



THE CITY OF SAN DIEGO

CITY OF SAN DIEGO	
REAL ESTATE ASSETS DEPT.	
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☐	DEPUTY MANAGER
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☐	ORIGINATOR

August 15, 2003

Mr. Tory Allman
General Manager
Frog's Club One
12171 World Trade Drive
San Diego, CA 92128

Dear Mr. Allman:

Subject: Right to Extend – Percentage Operating Agreement – The City of San Diego/Club One, Inc.

In accordance with the Section 2.3, Right to Extend, of the above agreement, the term of the agreement shall be extended for an additional seven years commencing on September 1, 2003, and expiring on August 31, 2010. The extension term is subject to all original agreements, considerations, covenants, and conditions except the rent. The new percentage rent for the extension term will be fifteen percent (15%) of the operator's gross income derived from the operation of a swimming pool as defined in the Section 3.4, Gross Income, of the agreement.

Should you have any questions, I can be reached at (619) 235-5248.

Sincerely,

V. Balotsky

Vladimir Balotsky
Property agent

VEB/cj

Lease File: Club One, Inc.

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Real Estate Assets

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THE CITY OF SAN DIEGO

**SOUTHERN CALIFORNIA FITNESS, INC.,
a California Corporation**

Percentage Operating Agreement

DOCUMENT NO. 00-18200
FILED AUG 07 1995
OFFICE OF THE CITY CLERK
SAN DIEGO, CALIFORNIA

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CITY OF SAN DIEGO OPERATING AGREEMENT

THIS OPERATING AGREEMENT is executed between the CITY OF SAN DIEGO, a municipal corporation, hereinafter called "CITY," and SOUTHERN CALIFORNIA FITNESS INC., a California Corporation hereinafter called "OPERATOR."

SECTION 1: USES

- 1.1 Premises. CITY hereby conditionally transfers to OPERATOR and OPERATOR accepts from CITY all of that certain real property situated in the City of San Diego, County of San Diego, State of California, described in Exhibits "10.1" through "10.3", attached hereto and by this reference made part of this agreement. Said real property is hereinafter called the "premises."
- 1.2 Uses. It is expressly agreed that the premises are transferred to OPERATOR solely and exclusively for the purposes of operating and maintaining a public swimming pool, and for such other related or incidental purposes as may be first approved in writing by the City Manager and for no other purpose whatsoever.

This operating agreement is contingent on development of a public swimming pool by Carmel Mountain Ranch, a General Partnership, on behalf of the City of San Diego, in accordance with Development Agreement, City Document No. 00-16537 and Reimbursement Agreement, City Document No. RR-285249. This operating agreement is further contingent upon OPERATOR closing escrow for the acquisition of the northerly portion of Parcel 4 of Parcel Map 14678, outlined on Exhibit "10.2," for the purpose of constructing, operating and maintaining a fitness facility.

The use of the premises for any unauthorized purpose shall constitute a substantial default and subject this agreement to termination at the sole option of the CITY.

OPERATOR covenants and agrees to use the premises throughout the term hereof for the above-specified purposes and to diligently conduct the business thereon to produce the most gross income that can be reasonably expected. Failure to continuously use the premises for said

purposes, or the use thereof for purposes not expressly authorized herein, shall be grounds for termination by CITY.

1.3 Related Council Actions. By the granting of this agreement, neither CITY nor the Council of CITY is obligating itself to any other governmental agent, board, commission, or agency with regard to any other discretionary action relating to development or operation of the premises. Discretionary action includes but is not limited to rezonings, variances, environmental clearances, or any other governmental agency approvals which may be required for the development and operation of the premises.

1.4 Quiet Possession. OPERATOR, paying the rent and performing the covenants and agreements herein, shall at all times during the term peaceably and quietly have, hold, and enjoy the premises. If CITY for any reason cannot deliver possession of the premises to OPERATOR at the commencement of the term, or if during the agreement term OPERATOR is temporarily dispossessed through action or claim of a title superior to CITY'S, then and in either of such events, this agreement shall not be voidable nor shall CITY be liable to OPERATOR for any loss or damage resulting therefrom, but there shall be determined and stated in writing by the City Manager of CITY a proportionate reduction of the minimum or flat rate rent for the period or periods during which OPERATOR is prevented from having the quiet possession of all or a portion of the premises.

1.5 Easements and Reservations.

- a. CITY hereby reserves all rights, title, and interest in any and all subsurface natural gas, oil, minerals, and water on or within the premises.
- b. CITY reserves the right to grant and use easements or to establish and use rights-of-way over, under, along, and across the premises for utilities, thoroughfares, or access as it deems advisable for the public good.
- c. CITY has the right to enter the premises for the purpose of making repairs to or developing municipal resources and services.

However, CITY shall not unreasonably or substantially interfere with OPERATOR'S use of the premises and will reimburse OPERATOR for physical damages, if any, to the permanent improvements located on the premises resulting from CITY exercising the rights reserved in this

section. Such reimbursement may include a reduction in the rent proportionate to the amount of physical damage as determined by CITY. CITY will pay the costs of maintenance and repair of all CITY installations made pursuant to these reserved rights.

- 1.6 Competent Management. Throughout the term of this agreement, OPERATOR shall provide competent management of the premises to the satisfaction of the City Manager. For the purposes of this paragraph, "competent management" shall mean demonstrated ability in the management and operation of a public swimming pool and related activities in a fiscally responsible manner.
- 1.7 Operation of Facilities. A regular schedule of days and hours of operation shall be established to best serve the public. OPERATOR agrees that the pool shall be open to public use twelve (12) months per year (except for New Year's Day, Thanksgiving Day, Christmas Day, Easter Day, Memorial Day, Independence Day, Labor Day, and any regularly scheduled maintenance closure). The following minimum hours shall be observed by OPERATOR: Monday through Friday 6:00 AM - 8:00 AM and 3:30 P.M. - 8:00 PM; Saturday and Sunday 8:00 AM - 4:00 PM; operating hours for Saturdays during the period from Memorial Day through Labor Day will be 8:00 AM - 6:00 PM. OPERATOR shall diligently and in a credible manner furnish services to the public in conformity with all applicable rules and regulations of CITY. OPERATOR and CITY shall review the minimum established hours of operation annually and mutually agree upon revised hours of operation, if necessary.
- 1.8 Rates and Charges. OPERATOR agrees that the rate charged for "day use" public access shall not exceed two dollars and fifty cents (\$2.50) per adult, and two dollars and twenty five cents (\$2.25) per child 17 years of age and under and senior citizens 60 years and over. Upon obtaining the written consent of the CITY Manager or his authorized representative, which consent shall not be unreasonably withheld, OPERATOR shall be permitted to increase such rates in increments of twenty five cents (25¢) to compensate for any increases in the Bureau of Labor Statistics, Consumer Price Index, "All Urban Consumers" as published by the United States Department of Labor for Los Angeles/Anaheim/Riverside, CA.

SECTION 2: TERM

- 2.1 Commencement. The term of this agreement shall be seven years commencing on either: the first day of the calendar month following completion of construction of the swimming pool as evidenced by a Notice of Completion; or, the first day of the calendar month following acquisition of the premises by CITY, whichever occurs last.

In the event construction is not completed by May 1, 1996, this operating agreement shall be void and no longer in full force and effect.

"Agreement year" as used in this agreement shall mean the 12-month period following commencement of the agreement.

- 2.2 Holdover. Any holding over by OPERATOR after expiration or termination shall not be considered as a renewal or extension of this agreement. The occupancy of the premises after the expiration or termination of this agreement constitutes a month-to-month tenancy, and all other terms and conditions of this agreement shall continue in full force and effect; provided, however, CITY shall have the right to apply a reasonable increase in rent to bring the rent to fair market value and to terminate the holdover tenancy at will.

- 2.3 Right to Extend. Provided that OPERATOR is not in default of this agreement, OPERATOR has the right to extend this agreement once for an additional term of seven years, subject to all original agreements, considerations, covenants, and conditions, and rent shall continue to be adjusted pursuant to Section 3.2 herein.

To exercise this right, OPERATOR must give CITY six months written notice before the date on which this agreement expires.

- 2.4 Surrender of Premises. At termination of this agreement for any reason, OPERATOR shall execute, acknowledge, and deliver to CITY, within five (5) days after written CITY demand, a valid and recordable quitclaim deed covering all of the premises. The premises shall be delivered free and clear of all liens and encumbrances and in a decent, safe, and sanitary condition.

If OPERATOR fails or refuses to deliver the required deed, CITY may prepare and record a notice reciting OPERATOR'S failure to execute this agreement provision, and the notice will be conclusive evidence of the termination of this agreement and all OPERATOR'S rights to the premises.

SECTION 3: RENT

- 3.1 Time and Place of Payment. All rents required herein must be made payable to the City Treasurer and mailed to the Office of the City Treasurer, City of San Diego, P.O. Box 2289, San Diego, California, 92112-4165, or delivered to the Office of the City Treasurer, City Operations Building, 1222 First Avenue, Third Floor, San Diego, California.

The place of payment may be changed at any time by CITY upon thirty (30) days' written notice to OPERATOR. Mailed rental payments shall be deemed paid upon the date such payment is postmarked by the postal authorities. If postmarks are illegible, the payment shall be deemed paid upon actual receipt by the City Treasurer. OPERATOR assumes all risk of loss and responsibility for late payment charges if payments are made by mail.

3.2 Rent.

- a. Minimum Rent. The annual minimum rent established for the first two (2) years following the effective date of this agreement is Nine Thousand (\$9,000.00), which is Seven Hundred Fifty Dollars (\$750.00), on a monthly installment basis.
- 1) If the minimum rent is greater than the percentage rent on a calendar month basis, then 1/12 of the annual minimum rent is required to be paid for that month. Minimum rents are to be paid in monthly installments on or before the day of the calendar month when percentage rents are due pursuant to Section 3.3, Payment Procedure, hereof.

Provided, however, in the event that the combined total percentage rent payments and monthly installments during any agreement year equal or exceed the required annual minimum rent for that year, then for the balance of such year, ~~OPERATOR shall discontinue paying~~ monthly installments of the minimum rent and shall continue paying only percentage rents until the beginning of the ensuing agreement year. Provided further, in the event minimum rents paid plus percentage rents paid exceed the annual minimum rent and also exceed the rent which would have been paid if the percentage rent had been paid on total gross income, the excess over the annual minimum rent shall be credited against the next payable rent as it becomes due. It is the intent of this provision that OPERATOR shall pay monthly installments of the annual minimum rent as a guarantee

against the percentage rent requirement and that the greater of the two requirements, minimum or percentage, whichever occurs throughout the term, shall prevail on an annual basis.

