EXCLUSIVE NEGOTIATIONS AGREEMENT (Former El Portal Elementary School Site)

THIS	EXCLUSIVE	NEGOTIATIONS	AGREEMENT	(hereinafter	"ENA"	or	
"Agreement"	") dated as of		, 2019, is e	ntered into by	and between	een	
the CITY OF SAN PABLO, a California municipal corporation (the "City"), and BROOKFIELD							
BAY AREA	HOLDINGS LLO	C, a Delaware limited	liability corporati	on (the "Devel	loper").		

RECITALS

THIS AGREEMENT IS MADE WITH REFERENCE TO THE FOLLOWING FACTS AND CIRCUMSTANCES:

- A. The City is the owner of that certain real property in the City limits with the known address of 2600 Moraga Road and APN 416-140-050-4 (the "**Site**"). The Site is approximately 8.95 acres, and is further depicted in the map of the Site attached hereto as Exhibit A.
- B. The Site was previously the site of the El Portal Elementary School. Although the school is now closed, several classroom buildings remain on the Site, together with a fenced soccer field.
- C. The City desires to sell, and the Developer desires to purchase, a portion of the Site containing approximately 5 acres (the "Development Parcel") for the development of a single family "for sale" residential project (the "Residential Project") on the Development Parcel. The City desires to retain the remaining portion of the Site for continued use as a soccer field (the "Park Parcel"), as improved by Developer to enlarge the soccer field to an adult-sized field and add other amenities as further described and generally depicted on Exhibit B attached hereto (the "Park Project"). The City and the Developer will work cooperatively to determine during the Feasibility Period (as defined below) the best location for the park improvements taking into consideration, in particular, the avoidance of earthquake fault zones that bisect the Site for residential and public vertical structures.
- D. The City and the Developer contemplate that the consideration for the Developer's acquisition of the Development Parcel would be the Developer's completion and delivery to the City of the Park Project, together with (i) the Profit Participation (as described in Section 2.1 below), if any, for which the Deposit (as defined in Section 3.1) may be applicable pursuant to Section 3.1, and (ii) certain other mutually agreed upon consideration reasonably requested by the City in connection with Developer's development of the Residential Project.
- E. The purpose of this Agreement is to establish procedures and standards for the negotiation by the City and the Developer of an agreement providing for the sale and development of the Residential Project on the Development Parcel and delivery of the Park Project.
- F. Each of the Developer and the City shall be individually referred to herein as a "**Party**" and collectively referred to herein as the "**Parties**".

AGREEMENTS

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein and for other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties mutually agree as follows:

ARTICLE 1 EXCLUSIVE NEGOTIATIONS RIGHT

Section 1.1 Good Faith Negotiations. The City and the Developer agree for the period set forth below in Section 1.2 to negotiate diligently and in good faith to prepare and execute a Disposition and Development Agreement ("DDA") providing for the sale and development of the Site incorporating the concepts provided in Articles 2 and 3 of this Agreement, subject to Developer's sole and absolute discretion to terminate this Agreement under Section 3.2 below. During the Negotiation Period, the Parties shall use good faith efforts to accomplish the respective tasks outlined in Section 3 to facilitate the negotiation of the DDA in a mutually satisfactory form. The obligation to negotiate in good faith requires the Parties to communicate with each other regarding issues for which agreement has not been reached, and in such communication to follow reasonable negotiation procedures, including meetings, telephone conversations, and correspondence. The Parties understand that final accord on all issues may not be reached.

Section 1.2 The Negotiation Period.

