten (10) days prior to the scheduled date for the close of escrow:

1. The escrow fee;
2. The premiums for the title insurance policy or special endorsements to be paid by the Developer as set forth in Section 308 of this Agreement;
3. Recording fees; and

4. Notary fees.

The City shall timely and properly execute, acknowledge and deliver to the Escrow Agent a grant deed conveying to the Developer title to the Development Parcel in accordance with the requirements of Section 304 of this Agreement, together with an estoppel certificate certifying that the Developer has completed all acts necessary to entitle the Developer to conveyance of the Development Parcel, if such be the fact.

The City shall pay in escrow to the Escrow Agent the following fees, charges and costs promptly after the Escrow Agent has notified the City of the amount of such fees, charges and costs, but not earlier than ten (10) days prior to the scheduled date for the close of escrow:

1. Costs necessary to place the title to the Development Parcel in the condition for conveyance required by the provisions of this Agreement; and
2. Any State, County or City documentary transfer tax.

Upon delivery of the deed to the Escrow Agent by the City pursuant to Section 306 of this Agreement, the Escrow Agent shall record such deed when title can be vested in the Developer in accordance with the terms and provisions of this Agreement. The Escrow Agent shall buy, affix and cancel any transfer stamps required by law and pay any transfer tax required by law. Any insurance policies governing the Development Parcel are not to be transferred.

The Escrow Agent is authorized to:

1. Pay and charge the City and the Developer, respectively, for any fees, charges and costs payable under this Section 302 of this Agreement. Before such payments are made, the Escrow Agent shall notify the City and the Developer of the fees, charges and costs necessary to clear title and close the escrow;
2. Disburse funds and deliver the deed and other documents to the parties entitled thereto when the conditions of this escrow have been fulfilled by the City and the Developer; and
3. Record any instruments delivered through this escrow, if necessary or proper, to vest title in the Developer in accordance with the terms and provisions of this Agreement.

All funds received in this escrow shall be deposited by the Escrow Agent with other escrow funds of the Escrow Agent in a general escrow account or accounts with any state or national bank doing business in the State of California. Such funds may be transferred to any other such general escrow account or accounts. All disbursements shall be

made by check of the Escrow Agent. All adjustments shall be made on the basis of a 30-day month.

If this escrow is not in condition to close before the time for conveyance established in Section 303 of this Agreement, either the City or the Developer, if such party shall have fully performed the acts to be performed before the conveyance of title, may, in writing, terminate this Agreement pursuant to Section 608 or 609 hereof, as the case may be, and demand the return of its money, papers or documents. Thereupon all obligations and liabilities of the parties under this Agreement shall cease and terminate in the manner set forth in Section 608 or 609 hereof, as the case may be. If neither the City nor the Developer shall have fully performed the acts to be performed before the time for conveyance established in Section 303, no termination or demand for return shall be recognized until ten (10) days after the Escrow Agent shall have mailed copies of such demand to the other party or parties at the address of its or their principal place or places of business. If any objections are raised within the 10-day period, the Escrow Agent is authorized to hold all money, papers and documents with respect to the Development Parcel until instructed in writing by the City and the Developer or upon failure thereof by a court of competent jurisdiction. If no such demands are made, the escrow shall be closed as soon as possible. Nothing in this Section 302 shall be construed to impair or affect the rights or obligations of the City or the Developer to specific performance or the other remedies provided for in Sections 602 through 610, inclusive, of this Agreement.

Any amendment of these escrow instructions shall be in writing and signed by both the City and the Developer. At the time of any amendment, the Escrow Agent shall agree to carry out its duties as Escrow Agent under such amendment.

All communications from the Escrow Agent to the City or the Developer shall be directed to the addresses and in the manner established in Section 701 of this Agreement for notices, demands and communications between the City and the Developer.

The liability of the Escrow Agent under this Agreement is limited to performance of the obligations imposed upon it under Sections 302 to 308, both inclusive, of this Agreement.

The City shall not be liable for any real estate commissions or brokerage fees that may arise herefrom. The City represents that it has not engaged any broker, agent or finder in connection with this transaction. The Developer shall be solely responsible to pay all fees due to any broker, agent or finder engaged by the Developer in connection with this transaction.

C. §303] Conveyance of Title and Delivery of Possession

Provided that the Developer is not in default under this Agreement in any material respect and all conditions precedent to such conveyance have occurred, and subject to any mutually agreed upon extensions of time, conveyance to the Developer of title to the Development Parcel shall be completed on or prior to the date specified in the Schedule of

Performance (Attachment No. 2). The City and the Developer agree to perform all acts necessary to conveyance of title in sufficient time for title to be conveyed in accordance with the foregoing provisions.

Possession of the Development Parcel shall be delivered to the Developer concurrently with the conveyance of title, except that limited access may be permitted before conveyance of title as permitted in Section 311 of this Agreement. The Developer shall accept title and possession on or before the said date.

1. City Conditions to Closing. The close of escrow is subject to the fulfillment, or waiver by the City, of each of the conditions precedent described below, which are solely for the benefit of the City and which shall be fulfilled or waived on or before the respective date in the Schedule of Performance (Attachment No. 2) or as otherwise set forth herein:

a. The Developer shall have timely made all submittals to the City as required under the Schedule of Performance.

b. There shall be no litigation pending with respect to this Agreement or any governmental approvals related to the development of the Development Parcel, the outcome of which could materially interfere with the development of the Development Parcel as set forth herein.

c. The City shall have issued, and Developer shall have obtained, all Entitlements for the development of the Development Parcel.

d. The Developer shall have delivered to the City the Deposit required by Section C.3. of the Scope of Development (Attachment No. 3).

e. The Developer shall not be in default in any material respect of any of its obligations under the terms of this Agreement.

2. Developer Conditions to Closing. The close of escrow is subject to the fulfillment, or waiver by the Developer, of each of the conditions precedent described below, which are solely for the benefit of the Developer and which shall be fulfilled or waived on or before the respective date in the Schedule of Performance (Attachment No. 2):

a. The Developer shall have approved the condition of title and physical condition of the Development Parcel pursuant to Section 202.

b. The City shall have issued, and Developer shall have obtained, all Entitlements for the development of the Development Parcel, including without limitation any zoning changes, General Plan amendments, conditional use permits or other permits, consents and approvals necessary to permit Developer to commence the development.

c. The City shall be in a position to issue, without further application or performance of requirements by Developer, the initial Grading and Demolition permits necessary to permit Developer to commence development of the Development Parcel.

d. There shall not then be pending or threatened in writing any litigation or appeals to any consents or approvals with respect to the approval of this Agreement or any governmental approvals related to the development of the Development Parcel, the outcome of which could materially interfere with the development of the Development Parcel as set forth herein.

e. The title company shall be irrevocably committed to issue at the close of escrow the Title Policy in the form and with the coverages and endorsements and subject to the exceptions requested and approved by Developer.

f. The City shall not be in default in any material respect of any of its obligations contained herein.

D. §304 Form of Deed

The City shall convey to the Developer title to the Development Parcel in the condition provided in Section 305 of this Agreement by grant deed in substantially the form set forth in Attachment No. 4.

E. §305 Condition of Title

The City shall convey to the Developer fee simple title to the Development Parcel in the condition shown in the Title Company's Preliminary Report delivered to the Developer pursuant to Section 201, except to the extent that the Developer has given timely notice to the City of an objection to title and the City has elected to remove or cure said title objection.