- b. Minimum Rent Adjustment. Effective at the beginning of the first day of the third year of this agreement and at the beginning of each two year period thereafter during the term, the annual minimum rent shall be eighty percent (80%) of the annual average of actual rents paid or accrued during the two (2) years preceding the adjustment date. Said annual minimum rent shall then be divided by twelve (12) to establish the new monthly minimum rent. It is recognized that such adjustments shall be calculated by CITY upon completion of payments due for the preceding rental period in order to determine the amount of the adjustment to be effective on the dates stated herein. Until such calculations are completed, OPERATOR shall continue paying monthly minimum rents at the prior rate. Any additional rents determined by the adjustment to be due for the months previously paid at the prior rate shall be paid to CITY within thirty (30) days following written notice. IN NO EVENT SHALL ANY SUCH MINIMUM RENT ADJUSTMENT RESULT IN A DECREASE IN THE MINIMUM RENT REQUIREMENT IN EFFECT IMMEDIATELY PRIOR TO THE ADJUSTMENT DATE.
- c. Percentage Rents. Percentage rents will be calculated on a calendar month basis and will consist of the following percentages of the gross income resulting from the use of the premises:

Percentages

Business Activities

Seven and One-Half Percent
(7-1/2%)

Of gross income as defined in Section 3.4 below, derived from the operation of a swimming pool.

Twenty-five Percent (25%)

Of commissions or any other compensation paid to OPERATOR or sublessee for the right to install or operate coin-operated vending, game, or service machines or devices on the premises, including telephones, or 10% of the gross income from any such coin-operated machines or

devices owned, rented, or leased by OPERATOR or sublessees for use on the premises.

Ten Percent (10%)

Of all other authorized activities

The City Manager, in his sole discretion, may approve another percentage rate or flat rate of rent for each other incidental service or operation supplementary to the permitted use(s) set forth under Section 1.2, Uses, hereof as may be approved in writing by the City Manager prior to commencement of such other service(s) or operation(s). Provided, however, any activity conducted on the premises without prior approval by the City Manager shall be subject to the requirements of Section 3.7, Unauthorized Use Charge, hereof.

- d. Percentage Rate Adjustment. Upon extension of this operating agreement as provided for in Section 2.3, the parties, by mutual consent or through appraisal as hereinafter set forth, may, at CITY'S option, adjust the percentage rates of OPERATOR'S gross income to be paid CITY effective upon the first day of the succeeding seven year extension period. Said adjustment will be made to the degree necessary to provide a fair rental to CITY as determined by the City Manager and OPERATOR, taking into consideration the criteria set forth in Section 3.2e. below. In the event that such adjustment is not made by mutual consent, within six (6) months from notice of lease extension, then the parties hereto will refer the matter to appraisal under the terms hereinafter set forth.
- e. Percentage Rate Appraisal. In the event the parties do not agree upon the amount of adjustment to said percentage rates as provided for in the previous section, then the adjustment shall be determined by a qualified professional independent real estate appraiser selected by mutual consent of the parties to this agreement from the list of appraisers approved by CITY. CITY and OPERATOR agree to equally share the cost of the mutually selected appraiser. In the event the parties do not reach agreement as to selection of a mutually acceptable appraiser, then CITY and OPERATOR shall each select a qualified professional independent real estate appraiser who in turn will select a third qualified professional independent real estate appraiser, which third appraiser will be employed to set the percentage rates to be applied to OPERATOR'S percentage rate adjustment. In the event a mutually acceptable third appraiser is not agreed upon between the two selected appraisers within ten (10) days, then the third appraiser will be appointed by the presiding

judge of the Superior Court of the State of California, County of San Diego, acting in his or her individual capacity, upon application by either CITY or OPERATOR with prior notice thereof to the other party. In the event that the Superior Court judge declines to make the appointment, the parties hereto agree that the third appraiser shall be promptly determined in accordance with the rules of the American Arbitration Association. Said third appraiser shall complete the assignment within sixty (60) days of appointment. Each party shall pay the cost of its own selected appraiser, and both CITY and OPERATOR agree to equally share the cost of the third mutually selected or court-appointed appraiser. CITY and OPERATOR agree to accept and be bound by the percentage rates determined by the appraiser selected or appointed to complete the assignment.

The appraiser will be guided by prevailing market percentage rates for similar operations primarily within the Southern California area, if available. In the event the appraisal is not completed in time to permit the percentage adjustment to be made upon the applicable commencement of the seven-year period, OPERATOR agrees to continue to pay rent in accordance with the then-existing agreement rates, and the adjustment, when determined, will be retroactive to said effective date of rental adjustment as hereinabove established. Any deficiency shall be paid by OPERATOR to CITY within sixty (60) days after determination of the new percentage rate(s). IN NO EVENT, HOWEVER, SHALL ANY RENT ADJUSTMENT RESULT IN ANY DECREASE IN ANY PERCENTAGE RENTAL RATE. Notwithstanding the foregoing, the City Manager, in his sole discretion, may determine that no market value adjustment is necessary and waive the requirement for the appraisal process for any specific adjustment period.

3.3 Payment Procedure. On or before the last day of the calendar month following the calendar month in which the gross income subject to rents was earned, OPERATOR shall provide CITY with a correct statement together with a payment of rent on all applicable gross receipts in a form selected by CITY. The statement will be signed by OPERATOR or its authorized agent attesting to the accuracy thereof, which shall be legally binding upon OPERATOR. Each statement will indicate or include:

- a. One-twelfth of the annual minimum rent until the full annual rent is achieved in any agreement year.

- b. Total gross receipts for the subject month, itemized as to business categories for which separate percentage rents are established. A gross receipts breakdown of each business conducted on the premises must be included when a reported category shows gross income to be from more than one business operation.
- c. The percentage rental due CITY, computed and totaled.
- d. The accumulated total of all rents previously paid for the current agreement year.
- e. Payment in the greater of the two following amounts: One-twelfth of the annual minimum rent or the total percentage rent due CITY computed as described in this section.
- f. Any rents due CITY from sublease activities or operations will begin with the earliest of the following dates (whether or not prior approval was given by CITY as required by this agreement and whether or not a separate percentage rent was established by CITY):
 - (1) Sublease commencement date.
 - (2) Physical occupancy date.
 - (3) Earliest activity date (i.e., sale of goods, solicitation of business, construction or alterations, etc.).

3.4 Gross Income. "Gross Income" or "Gross Receipts", as used in this agreement, shall consist of income from day use fees, swimming lessons, water fitness classes, subleasing activities, and any and all other activities which are exclusive to the use of the premises." Provided, however, gross income shall not include federal, state, or municipal taxes collected from the consumer (regardless of whether the amount thereof is stated to the consumer as a separate charge) and paid over periodically by OPERATOR to a governmental agency accompanied by a tax return or statement as required by law. Possessory interest taxes or other property taxes shall not be deducted by OPERATOR in computing gross income. Gross income shall not include refunds for goods returned for resale on the premises or refunds of deposits. The amount of such taxes and refunds shall be clearly shown on the books and records of OPERATOR. The percentage rent shall be calculated and paid by OPERATOR on the basis of said gross income whether the income is received by OPERATOR or by any sublessee, permittee or licensee, or their agents, and all gross income received by any sublessee, permittee,

licensee, or other party as a result of occupancy of said premises or the operation thereof shall be regarded as gross income of OPERATOR for the purpose of calculating the percentage rent hereunder required to be paid by OPERATOR to CITY, except as may be otherwise specified by or pursuant to this agreement.

3.5 Inspection of Records.

- a. Records. OPERATOR shall, at all times during the agreement term, keep or cause to be kept true and complete books, records, and accounts of all financial transactions in the operation of all business activities conducted upon and financial transactions resulting from the use of the premises. The records shall be supported by source documents such as sales slips, daily cash register tapes, purchase invoices, or other documents as necessary to allow CITY to easily determine the total gross income.

Any retail sales or charges will be recorded by means of cash registers or other comparable devices which display to the customer the amount of the transaction and automatically issue a sequentially numbered receipt. Totals registered shall be read and recorded at the beginning and end of each business day.

In the event of admission charges or rentals, OPERATOR shall issue serially numbered tickets or receipts for each such admission or rental and shall keep an adequate record of such tickets or receipts, as well as a record of unissued tickets or receipts.

All retail sales and charges may be recorded by a system other than cash registers or other comparable devices provided such system is approved by CITY.

- b. Financial Statements. Within sixty (60) days after the end of each agreement year as previously established herein, OPERATOR will, at its expense, submit to CITY a statement in which the total gross receipts and the corresponding amounts of rents paid CITY for the year are classified according to the categories of business established for any percentage rental and for any other business conducted on or from the premises. Said statement shall be signed by OPERATOR or its authorized agent attesting to the accuracy thereof, which shall be legally binding upon OPERATOR.
- c. Right to Inspect. All OPERATOR'S books of account, records, and supporting documentation, as described under Section 3.5a.

hereinabove, will be kept for at least five (5) years and made available to CITY in one location within the City of San Diego. Said books and records shall be maintained separate from all other accounts not relating to the premises. The CITY, at its discretion, shall have the right to inspect and audit the business of OPERATOR, its agents, sublessees, concessionaires, and licensees operating on and in connection with the premises as necessary and appropriate for CITY to determine the amounts of rent due CITY in compliance with the requirements of this agreement.

At CITY'S request, OPERATOR shall promptly provide, at OPERATOR'S expense, any necessary data to enable CITY to fully comply with all requirements of the state or federal government for operating agreement information or reports concerning the premises. Such data will include, if required, a detailed breakdown of OPERATOR'S receipts and expenses.

d. Audit Cost. The full cost of CITY'S audit(s) will be borne by CITY unless one or both of the following conditions exists, in which case OPERATOR hereby agrees to pay CITY'S cost of audit(s):

- (1) The audit(s) reveal an underpayment of more than five percent (5%) or more than \$10,000, whichever is less, between the rent due as reported and paid by OPERATOR pursuant to this agreement and rent due as determined by the audit(s); or
- (2) OPERATOR has failed to maintain complete and true books, records, accounts, and supporting source documents in strict accordance with this section hereof.