- a. The negotiation period (the "Negotiation Period") shall commence upon the date of the full execution of this Agreement by the Parties (the "Effective Date") and continue for one hundred five (105) days thereafter. Upon the expiration of the Negotiation Period, if the DDA has not yet been fully executed, this Agreement shall terminate and neither Party shall have any further rights or obligations hereunder, except those that expressly survive termination of this Agreement and except with respect to the return of the Deposit to Developer. The Negotiation Period may be extended by up to seventy-five (75) days by the mutual written consent of the Parties. If the DDA is executed by the Parties, then upon such execution, this Agreement shall terminate and all rights and obligations of the Parties shall be as set forth in the executed DDA, except for any obligations that expressly survive termination of this Agreement.
- b. The City acknowledges that any and all work produced by Developer during the Negotiation Period is the property of Developer and shall not be used by the City or disclosed to any third parties in the event of termination of this Agreement (except such disclosure as and to the extent required by the California Public Records Act, court order, discovery, or other legal process). The foregoing rights of Developer and obligations of City shall survive termination of this Agreement.
- c. The Negotiation Period shall be automatically extended by the duration of any Event of Force Majeure (as defined below) that may occur from time to time during the term hereof, provided that in no event shall the Negotiation Period be extended pursuant to this Section 1.2(c) past the date that is sixty (60) days after the expiration of the Negotiation Period (as it may have been extended pursuant to Section 1.2(a) above). The term "Event of Force Majeure" shall mean any and all acts of God, strikes, lock-outs, other industrial disturbances, acts of the public enemy, laws, rules and regulations of governmental entities, wars or warlike action (whether actual, impending, or expected and whether de jure or de facto), insurrections, riots, vandalism,

terrorism, epidemics, inclement weather, fire or other casualty, civil disturbances, confiscation or seizure by any government or public authority, lawsuits brought by third parties, governmental or administrative action, inaction or omission, or any other causes, whether the kind herein enumerated or otherwise, that are not reasonably within the control of or caused by the Party claiming the right to delay the performance on account of such occurrence; provided, however, in no circumstances shall the monetary inability of a Party to perform any covenant, agreement or other obligation contained in this Agreement be construed to be an Event of Force Majeure. Upon either Party hereto becoming aware of an Event of Force Majeure, it shall promptly notify the other Party hereof of such occurrence.

<u>Section 1.3</u> <u>Exclusive Negotiations</u>. During the Negotiation Period, the City shall not negotiate with any entity, other than the Developer, regarding the sale or development of the Development Parcel or any portion thereof, or solicit, entertain or accept bids, proposals or back-up offers to do so.

<u>Section 1.4</u> <u>Identification of Developer's Representatives</u>. The Developer's representative to negotiate the DDA with the City is Joe Guerra, Senior Director of Business Strategies.

ARTICLE 2 PROPOSED DEVELOPMENT AND PARK PROJECT

Proposed Development and Park Project. The negotiations of the DDA Section 2.1 shall be based upon the Developer's acquisition of the Development Parcel for the development of the Residential Project in exchange for the completion and delivery by the Developer of the proposed Park Project pursuant to a design-build contract to be negotiated pursuant to the DDA. The improvements to the Park Project shall include a fenced, adult-sized, soccer field, a tot lot play area, a picnic area, restrooms, lighting, parking and landscaping, all constructed in accordance with the State's prevailing wage requirements and generally consistent with those certain specifications for Twin Creeks Park dated April 13, 2016 submitted by Developer to the City. There shall be no reimbursement of City's actually incurred staff time costs (per City's standard rate schedule) for the design, plan check and permitting of the Park Project ("City Staff Costs"). Upon the completion of the Park Project in compliance with the requirements of the DDA and City's acceptance thereof, no implied warranties shall apply and the Developer shall have no further obligations for the repair, maintenance or replacement thereof. It is expected by the Parties that the consideration paid by Developer for the Developer Parcel shall also include participation by the City in the profits from the sale of residential units within the Residential Project pursuant to a profit participation agreement that will be attached to the DDA that shall include in the profit calculation the cost of building the Park and the Residential Project incurred by Developer or its successor-in-interest ("Profit Participation").

ARTICLE 3 NEGOTIATION TASKS

Section 3.1 Overview; Deposit. To facilitate the negotiation of the DDA, the Parties shall use reasonable good faith efforts to accomplish the tasks set forth in this Article 3 in a timeframe that will support negotiation and execution of a mutually acceptable DDA prior to the expiration of the Negotiation Period. Within three business days after the Effective Date, the Developer shall deliver to an escrow established with First American Title Company ("Escrow")

and held in an interest-bearing account for the benefit of Developer an initial deposit of \$50,000 (the "Initial Deposit"). Upon delivery of the Feasibility Approval Notice, the Developer shall deliver to Escrow a second deposit of \$50,000 (the "Second Deposit," and collectively with the Initial Deposit, the "Deposit"). The parties contemplate that the Deposit shall serve as the Deposit under the DDA and that, prior to execution of a DDA, the Deposit shall be fully refundable to the Developer upon the termination of this Agreement.