F. §306 Time for and Place of Delivery of Deed

Subject to any mutually agreed upon extensions of time, the City shall deposit the grant deed for the Development Parcel with the Escrow Agent on or before the date established for the conveyance thereof in the Schedule of Performance (Attachment No. 2).

G. §307 Payment of the Purchase Price and Recordation of Deed

The Developer shall deposit the Purchase Price (less the amount of the Deposit) for the Development Parcel and other sums required hereunder with the Escrow Agent prior to the date for conveyance thereof, provided that the Escrow Agent shall have notified the Developer in writing that the grant deed, properly executed and acknowledged by the City, has been delivered to the Escrow Agent and that title is in condition to be conveyed in conformity with the provisions of Section 305 of this Agreement. Upon the close of

escrow, the Escrow Agent shall file the grant deed for the Development Parcel for recordation among the land records in the Office of the County Recorder of Contra Costa County, and shall deliver to the Developer a title insurance policy insuring title in conformity with Section 308 of this Agreement.

H. §308] Title Insurance

Concurrently with recordation of the grant deed, Old Republic Title Company ("Title Company"), shall provide and deliver to the Developer a title insurance policy issued by the Title Company insuring that the title is vested in the Developer in the condition required by Section 305 of this Agreement. The Title Company shall provide the City with a copy of the title insurance policy and the title insurance policy shall be in the amount of the Purchase Price for the Development Parcel.

The Developer shall pay for all premiums for title insurance coverage or special endorsements. Concurrently with the recording of the grant deed conveying title to the Development Parcel, the Title Company shall, if requested by the Developer, provide the Developer with an endorsement to insure the amount of the Developer's estimated development costs of the improvements to be constructed upon the Development Parcel. The Developer shall pay the entire premium for any such increase in coverage requested by it.

I. §309] Taxes and Assessments

Ad valorem taxes and assessments, if any, on the Development Parcel, and taxes upon this Agreement or any rights hereunder applicable to the Development Parcel, levied, assessed or imposed for any period commencing prior to conveyance of title thereto, including deferred and "lookback" taxes, shall be borne by the City. All ad valorem taxes and assessments levied or imposed for any period commencing after closing of the escrow shall be paid by the Developer.

J. §310] Condition of the Development Parcel

1. "As Is". The City shall provide the Developer with all information of which it has actual knowledge concerning the physical condition of the Development Parcel, including, without limitation, information about any Hazardous Materials, as defined below. The Developer acknowledges and agrees that it is acquiring the Development Parcel "as is," in its current physical condition, with no warranties, express or implied, as to the physical condition thereof, the presence or absence of any latent or patent condition thereon or therein, including without limitation, any Hazardous Materials thereon or therein, and any other matters affecting the Development Parcel.

2. Indemnity.

The Developer agrees, from and after the date title to or possession of the Development Parcel is delivered to the Developer under this Agreement, to defend, indemnify, protect and hold harmless the City and its officers, beneficiaries, employees,

agents, attorneys, representatives, legal successors and assigns (“Indemnitees”) from, regarding and against any and all liabilities, obligations, orders, decrees, judgments, liens, demands, actions, Environmental Response Actions (as defined herein), claims, losses, damages, fines, penalties, expenses, Environmental Response Costs (as defined herein) or costs of any kind or nature whatsoever, together with fees (including, without limitation, reasonable attorneys’ fees and experts’ and consultants’ fees), whenever arising, and whether or not caused in whole or in part by the City, resulting from or in connection with the actual or claimed generation, storage, handling, transportation, use, presence, placement, migration and/or release of Hazardous Materials (as defined herein), at, on, in, beneath or from the Development Parcel (sometimes herein collectively referred to as “Contamination”). The Developer’s defense, indemnification, protection and hold harmless obligations herein shall include, without limitation, the duty to respond to any governmental inquiry, investigation, claim or demand regarding the Contamination, at the Developer’s sole cost.

3. Release and Waiver. The Developer hereby releases and waives all rights, causes of action and claims the Developer has or may have in the future against the Indemnitees arising out of or in connection with any Hazardous Materials (as defined herein) at, on, in, beneath or from the Development Parcel. In furtherance of the intentions set forth herein, the Developer acknowledges that it is familiar with Section 1542 of the Civil Code of the State of California that provides as follows:

“A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.”

The Developer hereby waives and relinquishes any right or benefit which it has or may have under Section 1542 of the Civil Code of the State of California or any similar provision of the statutory or nonstatutory law of any other applicable jurisdiction to the full extent that it may lawfully waive all such rights and benefits pertaining to the subject matter of this Section 310.

4. Definitions.

a. As used in this Agreement, the term “Environmental Response Actions” means any and all activities, data compilations, preparation of studies or reports, interaction with environmental regulatory agencies, obligations and undertakings associated with environmental investigations, removal activities, remediation activities or responses to inquiries and notice letters, as may be sought, engendered, initiated or required in connection with any local, state or federal governmental or private party claims, including any claims by the Developer.

b. As used in this Agreement, the term “Environmental Response Costs” means any and all costs associated with Environmental Response Actions including, without limitation, any and all fines, penalties and damages.

c. As used in this Agreement, the term “Hazardous Materials” means any substance, material or waste which is (1) defined as a “hazardous waste,” “hazardous material,” “hazardous substance,” “extremely hazardous waste,” or “restricted hazardous waste” under any provision of California law; (2) petroleum; (3) asbestos; (4) polychlorinated biphenyls; (5) radioactive materials; (6) designated as a “hazardous substance” pursuant to Section 311 of the Clean Water Act, 33 U.S.C. Section 1251 et seq. (33 U.S.C. Section 1321) or listed pursuant to Section 307 of the Clean Water Act (33 U.S.C. Section 1317); (7) defined as a “hazardous substance” pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901 et seq. (42 U.S.C. Section 6903); (8) defined as a “hazardous substance” pursuant to Section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Section 9601 et seq. (42 U.S.C. Section 9601); or (9) determined by California, federal or local governmental authority to be capable of posing a risk of injury to health, safety or property.

5. Materiality. The Developer acknowledges and agrees that the defense, indemnification, protection and hold harmless obligations of the Developer for the benefit of the City set forth in this Agreement are a material element of the consideration to the City for the performance of its obligations under this Agreement, and that the City would not have entered this Agreement unless the Developer’s obligations were as provided for herein.

K. [§311] Preliminary Work by the Developer

Prior to the conveyance of title or possession of the Development Parcel to the Developer, representatives of the Developer shall have the right of access to the Development Parcel at all reasonable times for the purpose of obtaining data and making surveys and tests necessary to carry out this Agreement. The Developer shall hold the City harmless for any injury or damages arising out of any activity pursuant to this Section. The Developer shall have access to all data and information on the Development Parcel available to the City, but without warranty or representation by the City as to the completeness, correctness or validity of such data and information.

Any preliminary work undertaken on the Development Parcel by the Developer prior to conveyance of title thereto or possession thereof shall be done only after written consent of the City and at the sole expense of the Developer. The Developer shall save and protect the City against any claims resulting from such preliminary work, access or use of the Development Parcel, and shall promptly repair any damage to the Development Parcel. Copies of data, surveys and tests obtained or made by the Developer on the Development Parcel shall be filed with the City. Any preliminary work by the Developer shall be undertaken only after securing any necessary permits from the appropriate governmental agencies.