OPERATOR shall pay any deficiency determined by the audit(s) plus interest on such amount as defined in Section 3.6, Delinquent Rent and Audit Fees, hereof, within thirty (30) days of notice thereof by CITY. CITY will credit any overpayment against incoming rents. Any overpayment determined after the end of this agreement will be refunded by CITY within thirty (30) days of confirmation by the City Manager of the audit(s) findings.

- e. Default. OPERATOR'S failure to keep complete and accurate records by means of double-entry bookkeeping and make them available for CITY inspection is, like all other failures to comply with covenants of this agreement, a breach of this agreement and cause for termination.

- 3.6 Delinquent Rent and Audit Fees. If OPERATOR fails to pay the rent when due, OPERATOR will pay, in addition to the unpaid rents, five percent (5%) of the delinquent rent. If the rent is still unpaid at the end of fifteen (15) days, OPERATOR shall pay an additional five percent (5%) [being a total of ten percent (10%)], which is hereby mutually agreed by the parties hereto to be appropriate to compensate CITY for loss resulting from rental delinquency, including lost interest, opportunities, legal costs, and the cost of servicing the delinquent account. Notwithstanding the foregoing, in no event shall the charge for late payments of rent be less than Twenty-five Dollars (\$25).

In the event CITY audit(s), if applicable, discloses that the rent for the audited period(s) has been underpaid in excess of five percent (5%) of the total required rent, then OPERATOR shall pay CITY the cost of the audit(s) plus ten percent (10%) per year on the amount by which said rent was underpaid, in addition to the unpaid rents as shown to be due CITY, as compensation to CITY for administrative costs and loss of interest as previously described herein. In the event CITY audit(s) discloses that the unpaid rent is less than five percent (5%) of the total rent, and should OPERATOR fail to pay said unpaid rent within thirty (30) days after written notice from CITY, an additional fee of ten percent (10%) of said unpaid amount shall be added to the unpaid amount to compensate CITY for costs and losses due to such nonpayment. OPERATOR agrees to pay such amounts and further agrees that the specific late charges represent a fair and reasonable estimate of the costs that CITY will incur from OPERATOR'S late payment. Acceptance of late charges and any portion of the late payment by CITY shall in no event constitute a waiver of OPERATOR default with respect to late payment, nor prevent CITY from exercising any of the other rights and remedies granted in this agreement.

- 3.7 Unauthorized Use Charge. OPERATOR shall pay CITY twenty percent (20%) of the gross receipts for any service or use that is not permitted by this agreement. This payment is subject to the due date provided in this agreement for rental payments and the provision for delinquent rent. The existence of the twenty percent (20%) charge in this clause and the payment of this charge or any part of it, does not constitute an authorization for a particular service or use, and does not waive any

CITY rights to terminate a service or use or to default OPERATOR for participating in or allowing any unauthorized use of the premises.

SECTION 4: ASSIGNMENT

- 4.1 Time is of Essence; Provisions Binding on Successors. Time is of the essence of all of the terms, covenants, and conditions of this agreement, and, except as otherwise provided herein, all of the terms, covenants, and conditions of this agreement shall apply to, benefit, and bind the successors and assigns of the respective parties, jointly and individually.
- 4.2 Assignment and Subletting. OPERATOR shall not assign this agreement or any interest therein and shall not sublet the premises or any part thereof, or any right or privilege appurtenant thereto, or suffer any other person, except employees, agents, and guests of OPERATOR, to use or occupy the premises or any part thereof, without the prior written consent of the City Manager in each instance. A consent to assignment, subletting, occupation, or use by any other person shall not be deemed to be a consent to any subsequent assignment, subletting, occupation, or use by another person. Any such assignment or subletting without such consent shall be void and shall, at the option of CITY, terminate this agreement. This agreement shall not, nor shall any interest therein, be assignable as to the interest of OPERATOR by operation of law, without the written consent of the City Manager.

"Assignment" for the purposes of this clause shall include any transfer of any ownership interest of 50% or more, either in a single transaction or as a result of cumulative transactions by OPERATOR or by any partners, principals, or stockholders, as the case may be, from the original OPERATOR, its general partners, or principals.

Approval of any assignment or sublease shall be conditioned upon the assignee or sublessee agreeing in writing that it will assume the rights and obligations thereby assigned or subleased and that it will keep and perform all covenants, conditions, and provisions of this agreement which are applicable to the rights acquired. The City Manager shall require, as a condition to approval of any sublease of the majority portion of the leasehold or any assignment, that the OPERATOR pay additional consideration to CITY, as set forth in Section 4.4, Additional Consideration to CITY, hereof, shall commence on the effective date of such proposed sublease of the majority portion of the leasehold or assignment, and may further require that this agreement or the requested sublease otherwise be revised to comply with standard CITY agreement

requirements that are then current. Pursuant to City Charter Section 225, the City Manager must review and approve every person or entity which will have an interest in this agreement as a sublessee or assignee. The City Manager's approval will not be unreasonably withheld, provided all such persons and entities are of good character and reputation in the community.

- 4.3 Encumbrance. Subject to prior consent by CITY, which shall not be unreasonably withheld, OPERATOR may encumber this agreement, its leasehold estate, and its improvements thereon by deed of trust, mortgage, chattel mortgage, or other security instrument to assure the payment of a promissory note or notes of OPERATOR, upon the express condition that the proceeds of such loan or loans be devoted exclusively to the purpose of developing and operating the premises in accordance with the Development Agreement, and Reimbursement Agreement. However, a reasonable portion of the loan proceeds may be disbursed for payment of incidental costs of construction, including but not limited to the following: off-site improvements for service of the premises; on-site improvements; escrow charges; premiums for hazard insurance or other insurance or bonds required by CITY; title insurance premiums; reasonable loan costs such as discounts, interest, and commissions; and architectural, engineering, and attorneys' fees and other normal expenses incidental to such construction.

Any subsequent encumbrances on the premises or on any permanent improvements thereon must first have the approval in writing of the City Manager. Such subsequent encumbrances shall also be for the exclusive purpose of development and operation of the premises. Provided, however, after the premises are fully developed in accordance with said Development Plan and Reimbursement Agreement, to the satisfaction of the City Manager, proceeds from refinancing or from such subsequent encumbrances may be used to reduce OPERATOR'S equity so long as OPERATOR pays additional consideration to CITY as set forth in Section 4.4, Additional Consideration to CITY, hereof, and further that OPERATOR understands and specifically agrees that the City Manager shall have the sole and absolute discretion to approve, disapprove, or condition any such proposed subsequent encumbrance, including but not limited to amending the agreement to provide then-current rents and provisions.

In the event any such approved deed of trust or mortgage or other security-type instrument should at any time be in default and be foreclosed or transferred in lieu of foreclosure, CITY will accept the approved mortgagee or beneficiary thereof as its new tenant under this

agreement with all the rights, privileges, and duties granted and imposed in this agreement.

Upon prior written approval by CITY, said mortgagee or beneficiary may assign this agreement to its nominee, if nominee is a reputable, qualified, and financially responsible person or entity in the opinion of CITY. Any deed of trust, mortgage, or other security instrument shall be subject to all of the terms, covenants, and conditions of this agreement and shall not be deemed to amend or alter any of the terms, covenants, or conditions hereof. Pursuant to City Charter Section 225, the City Manager must review and approve every person or entity which will have a financial interest in this agreement. The City Manager's approval will not be unreasonably withheld, provided all such persons and entities are of good character and reputation in the community.

- 4.4 Additional Consideration to CITY. OPERATOR acknowledges that operation of the pool enhances the value of OPERATOR'S business. OPERATOR and CITY agree that the exact amount of such enhancement is impossible to ascertain. However, CITY desires to be reimbursed to a reasonable extent in consideration for granting operation of the pool to OPERATOR. Therefore, OPERATOR and CITY agree that in the event of an assignment, in the event of a subletting of the majority portion of the premises, or in the event of a refinancing creating an encumbrance against the premises after the permanent improvements have been constructed. OPERATOR shall pay to CITY one and one-half percent (1 1/2%) of the gross amount paid for the premises in connection with an approved assignment of the agreement, one and one-half percent (1 1/2%) of any amount paid OPERATOR in consideration of a sublease of all or a majority portion of the premises, or) one and one-half percent (1 1/2%) of the amount of any increased loan or encumbrance against the property over and above the amount of the then existing balance(s) of the existing encumbrance(s). The amount upon which the one and one-half percent (1 1/2%) shall be based shall be the total consideration resulting from the transaction including total cash payments and the market value of noncash consideration, including but not limited to stocks, bonds, deferred payments, secured and unsecured notes, and forbearance regarding claims and judgments. Prior to CITY'S consent to any assignment, majority subletting, or refinancing, OPERATOR shall deliver to CITY a written statement of all sums due and owing to CITY from OPERATOR pursuant to the provisions of this paragraph, together with an acknowledgment from the proposed assignee, sublessee, or refinancing agency as to the amount due CITY. The sum due CITY shall be payable in full to CITY concurrent with the completion of the transaction, be it an assignment, a sublease, or a refinancing. Any

assignment, subletting, or refinancing in violation of the terms and conditions of this paragraph shall be void. The provisions of this paragraph shall not apply to:

- a. An assignment or transfer of a beneficial interest in the premises resulting from devise, bequest, intestate succession, or by operation of law for the benefit of the spouse or descendants (i) of OPERATOR (if an individual) or (ii) of OPERATOR'S principal owner or chief executive officer (if OPERATOR is other than an individual);
- b. Such other assignment for which the City Manager determines that the legal and equitable ownership interests in the premises have remained unchanged, such as a change in the legal or fictitious name of the OPERATOR without any other change in the equity in beneficial use of, or legal title to, the premises as an asset or the income produced thereby.
- c. An assignment, subletting or refinancing of the value of OPERATOR'S real property (as shown on Exhibit 10.2) or any other interest of OPERATOR at any other location not a part of the premises.

4.5 Control by Specified Individuals or Entities. The corporation named herein as OPERATOR is presently wholly owned and controlled by Richard D. Meyer. The corporation shall continue to be owned and controlled by Richard D. Meyer, at least to the extent of fifty-one percent (51%) of the issued stock of said corporation. Meyer shall actively administer and supervise the business enterprise operated on the premises. In the event that Meyer shall become incapacitated, then the stockholders or heirs shall select an experienced manager acceptable to CITY to administer and supervise the operations.