If a DDA is executed prior to the expiration of the Negotiation Period, the parties contemplate that: (a) the Deposit shall be non-refundable (provided that the Feasibility Approval Notice is timely delivered) unless the City defaults under the DDA resulting in a termination of the DDA, ("**Termination Default**"), and shall deemed the full deposit securing Developer's obligations under the DDA; and (b) the Deposit shall either be (i) released to Developer in the event of a Termination Default, (ii) paid to the City as liquidated damages in the event of a default by the Developer under the DDA resulting in a termination of the DDA, or (iii) applied towards Developer's payments of Profit Participation, if any, and the unapplied Deposit shall be released to the City upon the sale of the final residential unit in the Residential Project.

Section 3.2 Due Diligence.

- Feasibility Approval. During the period that continues seventy-five (75) days from the Effective Date (the "Feasibility Period"), the Developer shall have the right to perform inspections, soils testing, reports, and surveys of the Site, planning and research to determine in Developer's sole and absolute discretion whether the Park Parcel is physically, economically and financially suitable for the Park Project and whether the Development Parcel is financially, economically and physically suitable for the development of the Residential Project, taking into account, including but not limited to (i) market analysis conditions, the Development Parcel's competitive advantages and disadvantages, local economic and demographic conditions, community and political support, debt and equity financing availability the geotechnical and soils conditions, (ii) the presence or absence of toxic or other hazardous materials, the massing of the proposed improvements and parking requirements, and (iii) any other financial, physical, environmental and regulatory factors that the Developer deems relevant (collectively, the "Feasibility Matters"). Prior to the expiration of the Feasibility Period, the Developer may in its sole and absolute discretion deliver written approval to the City that the Developer approves the Feasibility Matters (the "Feasibility Approval Notice"). If the Developer has not delivered the Feasibility Approval Notice prior to the expiration of the Feasibility Period, this Agreement shall be terminated without further action of any Party, and thereafter no Party shall have any further duties, obligations, rights, or liabilities under this Agreement, except with respect to the return of the Deposit and any other obligations herein that expressly survive the termination of this Agreement. The Developer shall indemnify, protect, defend and hold harmless the City and the City's respective elected officials, officers, employees, representatives, members and agents from and against any and all losses, liabilities, damages, claims or costs (including attorneys' fees) arising from Developer's activities pursuant to this Section, except to the extent caused by the negligence, willful misconduct or breach of this Agreement or the DDA by the City. This indemnity obligation shall survive the termination of this Agreement.
- b. <u>Title Approval</u>. Within thirty (30) days following the Effective Date, the Developer shall request from a reputable title company the issuance of a Preliminary Title Report (the "**Report**") on the Site. If the Developer objects to any exception appearing on the Report, the Developer shall notify the City in writing on or before 5:00 p.m. on the thirtieth (30th) day

following the date the Developer receives the Report (the "Title Objection Notice"). The City, within fifteen (15) days of receipt of any Title Objection Notice, shall notify the Developer in writing ("Title Response") whether City elects to (1) cause the exception to be removed of record, (2) obtain a commitment from the title company for an appropriate endorsement to the policy of title insurance to be issued to the Developer, insuring against the objectionable exception, or (3) refuse to cure or endorse over such objectionable exception as provided in clauses (1) and (2) above. If the City fails to timely deliver a Title Response or such Title Response fails to address any objection provided in the Title Objection Notice, the Developer may terminate this Agreement upon written notice ("Termination Notice") to the City at any time prior to delivering the Feasibility Approval Notice, in which case neither Party shall thereafter have any obligations to or rights against the other hereunder, except for any obligations that expressly survive termination of this Agreement as provided herein and except with respect to the return of the Deposit to the Developer. If Developer does not timely deliver the Termination Notice, this Agreement shall continue in effect, and such uncured objections shall be deemed to have been waived.