ARTICLE IV. DEVELOPMENT OF THE DEVELOPMENT PARCEL

A. §401] Development of the Development Parcel by the Developer

1. §402] Scope of Development

The Development Parcel shall be developed materially as provided in the Scope of Development (Attachment No. 3) provided that the Entitlements permit development of the number and type of storage units described in the Scope of Development.

2. §403] Cost of Construction

The cost of developing the Development Parcel and constructing all improvements thereon shall be borne solely by the Developer. The City and the Developer shall each pay the costs necessary to administer and carry out their respective responsibilities and obligations under this Agreement.

3. §404] Construction Schedule

The Developer shall promptly begin and thereafter diligently prosecute to completion the construction of the improvements and the development of the Development Parcel. The Developer shall begin and complete all construction and development within the times specified in the Schedule of Performance (Attachment No. 2) or such reasonable extension of said dates as may be granted by the City or as provided in Section 704 of this Agreement. The Schedule of Performance is subject to revision from time-to-time as mutually agreed upon in writing between the Developer and the City.

4. §405] Bodily Injury, Property Damage and Workers' Compensation Insurance

Prior to the commencement of construction on the Development Parcel or any portion thereof, the Developer shall furnish or cause to be furnished to the City duplicate originals or appropriate certificates of insurance policies providing the following coverage in the following amounts from insurers acceptable to the City's Risk Manager:

- a. General Liability: \$5,000,000 single limit 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 the Development Parcel and the Developer's obligations under this Agreement or the general aggregate limit shall be twice the required occurrence limit;
- b. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage;

- c. Workers' Compensation and Employers' Liability: Workers' Compensation limits as required by state law and Employers' Liability limits of \$1,000,000 per accident, \$1,000,000 policy limit bodily injury by disease, and \$1,000,000 each employee bodily injury by disease; and
- d. Builders' Risk: Completed value of the improvements on the Development Parcel.

The above-required insurance policies shall name the City as an additional insured and shall be endorsed to provide that coverage shall not be suspended, voided, cancelled or reduced in limit except after thirty (30) days prior written notice to the City. The Developer shall include all contractors or subcontractors with whom it has contracted for the performance of work on the Development Parcel as insureds under its policies or shall furnish or cause to be furnished separate certificates of insurance for each contractor or subcontractor. All coverages for contractors or subcontractors shall be subject to all of the requirements stated herein. Except as otherwise expressly provided herein, the obligations set forth in this Section 405 shall remain in effect only until a Certificate of Occupancy has been issued.

5. §406] City and Other Governmental Agency Permits

Before commencement of construction or development of any buildings, structures or other work of improvement upon the Development Parcel, the Developer shall, at its own expense, secure or cause to be secured any and all permits which may be required by the City or any other governmental agency affected by such construction, development or work.

It is the responsibility of the Developer, without cost to the City, to process, obtain, and maintain all Entitlements to assure that the design, construction, use, operation, maintenance, repair and replacement of the improvements on the Development Parcel is carried out in accordance with the provisions of this Agreement, and is permitted by zoning, all applicable City land use requirements and all other governmental requirements. Nothing contained in this Agreement shall be deemed to waive the right of the City to act in its Governmental Capacity (as defined in Section 705 hereof) with respect to the consideration and approval of the Entitlements and all other permits, licenses and approvals requested by the Developer from time to time in connection with the development of the Development Parcel nor shall it entitle the Developer to any Entitlement or other City approval necessary for the development of the Development Parcel, or to the waiver of any applicable City requirements relating thereto, and the failure of the City to issue or approve any Entitlement shall not be a default of the City under this Agreement.

This Agreement does not (a) grant any land use entitlement to the Developer, (b) supersede, nullify, or amend any condition which may be imposed by the City in its Governmental Capacity in connection with approval of the development of the Development Parcel, (c) guarantee to the Developer or any other party any profits from the development of the Development Parcel, or (d) amend any governmental requirements of the

City. Nothing in this Agreement shall be construed or interpreted as committing the City to approve or undertake any action or review process or activities that require the independent exercise of discretion by the City, including any approval of any Entitlement or permit application for which the Developer applies after the date of this Agreement.

This Agreement is not a development agreement as provided in Government Code Section 65864 and, as set forth above, is not a grant of any entitlement, permit, land use approval, or vested right in favor of the Developer or the development of the Development Parcel.

6. [§407] Rights of Access

For the purposes of assuring compliance with this Agreement, representatives of the City shall have the reasonable right of access to the Development Parcel without charges or fees and at normal construction hours during the period of construction for the purposes of this Agreement, including, but not limited to, the inspection of the work being performed in constructing the improvements. Such representatives of the City shall be those who are so identified in writing by the City. The City shall indemnify the Developer and hold it harmless from any damage caused or liability arising out of this right to access.

7. [§408] Local, State and Federal Laws

The Developer shall carry out the construction of the improvements in conformity with all applicable laws, including all applicable federal and state labor standards.

8. [§409] Antidiscrimination During Construction

The Developer, for itself and its successors and assigns, agrees that in the construction of the improvements provided for in this Agreement, the Developer will not discriminate against any employee or applicant for employment because of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Section 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code.

B. [§410] Taxes, Assessments, Encumbrances and Liens

The Developer shall pay when due all real estate taxes and assessments assessed and levied on the Development Parcel. Prior to the issuance of a Certificate of Occupancy, the Developer shall not place or allow to be placed on the Development Parcel any mortgage, trust deed, encumbrance or lien unauthorized by this Agreement. The Developer shall remove or have removed any levy or attachment made on the Development Parcel (or any portion thereof), or shall assure the satisfaction thereof, within a reasonable time, but in any event prior to a sale thereunder. Nothing herein contained shall be deemed

to prohibit the Developer from contesting the validity or amounts of any tax, assessment, encumbrance or lien, nor to limit the remedies available to the Developer in respect thereto.

The Developer understands that under certain conditions, its control of the Development Parcel under this Agreement may give rise to the imposition of a possessory interest tax on said property, and in such event, the Developer agrees to pay when due any such possessory interest tax.

C. §411 Prohibition Against Transfer of the Development Parcel, the Buildings or Structures Thereon and Assignment of Agreement

Prior to the issuance by the City of a Certificate of Occupancy, the Developer shall not, except as expressly permitted by this Agreement, sell, transfer, convey, assign or lease the whole or any part of the Development Parcel or the buildings or improvements thereon without the prior written approval of the City. This prohibition shall not apply subsequent to the issuance of the Certificate of Occupancy for the completed improvements on the Development Parcel. This prohibition shall not be deemed to prevent the granting of easements or permits to facilitate the development of the Development Parcel or to prohibit or restrict the leasing of any part or parts of a building or structure when said improvements are completed or to restrict any financing permitted by Section 412 of this Agreement.

In the absence of specific written agreement by the City, no such transfer, assignment or approval by the City shall be deemed to relieve the Developer or any other party from any obligations under this Agreement until completion of development as evidenced by the issuance of a Certificate of Occupancy therefor.