Sale or transfer or stock or divestment of any interest in said corporation of 50% or more, either in a single transaction or as a result of cumulative transactions, shall be considered an assignment of interest and shall be treated in accordance with the provisions of Section 4.2, Assignment and Subletting and Section 4.4, Additional Consideration to CITY, hereof. Provided, however, that the stock of any stockholder may be assigned to his or her spouse or direct lineal heirs upon notifications in writing to CITY. For purposes of this Section 4.5, it is not intended that CITY approval be required for any assignment of less than 50% of the issued stock of said corporation, either in a single transaction or as a result of cumulative transactions. However, OPERATOR shall provide notice of such assignment(s) concurrently with completion of such transaction(s)

and shall pay additional consideration for any such assignment in accordance with Section 4.4.

4.6 Defaults and Remedies.

a. Default. In the event that:

- (1) OPERATOR shall default in the performance of any covenant or condition required by this agreement to be performed by OPERATOR and shall fail to cure said default within thirty (30) days following written notice thereof from CITY; or if any such default is not curable within thirty (30) days, and OPERATOR shall fail to commence to cure the default(s) within said thirty-day period and diligently pursue such cure to completion; or
- (2) OPERATOR shall voluntarily file or have involuntarily filed against it any petition under any bankruptcy or insolvency act or law; or
- (3) OPERATOR shall be adjudicated a bankrupt; or
- (4) OPERATOR shall make a general assignment for the benefit of creditors;

then CITY may, at its option, without further notice or demand upon OPERATOR or upon any person claiming rights through OPERATOR, immediately terminate this agreement and all rights of OPERATOR and of all persons claiming rights through OPERATOR to the premises or to possession thereof; and CITY may enter and take possession of the premises. Provided, however, in the event that any default described in Section 4.6a.(1), hereinabove is not curable within thirty (30) days after notice to OPERATOR, CITY shall not terminate this agreement pursuant to the default if OPERATOR immediately commences to cure the default and diligently pursues such cure to completion.

In the event there is a deed of trust or mortgage on the leasehold interest, CITY shall give the mortgagee or beneficiary written notice of the default(s) complained of, and the same mortgagee or beneficiary shall have thirty (30) days from such notice to cure the default(s) or, if any such default is not curable within thirty (30) days, to commence to cure the default(s) and diligently pursue such cure to completion. The thirty-day period may be extended during

such time as mortgagee or beneficiary pursues said cure with reasonable diligence.

- b. Remedies of Lender. Should the default(s) be noncurable by OPERATOR, then any lender holding a beneficial interest in the leasehold, whose qualifications as an assignee have been approved by CITY, shall have the absolute right to substitute itself to the estate of OPERATOR hereunder and to commence performance of this agreement. If such mortgagee or beneficiary shall give notice in writing of its election to so substitute itself within the thirty-day period after receiving written notice by CITY of the default, and the default, if curable, is cured by such mortgagee or beneficiary, then this agreement shall not terminate pursuant to the default. In that event, CITY expressly consents to the substitution and authorizes the mortgagee or beneficiary to perform under this agreement with all the rights, privileges, and obligations of OPERATOR, subject to cure of the default, if possible, by mortgagee or beneficiary. OPERATOR expressly agrees to assign all its interest in and to its leasehold estate to mortgagee or beneficiary in that event.
- c. Abandonment by OPERATOR. Even though OPERATOR has breached the agreement and abandoned the property, this agreement shall continue in effect for so long as CITY does not terminate this agreement, and CITY may enforce all its rights and remedies hereunder, including but not limited to the right to recover the rent as it becomes due, plus damages.
- d. Waiver. Any CITY waiver of a default is not a waiver of any other default. Any waiver of a default must be in writing and be executed by the City Manager in order to constitute a valid and binding waiver. CITY delay or failure to exercise a remedy or right is not a waiver of that or any other remedy or right under this agreement. The use of one remedy or right for any default does not waive the use of another remedy or right for the same default or for another or later default. CITY'S acceptance of any rents is not a waiver of any default preceding the rent payment. CITY and OPERATOR specifically agree that the property constituting the premises is CITY-owned and held in trust for the benefit of the citizens of the City of San Diego and that any failure by the City Manager or CITY staff to discover a default or take prompt action to require the cure of any default shall not result in an equitable estoppel, but CITY shall at all times, have the legal right to require the cure of any default when and as such defaults are discovered or when and as the City Council directs the City Manager to take action or require the cure

of any default after such default is brought to the attention of the City Council by the City Manager or by any concerned citizen.

- 4.7 Eminent Domain. If all or part of the premises are taken through condemnation proceedings or under threat of condemnation by any public authority with the power of eminent domain, the interests of CITY and OPERATOR (or beneficiary or mortgagee) will be as follows:
- a. In the event the entire premises are taken, this agreement shall terminate on the date of the transfer of title or possession to the condemning authority, whichever first occurs.
 - b. In the event of a partial taking, if, in the opinion of CITY, the remaining part of the premises is unsuitable for operation, this agreement shall terminate on the date of the transfer of title or possession to the condemning authority, whichever first occurs.
 - c. In the event of a partial taking, if, in the opinion of CITY, the remaining part of the premises is suitable for continued agreement operation, this agreement shall terminate in regard to the portion taken on the date of the transfer of title or possession to the condemning authority, whichever first occurs, but shall continue for the portion not taken. The minimum rent shall be equitably reduced to reflect the portion of the premises taken.
 - d. Award. All monies awarded in any such taking shall belong to CITY, whether such taking results in diminution in value of the leasehold or the fee or both; provided, however, OPERATOR shall be entitled to any award attributable to the taking of, or damages to OPERATOR'S then remaining leasehold interest in installations or improvements of OPERATOR. CITY shall have no liability to OPERATOR for any award not provided by the condemning authority.
 - e. Transfer. CITY has the right to transfer CITY'S interests in the premises in lieu of condemnation to any authority entitled to exercise the power of eminent domain. If a transfer occurs, OPERATOR shall retain whatever interest it may have in the fair market value of any improvements placed by it on the premises in accordance with this agreement.
 - f. No Inverse Condemnation. The exercise of any CITY right under this agreement shall not be interpreted as an exercise of the power of

eminent domain and shall not impose any liability upon CITY for inverse condemnation.

SECTION 5: INSURANCE RISKS/SECURITY

5.1 Indemnity. OPERATOR agrees to defend, indemnify, protect, and hold the CITY, its agents, officers, and employees harmless from and against any and all claims asserted or liability established for damages or injuries to any person or property, including injury to OPERATOR'S employees, invitees, guests, agents, or officers, which arise out of or are in any manner directly or indirectly connected with the development or operation of the leasehold or the work and operations to be performed under this agreement, and all expenses of investigating and defending against same; provided, however, that OPERATOR'S duty to indemnify and hold harmless shall not include any claims or liability arising from the established active negligence, sole negligence, or sole willful misconduct of the CITY, its agents, officers, or employees.

5.2 Insurance.

a. OPERATOR shall take out and maintain at all times during the term of this agreement the following insurance at its sole expense:

- (1) Public liability and property damage insurance in the amount of not less than One Million Dollars (\$1,000,000) Combined Single Limit Liability with an occurrence claims form and a minimum of Two Million Dollars (\$2,000,000) general aggregate. This policy shall cover all injury or damage, including death, suffered by any party or parties from acts or failures to act by CITY or OPERATOR or by authorized representatives of CITY or OPERATOR on or in connection with the use or operation of the premises.
- (2) Fire, extended coverage, and vandalism insurance policy on all insurable property on the premises in an amount to cover 100 percent of the replacement cost. Any proceeds from a loss shall be payable jointly to CITY and OPERATOR. The proceeds shall be placed in a trust fund to be reinvested in rebuilding or repairing the damaged property. If there is a mortgage or trust deed on the leasehold in accordance with Section 4.3, Encumbrance, hereof, the proceeds may be paid to the approved mortgagee or beneficiary so long as adequate provision reasonably satisfactory to CITY has been made in

each case for the use of all proceeds for repair and restoration of damaged or destroyed improvements on the premises.

b. OPERATOR'S responsibility to maintain said insurance also includes the following:

- (1) Additional Insured. All insurance policies will name CITY as an additional insured, protect CITY against any legal costs in defending claims, and will not terminate without sixty (60) days' prior written notice to CITY. All insurance companies must be satisfactory to CITY and licensed to do business in California. All policies will be in effect on or before the first day of the agreement, except "course of construction fire insurance" shall be in force on commencement of all authorized construction on the premises, and full applicable fire insurance coverage shall be effective upon completion of each insurable improvement. A copy of the insurance policy will remain on file with CITY during the entire term of the agreement. At least thirty (30) days prior to the expiration of each policy, OPERATOR shall furnish a certificate(s) showing that a new or extended policy has been obtained which meets the terms of this agreement.
- (2) Modification. CITY, at its discretion, may require the revision of amounts and coverages at any time during the term by giving OPERATOR sixty (60) days' prior written notice. CITY'S requirements shall be designed to assure protection from and against the kind and extent of risk existing on the premises. OPERATOR also agrees to obtain any additional insurance required by CITY for new improvements, in order to meet the requirements of this agreement.
- (3) Accident Reports. OPERATOR shall report to CITY any accident causing more than Ten Thousand Dollars (\$10,000) worth of property damage or any serious injury to persons on the premises. This report shall contain the names and addresses of the parties involved, a statement of the circumstances, the date and hour, the names and addresses of any witnesses, and other pertinent information.
- (4) Failure to Comply. If OPERATOR fails or refuses to take out and maintain the required insurance or fails to provide the proof of coverage, CITY has the right to obtain the insurance. OPERATOR shall reimburse CITY for the premiums paid with interest at the maximum allowable legal rate then in effect in

California. CITY shall give notice of the payment of premiums within thirty (30) days of payment stating the amount paid, names of the insurer(s), and rate of interest. Said reimbursement and interest shall be paid by OPERATOR on the first (1st) day of the month following the notice of payment by CITY.

Notwithstanding the preceding provisions of this Subsection (4), if OPERATOR fails or refuses to take out or maintain insurance as required in this agreement or fails to provide the proof of insurance, CITY has the right to declare this agreement in default without further notice to OPERATOR, and CITY shall be entitled to exercise all legal remedies in the event of such default.