- Section 3.3 Reports. The Developer shall provide the City with copies of all non-proprietary reports, studies, analyses, and similar documents, prepared or commissioned by the Developer with respect to this Agreement, the Site, the Residential Project and/or the Park Project, promptly upon their completion. The City shall provide the Developer with copies of all reports, studies, analyses, and similar documents prepared or commissioned by the City with respect to this Agreement, the Site and the Park Project, promptly upon their completion. The Developer acknowledges that the City will need sufficient, detailed information about the proposed Residential Project to make informed decisions about the content and approval of the DDA. Nothing in this Section 3.3 obligates the City to undertake any reports, studies, analyses or similar documents or to pay the Developer for any reports, studies, analyses, and similar documents which the Developer prepares or commissions.
- <u>Section 3.4</u> <u>Progress Reports.</u> Upon at least five (5) business days' notice, as from time to time requested by the City, the Developer shall make oral or written progress reports advising the City on studies being made and matters being evaluated by the Developer with respect to this Agreement during the Negotiation Period.
- <u>Section 3.5</u> <u>Other Terms to be Covered in DDA</u>. Negotiations by the Parties shall further be based upon the inclusion of the following terms in the DDA:
- a. The Developer shall have the right but not the obligation for processing a subdivision map dividing the Site into the Development Parcel and the Park Parcel.
- b. The Developer shall undertake a partial demolition of buildings on the Site within one hundred eighty (180) days after expiration of the Feasibility Period. This demolition shall only consist of the knocking down of buildings to avoid potential illegal trespass/habitation and will not require the removal of demolished materials or stockpiles.
- c. The escrow company for the purchase and sale of the Development Parcel will be First American Title Company, Pleasanton office.
- d. Closing costs will be paid by the City and the Developer in accordance with County custom. The Developer will pay the premium for any extended coverage of the title policy.

- e. Escrow will close within 30 days after: (1) verification of large lot final map and approved small lot final map for the Development Parcel; (2) final CEQA certification and expiration of appeal period for the Residential Project; and (3) approval of any governmental agency permits with jurisdiction over the Residential Project including but not limited to Regional Water Quality Control Board permits, US and California Department of Fish and Wildlife, and the U.S. Army Corps of Engineers (the "Entitlements"), and the expiration of all appeals periods applicable to the Entitlements without any appeal having been filed or if an appeal has been filed, such appeal shall have been resolved in a manner that upholds the Entitlements. In no event will escrow close later than twelve (12) months after the effective date of the DDA ("Outside Closing Date"), provided however, that (i) the Outside Closing Date shall be extended as necessary in the due to delays in the Entitlements beyond the reasonable control of Developer (including the filing of any litigation challenging the Entitlements for the Residential Project) and (ii) Developer shall have one (1) option to unilaterally extend the Outside Closing Date by six (6) months by delivering notice and One Hundred Thousand Dollars (\$100,000) to the City no later than five (5) days prior to the then-existing Outside Closing Date.
- f. The Park Project will be completed within 12 months after the close of escrow, subject to extension for any delays resulting from an Event of Force Majeure.
- g. The DDA shall include a representation by the City that at the time of execution of the DDA the Residential Project and the adjacent US Army-owned parcel depicted on Exhibit C attached hereto are not subject to any inclusionary housing requirements or affordable housing in lieu fees. In the event that at the time of closing those circumstances have changed, the Developer shall have the right, and the Developer's sole remedy with respect to such changed circumstances shall be, to terminate the DDA and receive the return of its Deposit. The Parties will explore and evaluate any opportunities to provide affordable housing on the Development Parcel.
- h. Following completion of the Park Project and the City's acceptance thereof, the DDA shall be assignable by Developer without the consent of City. Prior to completion of the Park Project and the City's acceptance thereof, (i) Developer's obligations to complete the Park Project under the DDA shall not be assignable without the consent of City (except for an assignment to an affiliate of Developer, which shall not require consent), such consent to be in the City's sole and absolute discretion, and (ii) Developer's rights and obligations under the DDA with respect to the Residential Project shall be assignable without the consent of the City. Notwithstanding anything in this subdivision h to the contrary, any assignment of rights and obligations under the DDA shall include a complete assumption of all obligations of the Developer under the DDA, including but not limited to the obligation to pay the Profit Participation, if any, to the City, provided, however, that in the event Developer assigns the obligation to complete the Park Project under the DDA without the rights to obtain or develop any portion of the Residential Project, no Profit Participation obligations must be transferred pursuant to this subsection.
- i. City shall make customary representations and warranties regarding the Development Parcel including but not limited to representations and warranties that (i) there is no pending litigation affecting the Development Parcel, (ii) there are no pending condemnation proceedings affecting the Development Parcel, and (iii) there are no known releases of Hazardous Materials, and (iv) there are no known violations of laws affecting the Development Parcel.
- Section 3.6 Organizational Documents. The Developer shall provide the City with a copy of its organizational documents, fully executed by the Developer, evidencing that the