D. §412 Security Financing; Rights of Holders

1. §413 No Encumbrances Except Mortgages, Deeds of Trust, Sales and Leases-Back or Other Financing for Development

Notwithstanding Sections 410 and 411 of this Agreement, mortgages, deeds of trust, sales and leases-back or any other form of conveyance required for any reasonable method of financing are permitted before issuance of a Certificate of Occupancy but only for the purpose of securing loans of funds to be used for financing the acquisition of the Development Parcel, the construction of improvements on the Development Parcel and any other expenditures necessary and appropriate to develop the Development Parcel under this Agreement. The Developer shall notify the City in advance of any mortgage, deed of trust, sale and lease-back or other form of conveyance for financing if the Developer proposes to enter into the same before issuance of a Certificate of Occupancy. The Developer shall not enter into any such conveyance for financing without the prior written approval of the City, which approval the City agrees to give if any such conveyance is given to a responsible financial or lending institution or other acceptable person or entity. Such lender shall be deemed approved unless rejected in writing by the City within ten (10) days after notice thereof to the City by the Developer. In any event, the Developer shall promptly

notify the City of any mortgage, deed of trust, sale and lease-back or other financing conveyance, encumbrance or lien that has been created or attached thereto prior to completion of the construction of the improvements on the Development Parcel whether by voluntary act of the Developer or otherwise. The words "mortgage" and "deed of trust," as used herein, include all other appropriate modes of financing real estate acquisition, construction and land development.

2. §414] Holder Not Obligated to Construct Improvements

The holder of any mortgage, deed of trust or other security interest authorized by this Agreement shall in no way be obligated by the provisions of this Agreement to construct or complete the improvements or to guarantee such construction or completion, nor shall any covenant or any other provision in the grant deed for the Development Parcel be construed so to obligate such holder. Nothing in this Agreement shall be deemed to construe, permit or authorize any such holder to devote the Development Parcel to any uses or to construct any improvements thereon other than those uses or improvements provided for or authorized by this Agreement.

3. §415] Notice of Default to Mortgage, Deed of Trust or Other Security Interest Holders; Right to Cure

Whenever the City shall deliver any notice or demand to the Developer with respect to any breach or default by the Developer in completion of construction of the improvements, the City shall at the same time deliver a copy of such notice or demand to each holder of record of any mortgage, deed of trust or other security interest authorized by this Agreement who has previously made a written request to the City therefor. Each such holder shall (insofar as the rights of the City are concerned) have the right, at its option, within ninety (90) days after the receipt of the notice, to cure or remedy or commence to cure or remedy any such default and to add the cost thereof to the security interest debt and the lien on its security interest. In the event there is more than one such holder, the right to cure or remedy a breach or default of the Developer under this Section 415 shall be exercised by the holder first in priority or as the holders may otherwise agree among themselves, but there shall be only one exercise of such right to cure and remedy a breach or default of the Developer under this Section 415. Nothing contained in this Agreement shall be deemed to permit or authorize such holder to undertake or continue the construction or completion of the improvements (beyond the extent necessary to conserve or protect the improvements or construction already made) without first having expressly assumed the Developer's obligations to the City by written agreement satisfactory to the City. The holder in that event must agree to complete, in the manner provided in this Agreement, the improvements to which the lien or title of such holder relates and submit evidence satisfactory to the City that it has the qualifications and financial responsibility necessary to perform such obligations.

4. §416] Failure of Holder to Complete Improvements

In any case where, six (6) months after the default by the Developer in completion of construction of improvements under this Agreement, the holder of any mortgage, deed of trust or other security interest creating a lien or encumbrance upon the Development Parcel or any portion thereof has not exercised the option to construct, or if it has exercised the option and has not proceeded diligently with construction, the City, or its assignee, may purchase the mortgage, deed of trust or other security interest by payment to the holder of the amount of the unpaid debt, plus any accrued and unpaid interest and other amounts due to such holder. If the ownership of the Development Parcel or such portion thereof has vested in the holder, the City, if it so desires, shall be entitled to a conveyance of the Development Parcel or such portion thereof from the holder to the City, or its assignee, upon payment to the holder of an amount equal to the sum of the following:

- a. The unpaid mortgage, deed of trust or other security interest debt at the time title became vested in the holder (less all appropriate credits, including those resulting from collection and application of rentals and other income received during foreclosure proceedings);
- b. All expenses with respect to foreclosure;
- c. The net expenses, if any (exclusive of general overhead), incurred by the holder as a direct result of the subsequent management of the Development Parcel or such portion thereof;
- d. The costs of any authorized improvements made by such holder; and
- e. An amount equivalent to the interest that would have accrued on the aggregate of such amounts had all such amounts become part of the mortgage or deed of trust debt and such debt had continued in existence to the date of payment by the City, or its assignee.

5. [§417] Right of City to Cure Mortgage, Deed of Trust or Other Security Interest Default

In the event of a default or breach by the Developer of a mortgage, deed of trust or other security interest with respect to the Development Parcel or any portion thereof prior to the completion of development, and the holder has not exercised its option to complete the development, the City may cure the default prior to completion of any foreclosure. In such event, the City shall be entitled to reimbursement from the Developer of all costs and expenses incurred by the City in curing the default. The City shall also be entitled to a lien upon the Development Parcel to the extent of such costs and disbursements. Any such lien shall be subject to mortgages, deeds of trust or other security interests executed

for the sole purpose of obtaining funds to purchase and develop the Development Parcel as authorized herein.

E. [§418] Right of the City to Satisfy Other Liens on the Development Parcel After Title Passes

Prior to the issuance of a Certificate of Occupancy, and after the Developer has had a reasonable time to challenge, cure or satisfy any liens or encumbrances on the Development Parcel, the City shall have the right to satisfy any such liens or encumbrances, provided, however, that nothing in this Agreement shall require the Developer to pay or make provision for the payment of any tax, assessment, lien or charge so long as the Developer in good faith shall contest the validity or amount thereof, and so long as such delay in payment shall not subject the Development Parcel or any portion thereof to forfeiture or sale.

ARTICLE V. USE OF THE DEVELOPMENT PARCEL

A. [§501] Obligation to Refrain From Discrimination

The Developer covenants by and for itself and any successors in interest that there shall be no discrimination against or segregation of any person or group of persons on any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Section 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code in the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the Development Parcel, nor shall the Developer itself or any person claiming under or through it establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees or vendees of the Development Parcel. The foregoing covenants shall run with the land.

B. [§502] Form of Nondiscrimination and Nonsegregation Clauses

The Developer shall refrain from restricting the rental, sale or lease of the Development Parcel on any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Section 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code. All such deeds, leases or contracts shall contain or be subject to substantially the following nondiscrimination or nonsegregation clauses:

1. In deeds: "The grantee herein covenants by and for himself or herself, his or her heirs, executors, administrators and assigns, and all persons claiming under or through them, that there shall be no discrimination against or segregation of any person or group of persons on any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Section 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code in the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the premises herein conveyed, nor shall the grantee himself or herself, or any person

claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees or vendees in the premises herein conveyed. The foregoing covenants shall run with the land."

2. In leases: "The lessee herein covenants by and for himself or herself, his or her heirs, executors, administrators and assigns, and all persons claiming under or through him or her, and this lease is made and accepted upon and subject to the following conditions:

"That there shall be no discrimination against or segregation of any person or group of persons on any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Section 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the leasing, subleasing, transferring, use, occupancy, tenure or enjoyment of the premises herein leased, nor shall the lessee himself or herself, or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees or vendees in the premises herein leased."

3. In contracts: "There shall be no discrimination against or segregation of any person or group of persons on any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Section 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code in the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the premises, nor shall the transferee himself or herself, or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees or vendees of the premises."

C. [§503] Effect and Duration of Covenants

The covenants against discrimination shall remain in effect in perpetuity. The covenants established in this Agreement and the grant deed for the Development Parcel shall, without regard to technical classification and designation, be binding for the benefit and in favor of the City, its successors and assigns, and any successor in interest to the Development Parcel or any part thereof.