- 5.3 Waste, Damage, or Destruction. OPERATOR agrees to give notice to CITY of any fire or other damage that may occur on the premises within ten (10) days of such fire or damage. OPERATOR agrees not to commit or suffer to be committed any waste or injury or any public or private nuisance, to keep the premises clean and clear of refuse and obstructions, and to dispose of all garbage, trash, and rubbish in a manner satisfactory to CITY. If the premises shall be damaged by any cause which puts the premises into a condition which is not decent, safe, healthy, and sanitary, OPERATOR agrees to make or cause to be made full repair of said damage and to restore the premises to the condition which existed prior to said damage; or, at CITY'S option, OPERATOR agrees to clear and remove from the premises all debris resulting from said damage and rebuild the premises in accordance with plans and specifications previously submitted to CITY and approved in writing in order to replace in kind and scope the operation which existed prior to such damage, using for either purpose the insurance proceeds as set forth in Section 5.2, Insurance, hereof.

OPERATOR agrees that preliminary steps toward performing repairs, restoration, or replacement of the premises shall be commenced by OPERATOR within thirty (30) days, and the required repairs, restoration, or replacement shall be completed within a reasonable time thereafter. CITY may determine an equitable deduction in the minimum annual rent requirement for such period or periods that said premises are untenable by reason of such damage.

SECTION 6: IMPROVEMENTS/ALTERATIONS/REPAIRS

- 6.1 Acceptance of Premises. By signing this agreement, OPERATOR represents and warrants that it has independently inspected plans for the premises (as set forth in Attachment 10.3) and the Reimbursement Agreement, and has approved each. OPERATOR further warrants that it will, within 30 days of the issuance of the Notice of Completion for the premises, conduct an inspection of same. OPERATOR will not hold CITY responsible for any defects whether apparent or latent, in the premises, including the presence of any hazardous waste.
- 6.2 Entry and Inspection. CITY reserves and shall always have the right, but not the obligation, to enter said premises for the purpose of viewing and ascertaining the condition of the same, or to protect its interests in the premises, or to inspect the operations conducted thereon. Except in the event of an emergency, such entry shall be limited to normal business hours. In the event that such entry or inspection by CITY discloses that said premises are not in a decent, safe, healthy, and sanitary condition, CITY shall have the right, after ten (10) days' written notice to OPERATOR, to have any necessary maintenance work done at the expense of OPERATOR, and OPERATOR hereby agrees to pay promptly any and all costs incurred by CITY in having such necessary maintenance work done, in order to keep said premises in a decent, safe, healthy, and sanitary condition. Further, if at any time CITY determines that said premises are not in a decent, safe, healthy, and sanitary condition, CITY may at its sole option, without additional notice, require OPERATOR to file with CITY a faithful performance bond to assure prompt correction of any condition which is not decent, safe, healthy, and sanitary. Said bond shall be in an amount adequate in the opinion of CITY to correct the said unsatisfactory condition. OPERATOR shall pay the cost of said bond. The rights reserved in this section shall not create any obligations on CITY or increase obligations elsewhere in this agreement imposed on CITY.
- 6.3 Maintenance. OPERATOR agrees to assume full responsibility and cost for the operation and maintenance of the premises throughout the term. OPERATOR will make all repairs and replacements necessary to maintain and preserve the premises in a decent, safe, healthy, and sanitary condition satisfactory to CITY and in compliance with all applicable laws.
- 6.4 Improvements/Alterations. No improvements, structures, or installations shall be constructed on the premises with the exception of normal maintenance, repairs and/or replacements. The premises may not be altered by OPERATOR without prior written approval by the City

Manager. Further, OPERATOR agrees that major structural or architectural design alterations to approved improvements, structures, or installations may not be made on the premises without prior written approval by the City Manager and that such approval shall not be unreasonably withheld. This provision shall not relieve OPERATOR of any obligation under this agreement to maintain the premises in a decent, safe, healthy, and sanitary condition, including structural repair and restoration of damaged or worn improvements. CITY shall not be obligated by this agreement to make or assume any expense for any improvements or alterations.

The foregoing notwithstanding, OPERATOR agrees that it may submit a plan for construction of a canopy or a "bubble" cover over all or part of the swimming pool. CITY agrees that the concept of such canopy or "bubble" cover is acceptable, and that it shall reasonably consider said plan providing that the cost of construction shall be the sole responsibility of OPERATOR.

- 6.5 Utilities. OPERATOR agrees to order, obtain, and pay for all utilities and service and installation charges in connection with the operation of the premises. CITY and OPERATOR agree that all initial utilities will be installed pursuant to the Development Agreement and Reimbursement Agreement. Operator further agrees that if any additional utilities are installed after the date of commencement of the operating agreement, OPERATOR will pay the cost of any such installations and insure that they are placed underground.
- 6.6 Construction Bond. Whenever there is any construction to be performed on the premises, in excess of Five Thousand Dollars (\$5,000.00), OPERATOR shall deposit with CITY, prior to commencement of said construction, a faithful performance bond in the amount of 100 percent of the estimated construction cost of the work to be performed. The bond may be in cash or may be a corporate surety bond or other security satisfactory to CITY. The bond shall insure that the construction commenced by OPERATOR shall be completed in accordance with the plans approved by CITY or, at the option of CITY, that the uncompleted construction shall be removed and the premises restored to a condition satisfactory to CITY. The bond or cash will be held in trust by CITY for the purpose specified above or at CITY'S option it may be placed in an escrow or other trust approved by CITY.
- 6.7 Liens. OPERATOR shall at all times save CITY free and harmless and indemnify CITY against all claims for labor or materials in connection with operations, improvements, alterations, or repairs on or to the

premises and the costs of defending against such claims, including reasonable attorney's fees.

If improvements, alterations, or repairs are made to the premises by OPERATOR or by any party other than CITY, and a lien or notice of lien is filed, OPERATOR shall within five (5) days of such filing either:

- a. take all actions necessary to record a valid release of lien, or
- b. file with CITY a bond, cash, or other security acceptable to CITY sufficient to pay in full all claims of all persons seeking relief under the lien.

6.8 Taxes. OPERATOR agrees to pay, before delinquency, all taxes, assessments, and fees assessed or levied upon OPERATOR or the premises, including the land, any buildings, structures, machines, equipment, appliances, or other improvements or property of any nature whatsoever erected, installed, or maintained by OPERATOR or levied by reason of the business or other OPERATOR activities related to the premises, including any licenses or permits. OPERATOR recognizes and agrees that this agreement may create a possessory interest subject to property taxation, and that OPERATOR may be subject to the payment of taxes levied on such interest, and that OPERATOR shall pay all such possessory interest taxes. OPERATOR further agrees that payment for such taxes, fees and assessments will not reduce any rent due CITY.

6.9 Signs. OPERATOR agrees not to erect or display any banners, pennants, flags, posters, signs, decorations, marquees, awnings, or similar devices or advertising without the prior written consent of CITY. If any such unauthorized item is found on the premises, OPERATOR agrees to remove the item at its expense within 24 hours notice thereof by CITY, or CITY may thereupon remove the item at OPERATOR'S cost. However, normal pool operational and/or directional and/or event-related signs are deemed acceptable provided said signs are not visible from outside the premises.

6.10 Ownership of Improvements and Personal Property.

- a. Any and all improvements, trade fixtures, structures, and installations or additions to the premises constructed on the premises by OPERATOR shall at agreement expiration or termination be deemed to be part of the premises and shall become, at CITY'S option, CITY'S property free of all liens and claims, except as otherwise provided in this agreement.

- b. If CITY elects not to assume ownership of all or any improvements, trade fixtures, structures, and installations, CITY shall so notify OPERATOR thirty (30) days prior to termination or one hundred eighty (180) days prior to expiration, and OPERATOR shall remove all such improvements, structures and installations as directed by CITY at OPERATOR'S sole cost on or before agreement expiration or termination. If OPERATOR fails to remove any improvements, structures, and installations as directed, OPERATOR agrees to pay CITY the full cost of any removal.
 - c. OPERATOR-owned machines, appliances, equipment (other than trade fixtures), and other items of personal property shall be removed by OPERATOR by the date of the expiration or termination of this agreement. Any said items which OPERATOR fails to remove will be considered abandoned and become CITY'S property free of all claims and liens, or CITY may, at its option, remove said items at OPERATOR'S expense.
 - d. If any removal of such personal property by OPERATOR results in damage to the remaining improvements on the premises, OPERATOR agrees to repair all such damage.
 - e. Any necessary removal by either CITY or OPERATOR which takes place beyond said expiration or termination hereof shall require OPERATOR to pay rent to CITY at the rate in effect immediately prior to said expiration or termination.
 - f. Notwithstanding any of the foregoing, in the event OPERATOR desires to dispose of any of its personal property used in the operation of said premises upon expiration or termination of this agreement, then CITY shall have the first right to acquire or purchase said personal property.
- 6.11 Unavoidable Delay. If the performance of any act required of CITY or OPERATOR is directly prevented or delayed by reason of strikes, lockouts, labor disputes, unusual governmental delays, acts of God, fire, floods, epidemics, freight embargoes, or other causes beyond the reasonable control of the party required to perform an act, said party shall be excused from performing that act for the period equal to the period of the prevention or delay. Provided, however, this provision shall not apply to obligations to pay rental as required pursuant to this agreement. In the event OPERATOR or CITY claims the existence of such a delay, the party claiming the delay shall notify the other party in

writing of such fact within ten (10) days after the beginning of any such claimed delay.

- 6.12 Hazardous/Toxic Waste. OPERATOR will not allow the installation of additional underground storage tanks or release of hazardous substances in, on, under, or from the premises. The foregoing shall not preclude OPERATOR from using normal pool operational materials on the premises. For the purposes of this provision, a release shall include but not be limited to any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leeching, dumping, or otherwise disposing of hazardous substances. "Hazardous substances" shall mean those hazardous substances listed by the Environmental Protection Agency in regularly released reports and any other substances incorporated into the State's list of hazardous substances. A copy of the presently effective EPA and the State lists is on file in the Office of the City Clerk as Document 769704 and by this reference is incorporated herein.

In the event of any release of a hazardous substance, OPERATOR shall be responsible for all costs of remediation and removal of such substances in accordance with all applicable rules and regulations of governmental authorities.