Developer exists and is in good standing to perform its obligations under the DDA within sixty (60) days following the Effective Date.

ARTICLE 4 GENERAL PROVISIONS

<u>Limitation on Effect of Agreement</u>. This Agreement shall not obligate Section 4.1 either the City or the Developer to enter into the DDA or to enter into any particular DDA. By execution of this Agreement, the City is not committing itself to or agreeing to the disposition of the Development Parcel or any portion of the Site. Execution of this Agreement by the City is merely an agreement to conduct a period of exclusive negotiations in accordance with the terms hereof, reserving for subsequent City Council action the final discretion and approval regarding the execution of the DDA and all proceedings and decisions in connection therewith. Any DDA resulting from negotiations pursuant to this Agreement shall become effective only if and after such DDA has been considered and approved by the City Council following conduct of all legally required procedures, and executed by duly authorized representatives of the City and the Developer. Until and unless the DDA is signed by the Developer, approved by the City Council, and executed by the City, no DDA drafts, actions, deliverables or communications arising from the performance of this Agreement shall impose any legally binding obligation on either Party to enter into or support entering into the DDA or be used as evidence of any oral or implied agreement by either Party to enter into any other legally binding document.

<u>Section 4.2</u> <u>Notices.</u> Formal notices, demands and communications between the City and the Developer shall be sufficiently given if, and shall not be deemed given unless, dispatched by certified mail, postage prepaid, return receipt requested, or sent by express delivery or overnight courier service, with signature required, to the office of the Parties shown as follows, or such other address as the Parties may designate in writing from time to time:

Agency: City of San Pablo

13831 San Pablo Avenue, Bldg. 1

San Pablo, CA 94806 Attn: City Manager

Developer: Brookfield Bay Area Holdings LLC

500 La Gonda Way, Suite 100

Danville, CA 94526

Attn: Josh Roden, President

Such written notices, demands and communications shall be effective on the date shown on the delivery receipt as the date delivered or the date on which delivery was refused.

Section 4.3 Waiver of Lis Pendens. It is expressly understood and agreed by the Parties that no lis pendens shall be filed against the Site, or any portion of the Site, with respect to this Agreement or any dispute or act arising from it.

<u>Section 4.4</u> <u>Costs and Expenses</u>. Except as otherwise specified herein, each Party shall be responsible for its own costs and expenses in connection with any activities and negotiations undertaken in connection with this Agreement.

Section 4.5 No Commissions. Each Party ("Representing Party") represents that it has engaged no broker, agent or finder in connection with this transaction, and Representing Party shall indemnify, defend and hold the other Party harmless from any claims by any broker, agent or finder retained or claiming to be retained by Representing Party. Each Party's rights and obligations under this Section 4.5 shall survive termination of this Agreement.

Section 4.6 Default and Remedies.