The City is deemed the beneficiary of the terms and provisions of this Agreement and of the covenants running with the land for and in its own rights and for the purposes of protecting the interests of the community and other parties, public or private, in whose favor and for whose benefit this Agreement and the covenants running with the land have been provided. This Agreement and the covenants shall run in favor of the City without regard to whether the City has been, remains or is an owner of any land or interest therein in the Development Parcel. The City shall have the right, if this Agreement or the covenants are breached, to exercise all rights and remedies and to maintain any actions or suits at law or in equity or other proper proceedings to enforce the curing of such breaches to which it or any other beneficiaries of this Agreement and the covenants may be entitled.

D. [§504] Rights of Access -- Public Improvements and Facilities

The City, for itself and other public agencies, at their sole risk and expense, reserves the right to enter the Development Parcel or any part thereof at all reasonable times and with as little interference as possible for the purposes of construction, reconstruction, maintenance, repair or service of any public improvements or public facilities located on the Development Parcel. Any such entry shall be made only after reasonable notice to the Developer, and the City shall indemnify and hold the Developer harmless from any claims or liabilities pertaining to any entry. Any damage or injury to the Development Parcel resulting from such entry shall be promptly repaired at the sole expense of the public agency responsible for the entry.

ARTICLE VI. DEFAULTS, REMEDIES AND TERMINATION

A. [§601] Defaults -- General

Subject to the extensions of time set forth in Section 704, failure or delay by either party to perform any term or provision of this Agreement constitutes a default under this Agreement. The party who so fails or delays must immediately commence to cure, correct or remedy such failure or delay and shall complete such cure, correction or remedy with reasonable diligence and during any period of curing shall not be in default.

The injured party shall give written notice of default to the party in default specifying the default complained of by the injured party. Except as required to protect against further damages, the injured party may not institute proceedings against the party in default until thirty (30) days after giving such notice, or if the default is not susceptible of cure within thirty (30) days, then such additional time as is determined by the injured party in its reasonable discretion to be necessary to cure such default, provided the party in default promptly commences and diligently proceeds with curing such default and such default is completely cured within ninety (90) days after notice thereof. Failure or delay in giving such notice shall not constitute a waiver of any default nor shall it change the time of default.

Except as otherwise expressly provided in this Agreement, any failure or delay by either party in asserting any of its rights or remedies as to any default shall not operate as a waiver of any default or of any such rights or remedies or deprive such party of

its right to institute and maintain any actions or proceedings which it may deem necessary to protect, assert or enforce any such rights or remedies.

B. §602] Legal Actions

1. §603] Institution of Legal Actions

In addition to any other rights or remedies, any party may institute legal action to cure, correct or remedy any default, or recover damages for any default, or to obtain any other remedy consistent with the purpose of this Agreement. Such legal actions must be instituted in the Superior Court of the County of Contra Costa, State of California, in an appropriate municipal court in that County or in the appropriate Federal District Court in the State of California.

2. §604] Applicable Law

The laws of the State of California shall govern the interpretation and enforcement of this Agreement.

3. §605] Acceptance of Service of Process

In the event that any legal action is commenced by the Developer against the City, service of process on the City shall be made by personal service upon the City Manager of the City or in such other manner as may be provided by law.

In the event that any legal action is commenced by the City against the Developer, service of process on the Developer shall be made by personal service upon the Developer or in such other manner as may be provided by law and shall be valid whether made within or without the State of California.

C. §606] Rights and Remedies are Cumulative

Except as otherwise expressly stated in this Agreement, the rights and remedies of the parties are cumulative, and the exercise by any party of one or more of such rights or remedies shall not preclude the exercise by it, at the same time or different times, of any other rights or remedies for the same default or any other default by the other party.

D. §607] Remedies and Rights of Termination

1. §608] Termination by the Developer

In the event that prior to the close of escrow for conveyance of title to the Development Parcel to the Developer:

- a. This Agreement may be terminated under any of the circumstances set forth in Article II hereof; or

- b. The City does not tender conveyance of the Development Parcel or possession thereof in the manner and condition and by the date provided in this Agreement, and any such failure is not cured within thirty (30) days after written demand by the Developer;

then this Agreement may, at the option of the Developer, be terminated by written notice thereof to the City. Upon such termination, the City and the Developer shall have no further rights against or liability to the others under this Agreement with respect to the Development Parcel, except that the Deposit shall be returned to the Developer.

2. [\$609] Termination by the City

In the event that prior to the close of escrow for conveyance of title to the Development Parcel to the Developer:

- a. The Developer fails to maintain the amount of the Deposit as required by Section 106 of this Agreement; or
- b. The Developer transfers or assigns or attempts to transfer or assign this Agreement or any rights herein or in the Development Parcel or the buildings or improvements thereon in violation of this Agreement; or
- c. There is any significant change in the membership, management or control of the Developer contrary to the provisions of Section 105 hereof; or
- d. The Developer does not take title to the Development Parcel under tender of conveyance by the City pursuant to this Agreement; or
- e. The Developer is in breach or default with respect to any other obligation of the Developer under this Agreement; and
- f. If any default or failure referred to in subparagraph a., d. or e. of this Section 609 shall not be cured within thirty (30) days after the date of written demand by the City;

then this Agreement, and any rights of the Developer or any assignee or transferee in this Agreement pertaining thereto or arising therefrom with respect to the City, may, at the option of the City, be terminated by the City by written notice thereof to the Developer.

IN THE EVENT OF TERMINATION UNDER THIS SECTION 609,
THE DEPOSIT MAY BE RETAINED BY THE CITY AS LIQUIDATED DAMAGES

AND AS ITS PROPERTY WITHOUT ANY DEDUCTION, OFFSET OR RECOUPMENT WHATSOEVER. IF THE DEVELOPER SHOULD DEFAULT UPON ITS OBLIGATIONS MAKING IT NECESSARY FOR THE CITY TO TERMINATE THIS AGREEMENT AND TO PROCURE ANOTHER PARTY OR PARTIES TO DEVELOP THE DEVELOPMENT PARCEL, THEN THE DAMAGES SUFFERED BY THE CITY BY REASON THEREOF WOULD BE UNCERTAIN. SUCH DAMAGES WOULD INVOLVE SUCH VARIABLE FACTORS AS THE EXPENSE OF INTERESTING PARTIES AND NEGOTIATING WITH SUCH PARTIES; POSTPONEMENT OF REVENUES TO THE COMMUNITY; AND THE FAILURE OF THE CITY TO EFFECT ITS OBJECTIVES WITHIN A REASONABLE TIME, RESULTING IN ADDITIONAL IMMEASURABLE DAMAGE AND LOSS TO THE CITY. IT IS IMPRACTICABLE AND EXTREMELY DIFFICULT TO FIX THE AMOUNT OF SUCH DAMAGES TO THE CITY, BUT THE PARTIES ARE OF THE OPINION, UPON THE BASIS OF ALL INFORMATION AVAILABLE TO THEM, THAT SUCH DAMAGES WOULD APPROXIMATELY EQUAL THE AMOUNT OF THE DEPOSIT HELD BY THE CITY AT THE TIME OF THE DEFAULT OF THE DEVELOPER, AND THE AMOUNT OF SUCH DEPOSIT SHALL BE PAID TO THE CITY UPON ANY SUCH OCCURRENCE AS THE TOTAL OF ALL LIQUIDATED DAMAGES FOR ANY AND ALL SUCH DEFAULTS AND NOT AS A PENALTY. IN THE EVENT THAT THIS PARAGRAPH SHOULD BE HELD TO BE VOID FOR ANY REASON, THE CITY SHALL BE ENTITLED TO THE FULL EXTENT OF DAMAGES OTHERWISE PROVIDED BY LAW.