OPERATOR agrees to assume the defense of, indemnify, and hold CITY harmless from any and all claims, costs, and expenses related to environmental liabilities resulting from OPERATOR'S operations on the premises, including but not limited to costs of environmental assessments, costs of remediation and removal, any necessary response costs, damages for injury to natural resources or the public, and costs of any health assessment or health effect studies.

If OPERATOR knows or has reasonable cause to believe that any hazardous substance has been released on or beneath the premises, OPERATOR shall give written notice to the City Manager within ten (10) days of receipt of such knowledge or cause for belief. Provided, however, if OPERATOR knows or has reasonable cause to believe that such substance is an imminent and substantial danger to public health and safety, OPERATOR shall notify the City Manager immediately upon receipt of this knowledge or belief and shall take all actions necessary to alleviate such danger. OPERATOR will notify the City Manager immediately of any notice of violation received or initiation of environmental actions or private suits relative to the premises. In addition, OPERATOR and OPERATOR'S sublessees shall not utilize or sell

any hazardous substance on the property without the prior written consent of CITY.

At any time within the twelve (12) months before the expiration or earlier termination of this agreement, OPERATOR, at CITY'S sole option, shall cause an environmental assessment of the premises to be completed by a professional environmental consultant registered with the State of California as a Professional Engineer, Certified Engineering Geologist, or Registered Civil Engineer. Said environmental assessment shall be obtained at the sole cost and expense of OPERATOR and shall establish what, if any, hazardous substances exist on, in, or under the premises, and in what quantities. If any hazardous substances exist in quantities greater than that allowed by CITY, county, state, or federal laws, statutes, ordinances, or regulations, then said environmental assessment shall include a discussion of these substances with recommendations for remediation and removal necessary to effect compliance with those laws or statutes and estimates of the cost of such remediation or removal. OPERATOR shall cause the remediation and/or removal recommended in the environmental assessment such that compliance with environmental law is achieved and shall be solely responsible for all costs and expenses incurred.

SECTION 7: GENERAL PROVISIONS

7.1 Notices

- a. Any notice required or permitted to be given hereunder shall be in writing and may be served personally or by United States mail, postage prepaid, addressed to OPERATOR at the premises or at such other address designated in writing by OPERATOR; and to CITY as follows:

City Manager
Attention Real Estate Assets Director
City Administration Building
202 "C" Street, M.S. 9B
San Diego, CA 92101-4155

or to any mortgagee, trustee, or beneficiary, as applicable, at such appropriate address designated in writing by the respective party.

- b. Any party entitled or required to receive notice under this agreement may by like notice designate a different address to which notices shall be sent.
- 7.2 Compliance with Law. OPERATOR shall at all times in the construction, maintenance, occupancy, and operation of the premises comply with all applicable laws, statutes, ordinances, and regulations of CITY, county (including, but not limited to the county's Department of Environmental Health Services' requirements for the safe operation of a public swimming pool), state, and federal governments at OPERATOR'S sole cost and expense. In addition, OPERATOR shall comply with any and all notices issued by the City Manager or his authorized representative under the authority of any such law, statute, ordinance, or regulation.
- 7.3 CITY Approval. The approval or consent of CITY, wherever required in this agreement, shall mean the written approval or consent of the City Manager unless otherwise specified, without need for further resolution by the City Council.
- 7.4 Nondiscrimination. OPERATOR agrees not to discriminate in any manner against any person or persons on account of race, color, religion, gender, sexual orientation, medical status, national origin, age, marital status, or physical disability in OPERATOR'S use of the premises, including but not limited to the providing of goods, services, facilities, privileges, advantages, and accommodations, and the obtaining and holding of employment.
- 7.5 Compliance with CITY'S Equal Opportunity Contracting Program.
- a. Equal Opportunity Contracting. OPERATOR shall submit to the Project Manager statistical information as requested in the City of San Diego Contract Activity Report indicating the amount of subcontracting provided by firms during the period covered by the report. This information should be accompanied by an invoice from each subconsultant/subcontractor/ vendor/service provider listed in the report.
 - b. Equal Employment Opportunity. OPERATOR will comply with Title VII of the Civil Rights Act of 1964, as amended; Executive Orders 11246, 11375, and 12086; the California Fair Employment Practices Act; and any other applicable federal and state laws and regulations hereafter enacted. OPERATOR will not discriminate against any employee or applicant for employment based on race, religion, color,

ancestry, age, gender, sexual orientation, disability, medical condition, or place of birth.

Upon request by the City of San Diego, OPERATOR will submit a current Work Force Report and, if required, an Equal Employment Opportunity Plan which sets forth the actions that OPERATOR will take to achieve the CITY'S goals for the employment of African Americans, American Indians, Asians, Filipinos, Latinos, women, and people with disabilities.

Further, OPERATOR will cause the foregoing provisions to be inserted in all subcontracts for any work covered by this agreement so that such provisions will be binding upon each subcontractor.

- c. Local Business and Employment. OPERATOR acknowledges that the City of San Diego seeks to promote employment and business opportunities for local residents and firms on all CITY contracts. OPERATOR will, to the extent legally possible, solicit applications for employment, and bids and proposals for subcontracts, for work associated with this agreement from local residents and firms as opportunities occur. OPERATOR agrees to hire qualified local residents and firms whenever feasible.

OPERATOR understands that failure to comply with the above requirements and/or submitting false information in response to these requirements may result in termination of this agreement and debarment from participating in CITY contracts for a period of not less than one (1) year.

- 7.6 Partial Invalidity. If any term, covenant, condition, or provision of this agreement is found invalid, void, or unenforceable by a court of competent jurisdiction, the remaining provisions will remain in full force and effect.
- 7.7 Legal Fees. In the event of any litigation regarding this agreement, the prevailing party shall be entitled to an award of reasonable legal costs, including court and attorneys' fees.
- 7.8 Number and Gender. Words of any gender used in this agreement shall include any other gender, and words in the singular number shall include the plural, when the tense requires.
- 7.9 Captions. The Agreement Outline, section headings, and captions for various articles and paragraphs shall not be held to define, limit,

augment, or describe the scope, content, or intent of any or all parts of this agreement. The numbers of the paragraphs and pages of this agreement may not be consecutive. Such lack of consecutive numbers is intentional and shall have no effect on the enforceability of this agreement.

- 7.10 Entire Understanding. This agreement contains the entire understanding of the parties. OPERATOR, by signing this agreement, agrees that there is no other written or oral understanding between the parties with respect to the premises. Each party has relied on its own examination of the premises, advice from its own attorneys, and the warranties, representations, and covenants of the agreement itself. Each of the parties in this agreement agrees that no other party, agent, or attorney of any other party has made any promise, representation, or warranty whatsoever which is not contained in this agreement.

The failure or refusal of any party to read the agreement or other documents, inspect the premises, and obtain legal or other advice relevant to this transaction constitutes a waiver of any objection, contention, or claim that might have been based on these actions. No modification, amendment, or alteration of this agreement will be valid unless it is in writing and signed by all parties.

- 7.11 CITY Employee Participation Policy. It is the policy of CITY that all CITY contracts, agreements, or agreements with lessees, consultants, vendors, or OPERATORS shall include a condition that the contract, agreement, or lease may, at the sole option of CITY, be unilaterally and immediately terminated by CITY if the contractor or OPERATOR employs an individual who, within the twelve months immediately preceding such employment, did in his/her capacity as a CITY officer or employee participate in negotiations with or otherwise have an influence on the recommendation made to the City Council in connection with the selection of the contractor or OPERATOR. It is not the intent of this policy that these provisions apply to members of the City Council.

- 7.12 Drug-free Workplace. OPERATOR shall be required to abide by the omnibus drug legislation passed by Congress on November 18, 1988, by adopting and enforcing a policy to maintain a drug-free workplace by doing all of the following:

- a. Publish a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of controlled substances are prohibited on the premises and specifying

the actions that will be taken against employees for violations of the prohibition.

- b. Establishing a drug-free awareness program to inform employees about all of the following:
 - (1) The dangers of drug abuse in the workplace.
 - (2) The OPERATOR'S policy of maintaining a drug-free workplace.
 - (3) Any available drug counseling, rehabilitation, and employees assistance programs.
 - (4) The penalties that may be imposed upon employees' for drug abuse violations.
- c. OPERATOR shall include in each sublease agreement language which indicates the sublessee's agreement to abide by the provisions of a drug-free workplace. OPERATOR and sublessees shall be individually responsible for their own drug-free workplace programs.

7.13 Disabled Access Compliance. OPERATOR agrees to comply with the California Government Code, Sections 11135-11139.5; the Federal Rehabilitation Act of 1973, Section 504, Title V; the Americans with Disabilities Act of 1990 (ADA); and any other applicable state and federal laws and regulations hereafter enacted protecting the rights of people with disabilities. OPERATOR'S compliance shall include but not necessarily be limited to the following:

- a. OPERATOR shall not discriminate against qualified persons with disabilities in any aspects of employment, including recruitment, hiring, promotions, conditions and privileges of employment, training, compensation, benefits, discipline, layoffs, and termination of employment.
- b. No qualified individual with a disability may be excluded on the basis of disability from participation in, or be denied the benefits of, services, programs, or activities of OPERATOR.
- c. OPERATOR shall post a statement addressing the requirements of the ADA in a prominent place at the work site.
- d. Where required by law, OPERATOR shall comply with CITY'S disabled access requirements by bringing up to code and making

accessible any areas of the premises which deny access to disabled persons. All such improvements and alterations shall be at the sole cost of OPERATOR.

- e. OPERATOR shall include language in each sublease agreement which indicates the sublessee's agreement to abide by the foregoing provisions. OPERATOR and sublessees shall be individually responsible for their own ADA employment programs.

OPERATOR understands that failure to comply with the above requirements and/or submitting false information in response to these requirements shall constitute a default under this agreement.

SECTION 8: SPECIAL PROVISIONS

- 8.1 Corporate Authority. Each individual executing this agreement on behalf of OPERATOR represents and warrants that he/she is duly authorized to execute and deliver this agreement on behalf of said corporation, in accordance with a duly adopted resolution of the Board of Directors of the corporation or in accordance with the bylaws of the corporation, and that this agreement is binding upon the corporation in accordance with its terms, and that OPERATOR is a duly qualified corporation and all steps have been taken prior to the date hereof to qualify OPERATOR to do business in the state where the premises are situated.
- 8.2 Standard of Employees. OPERATOR and its employees shall at all times conduct themselves and the operations on the premises in a creditable manner.