- a. <u>Default</u>. Failure by any Party to negotiate in good faith as provided in this Agreement shall constitute an event of default hereunder. The non-defaulting Party shall give written notice of a default to the defaulting Party, specifying the nature of the default and the required action to cure the default. If a default remains uncured thirty (30) days after receipt by the defaulting Party of such notice, the non-defaulting Party may exercise the remedies set forth in subsection b.
- Remedies. In the event of an uncured default by any Party, the other Party's sole b. remedy shall be to terminate this Agreement. Following such termination, no Party shall have any further right, remedy or obligation under this Agreement, except for any obligations that expressly survive termination of this Agreement and the Developer's Deposit shall be returned to the Developer. Except as expressly provided above, no Party shall have any liability to the other Party for damages or otherwise for any default, nor shall any Party have any other claims with respect to performance under this Agreement, and each Party specifically waives and releases any such rights or claims it may otherwise have at law or in equity. Notwithstanding anything in this Agreement to the contrary, the Parties expressly acknowledge and agree that it is a material part of the Developer's consideration to the City that the City shall not be at any risk whatsoever to liability for money damages relating to or arising from this Agreement, and that the Developer, for itself and for all successors and assignees, hereby releases the City, and all of its agents, employees, representatives, council members, board members, consultants and officers of the City from any and all claims seeking to impose money damages on the City as a result of the City's performance of this Agreement. Notwithstanding the foregoing, in the event of a default by City to negotiate exclusively and in good faith under the terms of this Agreement beyond all applicable notice and cure periods, Developer shall have the right to seek specific performance to compel the City to continue negotiations in good faith pursuant to the terms of this Agreement and to cease negotiations with any other party in violation of the terms of this Agreement.
- Section 4.7 <u>Assignment</u>. The Developer may not transfer or assign any or all of its rights or obligations hereunder without the prior written consent of the City, which consent shall be granted or withheld in the City's sole and absolute discretion, and any such attempted transfer or assignment without the prior written consent of the City shall be void.
- <u>Section 4.8</u> <u>No Third Party Beneficiaries</u>. This Agreement is made and entered into solely for the benefit of the City and the Developer and no other person shall have any right of action under or by reason of this Agreement.

- <u>Section 4.9</u> <u>Right of Entry</u>. The City shall cooperate with the Developer to provide the Developer the right to enter upon the Site, as necessary, for purposes of conducting investigations to further the objectives of this Agreement.
- <u>Section 4.10</u> <u>Governing Law; Venue</u>. This Agreement shall be governed by and construed in accordance with the laws of the State of California other than its choice of law provisions. Venue shall be in Contra Costa County, California.
- <u>Section 4.11</u> <u>Entire Agreement.</u> This Agreement constitutes the entire Agreement of the Parties regarding the subject matter of this Agreement.
- <u>Section 4.12</u> <u>Counterparts.</u> This Agreement may be executed in counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same Agreement.
- <u>Section 4.13</u> <u>Actions By The City</u>. Whenever this Agreement calls for or permits the approval, consent, authorization or waiver of the City, the approval, consent, authorization or waiver of the City Manager shall constitute the approval, consent, authorization or waiver of the City without the further action of the City Council.
- Section 4.14 Dispute Costs. In the event any dispute between the parties with respect to this Agreement results in litigation or other proceedings, the prevailing party shall be reimbursed for all its reasonable costs and expenses by the party not prevailing, including, without limitation, reasonable attorneys' and experts' fees and costs incurred in connection with such litigation or other proceeding, any appeal thereof and/or enforcing any judgment granted therein, all of which shall be deemed to have accrued upon the commencement of such action or proceeding and shall be paid whether or not such action or proceeding is prosecuted to final judgment. Such costs, expenses and fees shall be included in and made a part of the judgment recovered by the prevailing party. This Section is intended to be expressly severable from the other provisions of this Agreement, is intended to survive any judgment and is not to be deemed merged into the judgment. The provisions of this Section shall survive any termination of this Agreement.

IN WITNESS WHEREOF, this Agreement has been executed by the Parties on the date first above written.