THE DEVELOPER AND THE CITY SPECIFICALLY ACKNOWLEDGE THIS LIQUIDATED DAMAGES PROVISION BY THEIR SIGNATURES HERE:

By:  
Developer

By: _____
City

G. §610] Option to Repurchase, Reenter and Repossess

The City shall have the additional right at its option to repurchase, reenter and take possession of the Development Parcel with all improvements thereon, if after conveyance of title thereto and prior to the issuance of the Certificate of Occupancy for the Development Parcel, the Developer shall:

1. Fail to proceed with the construction of the improvements as required by this Agreement for a period of three (3) months after written notice thereof from the City; or

2. Abandon or substantially suspend construction of the improvements for a period of three (3) months after written notice of such abandonment or suspension from the City; or
3. Transfer or suffer any involuntary transfer of the Development Parcel or any part thereof in violation of this Agreement.

Such right to repurchase, reenter and repossess, to the extent provided in this Agreement, shall be subordinate and subject to and be limited by and shall not defeat, render invalid or limit:

1. Any mortgage, deed of trust or other security instrument permitted by this Agreement; or
2. Any rights or interests provided in this Agreement for the protection of the holder of such mortgages, deeds of trust or other security instruments.

To exercise its right to repurchase, reenter and take possession with respect to the Development Parcel, the City shall pay to the Developer in cash an amount equal to:

1. The Purchase Price paid to the City by the Developer for the Development Parcel; plus
2. The costs actually incurred and documented by the Developer for on-site labor and materials for the construction of the improvements existing on the Development Parcel at the time of the repurchase, reentry and repossession, but specifically not including any design, planning or other preconstruction or other soft costs, and exclusive of amounts financed; less
3. Any gains or income withdrawn or made by the Developer from the Development Parcel or the improvements thereon; and less
4. The amount of any unpaid assessments and liens against the Development Parcel.

ARTICLE VII. GENERAL PROVISIONS

A. §701 Notices, Demands and Communications Between the Parties

Any formal notices relating to this Agreement must be given in writing and delivered personally, by generally recognized overnight courier service, by email or other electronic transmission, or by United States mail, certified or registered, return receipt requested, with postage prepaid, addressed as follows:

City: City of San Pablo
13831 San Pablo Avenue, Building 1
San Pablo, CA 94806
Attention: City Manager
Email: MattR@sanpabloca.gov

Developer: American Recess Development Company
85 Keystone Avenue, Suite E
Reno, NV 89503
Attention: Reid Hamilton
Email: Reid@arecess.com

Such written notices, demands and communications may be sent in the same manner to such other addresses as either party may from time-to-time designate by written notice. Notices shall be deemed sufficiently given and served upon delivery (as evidenced by certified mail return receipt or proof of delivery), refusal to accept delivery, or when delivery is first attempted but cannot be made due to a change of address for which no notice was given.

B. §702 Conflicts of Interest

No member, official or employee of the City shall have any personal interest, direct or indirect, in this Agreement, nor shall any such member, official or employee participate in any decision relating to this Agreement which affects his personal interests or the interests of any corporation, partnership or association in which he is directly or indirectly interested.

The Developer warrants that it has not paid or given, and will not pay or give, any third person any money or other consideration for obtaining this Agreement.

C. §703 Nonliability of City Officials and Employees

No member, official or employee of the City shall be personally liable to the Developer in the event of any default or breach by the City or for any amount which may become due to the Developer or on any obligations under the terms of this Agreement.

D. [§704] Enforced Delay: Extension of Times of Performance

In addition to the specific provisions of this Agreement, performance by any party hereunder shall not be deemed to be in default where delays or defaults are due to war; insurrection; strikes; lock-outs; riots; floods; earthquakes; fires; casualties; acts of God; acts of the public enemy; epidemics; quarantine restrictions; freight embargoes; lack of transportation; governmental restrictions or priority; litigation; unusually severe weather; inability to secure necessary labor, materials or tools; delays of any contractor, subcontractor or supplier; acts of another party; acts or the failure to act of any public or governmental agency or entity (except that acts or the failure to act of the City shall not excuse performance by the City) or any other causes beyond the control or without the fault of the party claiming an extension of time to perform. An extension of time for any such cause shall only be for the period of the enforced delay, which period shall commence to run from the time of the commencement of the cause. If, however, notice by the party claiming such extension is sent to the other parties more than thirty (30) days after the commencement of the cause, the period shall commence to run only thirty (30) days prior to the giving of such notice. Times of performance under this Agreement may also be extended in writing by the City and the Developer.

E. [§705] Proprietary and Governmental Roles of City. Except where clearly and expressly provided otherwise in this Agreement, the capacity of the City in this Agreement shall be as owner and/or seller of property only (“Proprietary Capacity”), and any obligations or restrictions imposed by this Agreement on the City shall be limited to that capacity and shall not relate to, constitute a waiver of, supersede or otherwise limit or affect the exercise by the City of its governmental authority with respect to any matter related to this Agreement, including the regulation and entitlement of the Development Parcel pursuant to governmental requirements, enacting laws, inspecting structures, reviewing and issuing permits and all of the other legislative and administrative or enforcement functions of each pursuant to federal, state or local law (“Governmental Capacity”).

F. [§706] Attorneys’ Fees. The prevailing party in any action or other proceeding to enforce or interpret any of the terms, conditions or provisions hereof shall be entitled to receive from the nonprevailing party all of the prevailing party’s legal and other costs and expenses in connection with such action or proceeding, including without limitation, attorneys’ fees and other legal costs and expenses, including costs incurred during any appeal or in the enforcement of any judgment or settlement.

G. [§707] Severability. In case any provision in this Agreement shall be held invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

H. [§708] Mediation. If negotiation by the parties of any dispute hereunder is unsuccessful after a period of fifteen (15) days and the parties have not resolved the dispute, the controversy or claim arising out of or relating to this Agreement, the relationship resulting in or from this Agreement or alleged breach will be then mediated between the parties with a Mediator agreed to by both parties, the mediation shall occur in the City of San

Pablo and shall last no more than three (3) full days without the agreement of the parties. The parties agree that the intention to mediate is to come to a prompt, equitable and inexpensive method of dispute resolution. In that regard, the Mediator shall be paid in equal share by the parties unless the parties agree otherwise in order to settle the matter.

ARTICLE VIII. ENTIRE AGREEMENT, WAIVERS AND AMENDMENTS

A. §801 Entire Agreement, Waivers and Amendments

This Agreement is executed in two (2) duplicate originals, each of which is deemed to be an original. This Agreement comprises pages 1 through 29, inclusive, and Attachment Nos. 1 through 4, attached hereto and incorporated herein by reference, all of which constitute the entire understanding and agreement of the parties.

This Agreement integrates all of the terms and conditions mentioned herein or incidental hereto, and supersedes all negotiations or previous agreements between the parties with respect to all or any part of the subject matter hereof.