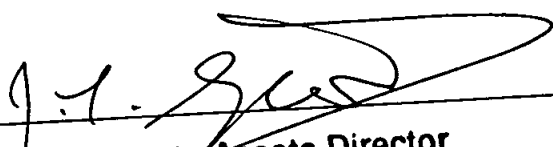
SECTION 9: SIGNATURES

9.1 Signature Page.

IN WITNESS WHEREOF, this operating agreement is executed by CITY, acting by and through its City Manager, and by OPERATOR, acting by and through its lawfully authorized officers.

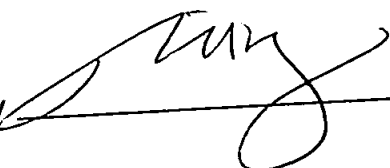
THE CITY OF SAN DIEGO

Date AUG 07 1995

By 
Real Estate Assets Director

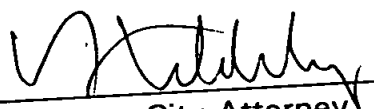
OPERATOR: SOUTHERN CALIFORNIA
FITNESS, INC.

Date 7/10/95

By  President

APPROVED as to form and legality this 15 day of August, 1995.

JOHN W. WITT, City Attorney

By 
Deputy City Attorney

LMF:rc-t
7/06/95
H:\WPDATA\WP{WP}.BK1

SECTION 10: EXHIBITS

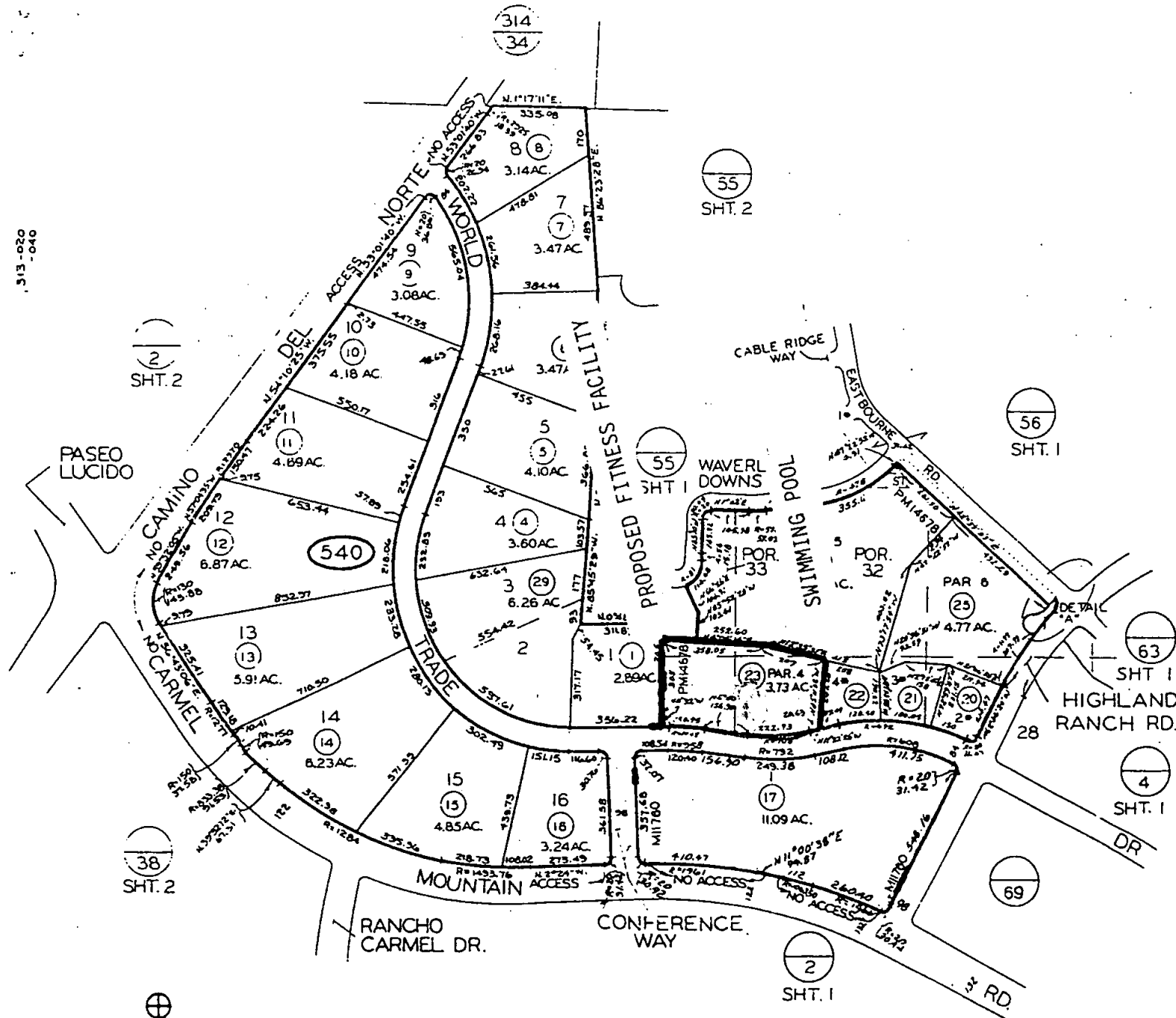
10.1 Legal Description.

Being the southerly portion of Parcel 4 of Parcel Map No. 14678, located in the City of San Diego, County of San Diego, State of California, said parcel map being recorded by the County of said county on February 12, 1987 as File no. 87-079344 of Official Records. Said Parcel consists of 1.3 acres, more or less.

ORIGINAL

313-54
SHT. 1 OF 3

1" = 400'



CHANGES			
BLK	OLD	NEW	PRICE
540	1-17	87	99
141	1-17	87	1260
142	1-17	87	1260
143	1-17	87	1260
144	1-17	87	1260
145	1-17	87	1260
146	1-17	87	1260
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- 1 = WERRIS CREEK LN.
- 2 = PAR. 1, 1.00 AC
- 3 = PAR. 2, 1.00 AC
- 4 = PAR. 3, 1.00 AC

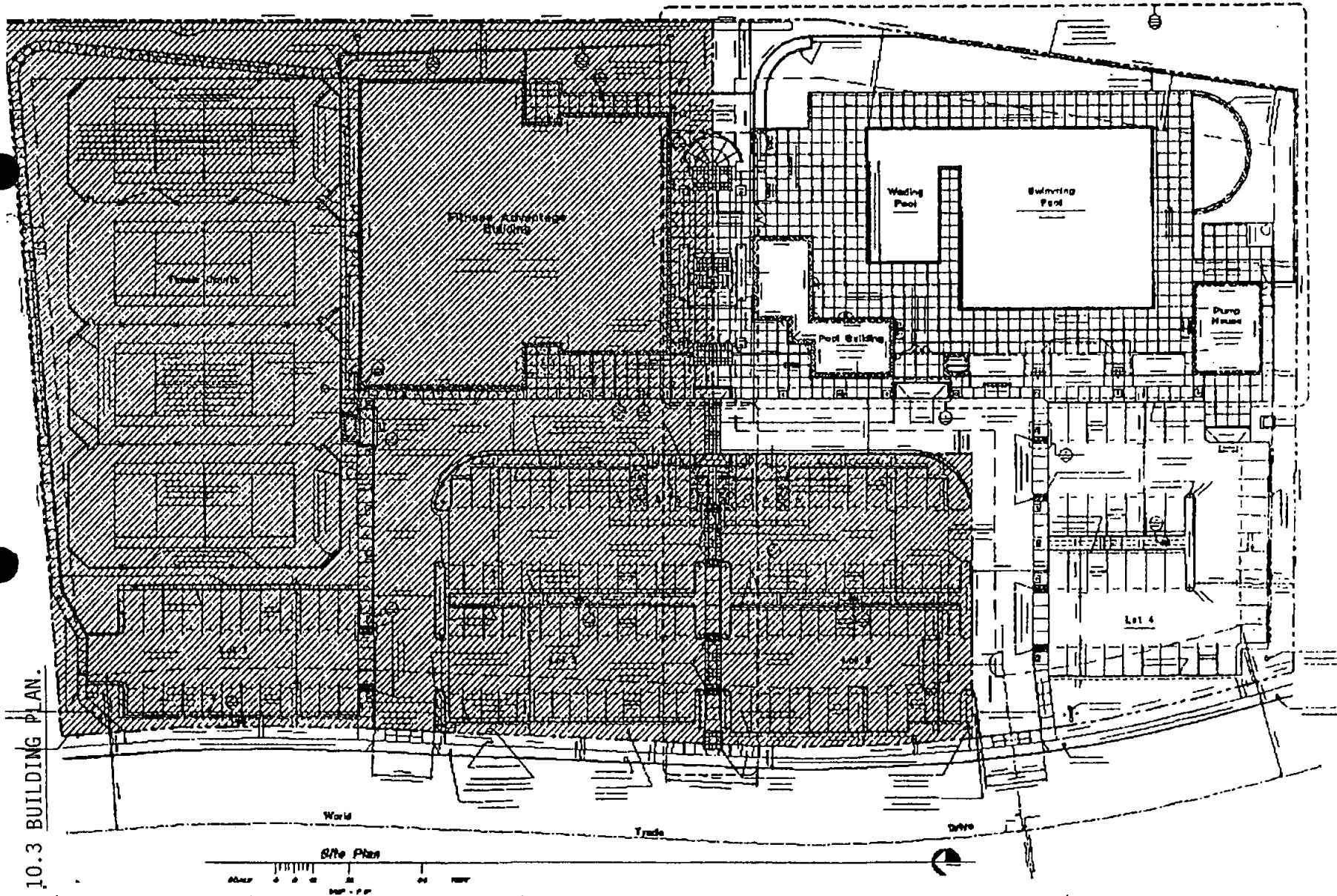
DETAIL "A"
NO SCALE

MAP 11760 - CARMEL MOUNTAIN RANCH UNIT 31
MAP 11568 - CARMEL MOUNTAIN RANCH INDUSTRIAL UNIT NO. 2
MAP 1738 - POMPEII FARMS CO. SUB-POR.