	DEVELOPER:
	BROOKFIELD BAY AREA HOLDINGS LLC, a Delaware limited liability company
	By: Name: By:
	Name: Its:
	CITY:
	CITY OF SAN PABLO, a California municipal corporation
	By: Matt Rodriguez, City Manager
APPROVED AS TO FORM:	
By: C. Nicole Murphy, Special Counsel	

EXHIBIT A

SITE MAP



EXHIBIT B

DEPICTION AND DESCRIPTION OF PARK IMPROVEMENTS

attached

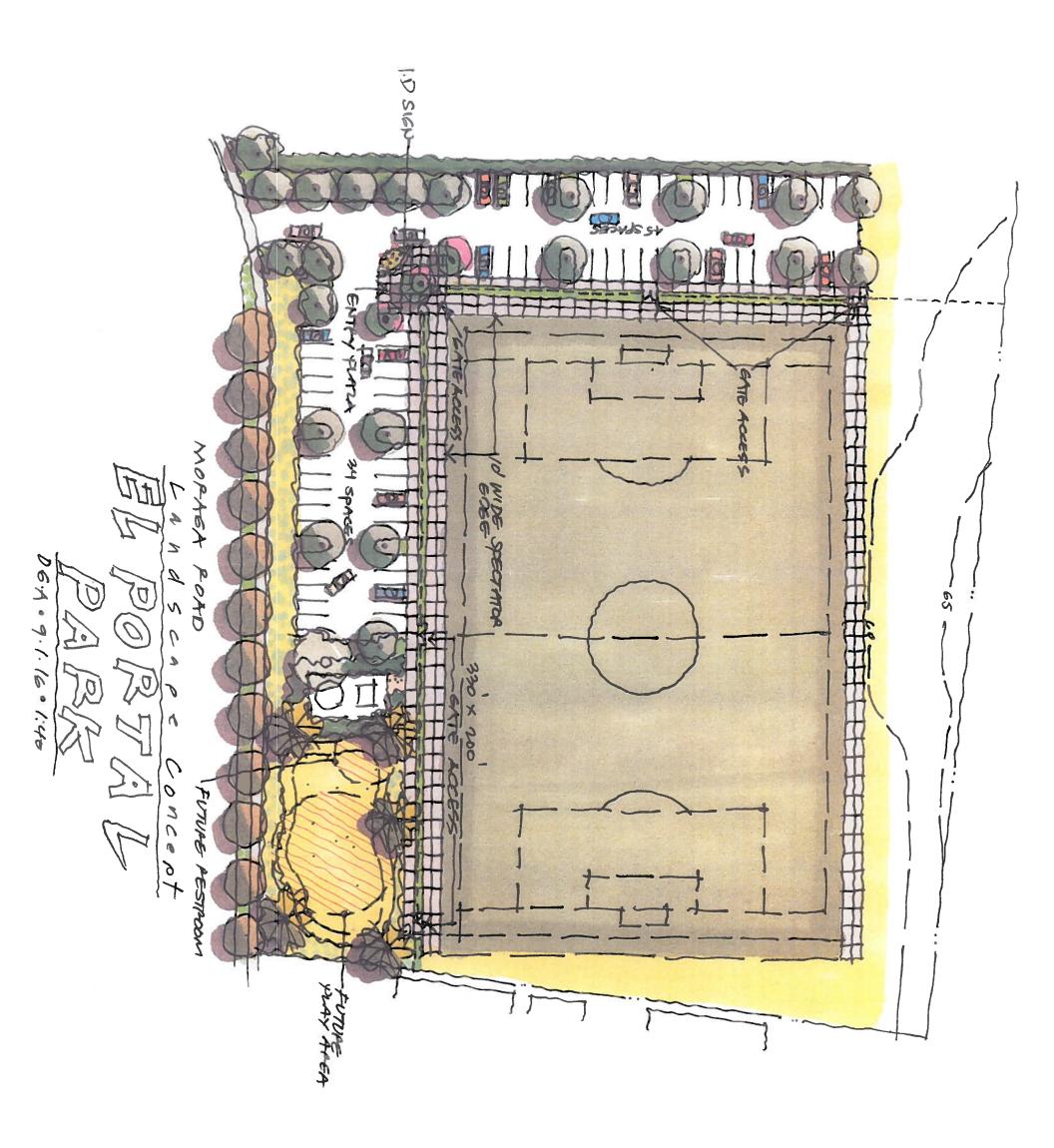


EXHIBIT C

DEPICTION OF ARMY-OWNED PARCEL