All waivers of the provisions of this Agreement must be in writing and signed by the appropriate authorities of the City and the Developer, and all amendments hereto must be in writing and signed by the appropriate authorities of the City and the Developer.

ARTICLE IX. TIME FOR ACCEPTANCE OF AGREEMENT BY CITY

A. §901 Time for Acceptance of Agreement by City

This Agreement, when executed by the Developer and delivered to the City, must be authorized, executed and delivered by the City within forty-five (45) days after the date of signature by the Developer or this Agreement shall be void, except to the extent that the Developer shall consent in writing to further extensions of time for the authorization, execution and delivery of this Agreement. The effective date of this Agreement shall be the date when this Agreement has been signed by the City.

_____, 2020

CITY OF SAN PABLO

By _____
City Manager

"CITY"

AND

May 26th _____, 2020

American Recess, LLC &
The Mulholland Drive Company, LLC

By  _____

By  _____

"DEVELOPER"

ACKNOWLEDGMENTS

ATTACHMENT NO. 1

MAP OF THE SCHOOL SITE

[TO BE INSERTED—SEPARATELY IDENTIFY
DEVELOPMENT PARCEL AND PARK PARCEL]

ATTACHMENT NO. 2

SCHEDULE OF PERFORMANCE

<u>Action</u>	<u>Date</u>
1. <u>Execution and Delivery of Agreement by Developer.</u> The Developer shall execute and deliver this Agreement to the City.	Not later than July 31, 2020.
2. <u>Execution of Agreement by City.</u> The City Council shall hold a meeting to consider and authorize execution of this Agreement, and, if so authorized, the City shall execute and deliver this Agreement to the Developer. (Section 1001)	Within 45 days after the Developer executes this Agreement and delivers it to the City.
3. <u>Opening of Escrow.</u> The City shall open an escrow for conveyance of the Development Parcel to the Developer. (Section 302)	Within 30 days after execution of this Agreement by the City.
4. <u>Deposit.</u> The Developer shall deliver the Deposit to the Escrow Agent. (Section 106)	Within 5 days after the opening of escrow for conveyance of the Development Parcel from the City to the Developer.
5. <u>Contingency Period.</u> The Developer shall review and approve the title and physical condition of the Development Parcel. (Section 202)	Within 150 days after the opening of escrow for conveyance of the Development Parcel from the City to the Developer.
6. <u>Governmental Entitlements.</u> The Developer shall obtain any and all permits and entitlements required for the development of the Development Parcel by the City or any other governmental agency. (Sections 202 and 406)	Within 150 days after the opening of escrow for the conveyance of the Development Parcel from the City to the Developer.
7. <u>Deposit of Purchase Price and Other Required Sums.</u> The Developer shall deposit the Purchase Price and other required sums into escrow. (Section 307)	Prior to the date set forth herein for the close of escrow for conveyance of the Development Parcel from the City to the Developer.

<u>Action</u>	<u>Date</u>
8. <u>Deposit of Grant Deed.</u> The City shall deposit the grant deed into escrow. (Section 306)	Prior to the date set forth herein for the close of escrow for conveyance of the Development Parcel from the City to the Developer.
9. <u>Close of Escrow.</u> The City shall convey title to the Development Parcel to the Developer, and the Developer shall accept such conveyance. (Section 303)	Within 7 days after Developer has obtained all necessary Entitlements, but in no event later than July 31, 2021.
10. <u>Submission -- Certificates of Insurance.</u> The Developer shall furnish to the City duplicate originals or appropriate certificates of bodily injury and property damage insurance policies. (Section 405)	Prior to the date set forth herein for the commencement of construction of the Developer's improvements on the Development Parcel.
11. <u>Commencement of Construction of Developer's Improvements.</u> The Developer shall commence construction of the improvements to be constructed on the Development Parcel. (Section 404)	Within 30 days after the Developer obtains a demolition permit from the City, but in no event later than August 31, 2021.
12. <u>Completion of Construction of Developer's Improvements.</u> The Developer shall complete construction of the improvements to be constructed on the Development Parcel. (Section 404)	Within 18 months after commencement thereof by the Developer.

ATTACHMENT NO. 3

SCOPE OF DEVELOPMENT

A. General

The Developer agrees that the Development Parcel shall be developed and improved in accordance with the provisions of this Agreement and in accordance with all City approvals and related requirements. The Developer understands and acknowledges that the City approvals and related requirements include actions requiring the exercise by the City of its governmental authority and discretion in its Governmental Capacity, as described in Sections 202, 406, and 705 of this Agreement, to ensure that the development complies with the City of San Pablo Municipal Code, including as set forth in Chapter 17.16 thereof compliance with the California Environmental Quality Act (“CEQA”; Public Resources Code Section 21000 *et seq.*), and the guidelines implementing CEQA (“CEQA Guidelines”; Title 14 of the California Code of Regulations, Section 15000 *et seq.*). The Developer further understands and acknowledges that the cost of preparing a document evaluating the proposed development in accordance with CEQA and the CEQA Guidelines is a cost payable by the Developer as part of the application process for the City approvals, that a determination that the proposed development will have significant adverse impacts that cannot be mitigated or reduced to a less than significant level is possible and may preclude the development proposed in this Agreement, and that any mitigation measures necessary to mitigate or reduce significant adverse impacts may be required to be incorporated as part of the proposed development as part of the City approvals.

B. Developer's Work

1. Demolition and Clearance

The Development Parcel was previously used as the El Portal Elementary School and old school improvements remain. The Developer shall demolish or salvage, clear, grub and remove (as may be needed and called for in the approved plans) all on-site pavements, walks, curbs, gutters and other improvements. Further, the Developer shall remove, plug and/or crush in place utilities, such as storm sewers, sanitary sewers, water systems, electrical overhead and underground systems and telephone and gas systems located on the Development Parcel, as may be required following any necessary relocation of the utilities.

2. Compaction, Finish Grading and Site Work

The Developer shall compact, finish grade and do such site preparation as is necessary for the construction of the Developer's improvements on the Development Parcel.

3. Developer's Improvements

The Developer shall construct, or cause to be constructed, on the Development Parcel an approximately 131,975 square foot, Class A, climate-controlled, self-storage facility, consisting of approximately 975 storage units and an approximately 1,500 square foot rental office/retail area for customer convenience. The facility shall be of first-class quality construction with a modern, eye-catching and innovative design, provided, however, that Developer shall be entitled to utilize relocatable and/or modular units if desired to accommodate risks of earthquake damage.

Landscaping shall embellish all open spaces upon the Development Parcel to integrate the Developer's improvements with adjacent property, particularly recognizing that the immediately adjacent Park Parcel will be developed by the City as a public park. Landscaping includes such materials as paving, trees, shrubs and other plant materials, landscape containers, plaza furniture, top soil preparation, automatic irrigation, landscape and pedestrian lighting. Landscaping shall carry out the objectives and principles of the City's desire to accomplish a high-quality aesthetic environment.

The Developer's improvements shall be constructed in accordance with the Uniform Building Code (with City modifications) and the Municipal Code.

C. Local Employment and Contracting

1. Local Employment and Training Opportunities.

In construction of Developer's improvements, Developer shall ensure that contractors constructing such improvements, in aggregate, sponsor and employ at least 1 New Apprentice(s) to perform at least 400 total construction work hours. A "New Apprentice" is a San Pablo resident who enrolls in a state-registered construction apprenticeship program for the first time at the outset of his or her work on this Project. Developer or contractors shall pay fees related to enrollment and/or sponsorship of such New Apprentices. Construction work hours performed by residents of states other than California shall not be taken into account in application of this paragraph, including calculation of total construction work hours. Developer shall obtain from contractors and subcontractors, and provide to the City upon request, information sufficient to determine compliance with this paragraph. The City shall ensure that the San Pablo Economic Development Corporation (the EDC) works cooperatively with contractors and subcontractors to assist in identification of local workers available to work and interested in enrolling in registered apprenticeship programs. **Because damages for failure to satisfy requirements of this paragraph would be difficult to determine, Developer and City agree that if the New Apprentice work-hours requirement of this paragraph is not satisfied, Developer shall pay to the EDC \$30 per hour by which contractors in aggregate fell short of satisfaction of the New Apprentice work-hours requirement, with such funds to be used by the EDC to support training and referral of local residents. THE DEVELOPER AND THE CITY SPECIFICALLY ACKNOWLEDGE THIS LIQUIDATED DAMAGES PROVISION BY THEIR SIGNATURES HERE:**

By: _____
Developer

By: _____
City

2. Local Contracting.

a. Construction Contracts. Prior to solicitation of bids for contracts for construction of improvements on the Development Parcel, Developer shall meet with the EDC, and work cooperatively with the EDC to contact local contractors to provide a reasonable opportunity to bid, and shall make commercially reasonable efforts to maximize the use of local contractors, including local trucking firms. Developer shall make commercially reasonable efforts to award separate contracts for discrete portions of construction improvements, in order to promote opportunities for local participation. Developer shall require all prime construction contractors that are retaining subcontractors to work cooperatively with the EDC to contact local contractors to provide a reasonable opportunity to bid, and to make commercially reasonable efforts to maximize the use of local contractors, including local trucking firms. Prior to commencement of construction under any prime contract award, Developer shall provide the City with a list of contractors and subcontractors to be used in performance of the contract, and whether each listed contractor or subcontractor is a local business.

b. Service Contracts During Construction Phase. Prior to solicitation of bids for service contracts to be performed on-site during construction of improvements, including contracts for security services, Developer or its property manager shall work cooperatively with the EDC to contact local contractors to provide a reasonable opportunity to bid on such service contracts, and shall make commercially reasonable efforts to maximize the use of local contractors.

3. Good Faith Deposit.

Prior to and as a condition of the close of escrow for conveyance of the Development Parcel from the City to the Developer, the Developer shall deliver to the City a deposit (the "Local Employment Deposit") of cash or certified check satisfactory to the City in the amount of TWENTY THOUSAND DOLLARS (\$20,000.00) as security for the performance of the obligations of the Developer under this Section C. The City shall be under no obligation to pay or earn interest on the Deposit, but if interest is paid thereon, such interest shall become part of the Deposit. The Deposit may be retained by the City in whole or in part to pay the liquidated damages described in paragraph C.1. above. Upon satisfactory completion of construction of all improvements required to be constructed by this Agreement in compliance with the terms hereof, as evidenced by the City's issuance of a Certificate of Occupancy, the City shall return the Local Employment Deposit to the Developer.

ATTACHMENT NO. 4

FORM OF GRANT DEED

Recording Requested by:

CITY OF SAN PABLO

After Recordation, Mail to:

GRANT DEED

For valuable consideration, the receipt of which is hereby acknowledged,

THE CITY OF SAN PABLO, a public body, corporate and politic, of the State of California (herein called "Grantor") hereby grants to American Recess, LLC & The Mulholland Drive Company, LLC (herein called "Grantee"), the real property (the "Property") legally described in the document attached hereto, labeled Exhibit A, and incorporated herein by this reference.

1. The Property is conveyed subject to a Disposition and Development Agreement (the "DDA") entered into by and between the Grantor and the Grantee and dated May 26th, 2020. The Property is also conveyed subject to easements and encumbrances of record.

2. Prior to the issuance of a Certificate of Occupancy as provided in the DDA, the Grantee shall not, except as permitted by the DDA, sell, transfer, convey, assign or lease the whole or any part of the Property without the prior written approval of the Grantor. This prohibition shall not apply subsequent to the issuance of the Certificate of Occupancy for the Development Parcel. This prohibition shall not be deemed to prevent the granting of easements or permits to facilitate the development of the Property or to prohibit or restrict the leasing of any part or parts of a building or structure when said improvements are completed or to restrict any financing permitted by the DDA.

3. Subject to the provisions of Section 610 of the DDA, the City shall have the additional right, at its option, to repurchase, reenter and take possession of the Property hereby conveyed, or such portion thereof, with all improvements thereon, if after conveyance of title and prior to issuance of a Certificate of Occupancy for the Development Parcel, the Grantee or successor in interest shall:

- a. Fail to proceed with the construction of the improvements as required by the DDA for a period of three (3) months after written notice thereof from the Grantor; or
- b. Abandon or substantially suspend construction of the improvements for a period of three (3) months after written notice of such abandonment or suspension from the Grantor; or
- c. Transfer or suffer any involuntary transfer of the Development Parcel (as defined in the DDA), or any part thereof, in violation of the DDA.

Such right to repurchase, reenter and repossess, to the extent provided in this paragraph 3, shall be subordinate and subject to and be limited by and shall not defeat, render invalid or limit:

- a. Any mortgage, deed of trust or other security instrument permitted by the DDA; or
- b. Any rights or interests provided in the DDA for the protection of the holder of such mortgages, deeds of trust or other security instruments.

4. The Grantee covenants by and for itself and any successors in interest that there shall be no discrimination against or segregation of any person or group of persons on any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Section 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code in the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the Property, nor shall the Grantee itself or any person claiming under or through it establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees or vendees in the Property.

All deeds, leases or contracts made relative to the Property, the improvements thereon or any part thereof, shall contain or be subject to substantially the following nondiscrimination clauses:

- a. In deeds: "The grantee herein covenants by and for himself or herself, his or her heirs, executors, administrators, and assigns, and all persons claiming under or through them, that there shall be no discrimination against or segregation of any person or group of persons on any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Section 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code in the sale, lease,

sublease, transfer, use, occupancy, tenure or enjoyment of the land herein conveyed, nor shall the grantee himself or herself, or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees or vendees in the land herein conveyed. The foregoing covenants shall run with the land."

- b. In leases: "The lessee herein covenants by and for himself or herself, his or her heirs, executors, administrators and assigns, and all persons claiming under or through him or her, and this lease is made and accepted upon and subject to the following conditions:

"That there shall be no discrimination against or segregation of any person or group of persons on any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Section 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code in the leasing, subleasing, transferring, use, occupancy, tenure or enjoyment of the land herein leased, nor shall the lessee himself or herself, or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, sublessees, subtenants or vendees in the land herein leased."

- c. In contracts: "There shall be no discrimination against or segregation of any person or group of persons on any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Section 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code in the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the land, nor shall the transferee himself or herself, or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, sublessees, subtenants or vendees in the land."

5. No violation or breach of the covenants, conditions, restrictions, provisions or limitations contained in this Grant Deed shall defeat or render invalid or in any way impair the lien or charge of any mortgage, deed of trust or other financing or security instrument permitted by the DDA; provided, however, that any successor of Grantee to the Property shall be bound by such remaining covenants, conditions, restrictions, limitations and

EXHIBIT A

LEGAL DESCRIPTION OF THE PROPERTY

[TO BE INSERTED]

ACKNOWLEDGMENTS