SAN DIEGO COUNTY
ASSESSOR'S MAP
BOOK 313 PAGE 54 SHT. 1 OF 3
MADE FOR ASSESSMENT PURPOSES ONLY

10.3 BUILDING PLAN.

Crashatched Portion of Site Plan Under Separate Permit



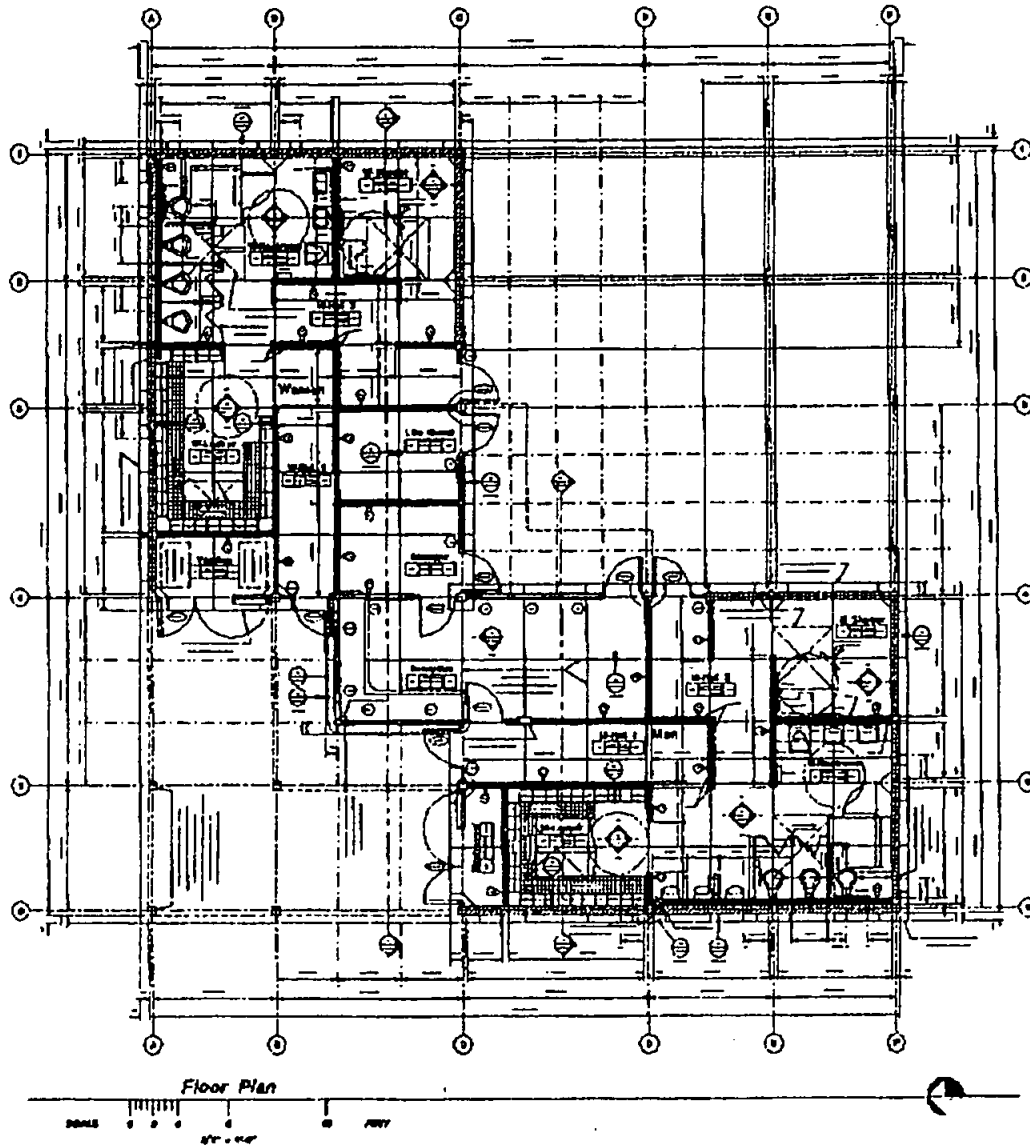
M.W. STEELE
GROUP INC.
ARCHITECTURE
PLANNING
INTERIOR DESIGN
7801 Deane Lane
La Jolla, CA 92037
Phone 619-450-7600
Fax 619-450-5600



COMMUNITY POOL
UNIVERSITY MOUNTAIN PARK
SANDS SPRING

DATE: 11/11/99
BY: [Signature]
CHECKED BY: [Signature]
APPROVED BY: [Signature]

ALL



MW STEELE
GROUP INC.
ARCHITECTS
PLANNING
INTERIOR DESIGN
7401 DOWNEY LANE
LOS ANGELES, CA 90047
PHONE 310-450-7700
FAX 310-450-0660



**COMMUNITY
POOL**
CINDAL
MOUNTAIN
BANCHE
MOUNTAIN VIEW

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**POOL
BUILDING
FLOOR PLAN
& SCHEDULE**

A21

Floor Plan
KC-130

COMMUNITY
POOL
CARRIE
MOUNTAIN
RANCH
-
GAMES SERVICE

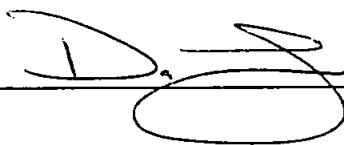
[illegible]

A13

10.4 Corporate Name.

Southern California Fitness, Inc.
CORPORATE NAME

I, Dan Murphy, certify that I am the
Secretary of the corporation named in the attached
agreement; that Richard D. Meyer, who signed this agreement on behalf of
the corporation, was then President of said corporation; that said
agreement was duly signed for and on behalf of said corporation by authority of its
governing body, pursuant to a resolution duly adopted by its Board of Directors on
July 10, 19 95, and is within the scope of its corporate powers; and
that set out below are the names of the officers and directors of said corporation.

By 

CORPORATE SEAL

Name  Title President

Name  Title Secretary

Name _____ Title _____

Name _____ Title _____

(O-96-4)

ORDINANCE NUMBER O- 18200 (NEW SERIES)

ADOPTED ON AUG 07 1995

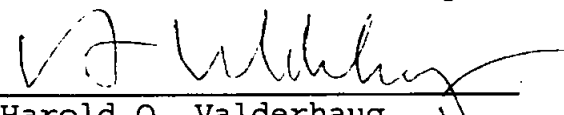
AN ORDINANCE AUTHORIZING THE EXECUTION OF A SEVEN-YEAR OPERATING AGREEMENT, WITH ONE SEVEN-YEAR OPTION TO RENEW, WITH SOUTHERN CALIFORNIA FITNESS, INC. FOR THE OPERATION OF CARMEL MOUNTAIN RANCH SWIMMING POOL

BE IT ORDAINED, by the Council of The City of San Diego, as follows:

Section 1. That the City Manager is hereby authorized to execute, for and on behalf of The City of San Diego, a seven-year Operating Agreement (with one seven-year option to renew) with SOUTHERN CALIFORNIA FITNESS INC., a California corporation, dba FITNESS ADVANTAGE, for the operation and maintenance of a public swimming pool on property located east of the intersection of World Trade Drive and Highland Ranch Road in the Carmel Mountain Ranch area, at a minimum rent of \$9,000 per year versus 7-1/2 percent of operator's gross income, under the terms and conditions set forth in that Operating Agreement on file in the office of the City Clerk as Document No. OO- 18200.

Section 2. This ordinance shall take effect and be in force on the thirtieth day from and after its passage.

APPROVED: JOHN W. WITT, City Attorney

By 
Harold O. Valderhaug
Chief Deputy City Attorney

HOV:ps
07/10/95
Or. Dept: REA
Job: 221925
O-96-4

RECEIVED
95 JUL 12 PM 2:11
CITY CLERKS OFFICE
SAN DIEGO, CA

APR 11 1995

Recording Requested by: City Clerk

After recording mail to:

City Clerk
City of San Diego
Mail Station 2A

THE ORIGINAL OF THIS DOCUMENT
WAS RECORDED ON 28-AUG-1996,
DOCUMENT NUMBER 1996-0437888.
GREGORY SMITH, COUNTY RECORDER
SAN DIEGO COUNTY RECORDER'S OFFICE

313	540	23	00	ALL
				PTN

313-540-31

SPACE ABOVE THIS LINE FOR RECORDER'S USE
NO DOCUMENTARY TAX DUE - R&T 11922 (amended)
Presented for record by the CITY OF SAN DIEGO

GRANT DEED

For and in consideration of a valuable consideration

CARMEL MOUNTAIN RANCH, a California Partnership

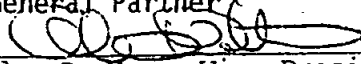
HEREBY GRANT(S) to the City of San Diego, a municipal corporation, in the County of San Diego, State of California, all that real property situated in the City of San Diego, County of San Diego, State of California:

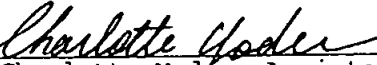
Parcel 2 of Parcel Map No. 17556, in the City of San Diego, State of California, filed in the Office of the County Recorder of San Diego County, June 20, 1995 as File No. 1995-030-9827 of Official Records.

This is to certify that the interest in real property conveyed by this instrument to the City of San Diego, a municipal corporation, is hereby accepted by the undersigned officer on behalf of the City of San Diego pursuant to authority conferred by Resolution No. 250320, adopted by the Council of the City of San Diego on October 1, 1979, and the grantee consents to recordation thereof by its duly authorized officer.

CARMEL MOUNTAIN RANCH,
a California Partnership

By: PRESLEY HOMES, a California corporation,
General Partner

By: 
Alan D. Uman, Vice President

By: 
Charlotte Yoder, Assistant Secretary

Dated 8-22-96 By Michael R. Steffen
Michael R. Steffen, Deputy Director
Acquisitions Division

FEB 15 1995

COMMUNITY PLANNING

REIMBURSEMENT AGREEMENT

Community Recreation Building and Community Swimming Pool
for the communities of
Carmel Mountain Ranch and Sabre Springs

THIS AGREEMENT is made between THE CITY OF SAN DIEGO, a municipal corporation, herein called "City", and CARMEL MOUNTAIN RANCH, a General Partnership, herein called "Carmel", and is based on the following facts:

RECITALS

A. Carmel is the developer of real property within the Carmel Mountain Ranch community plan area which is located within the City of San Diego. The community has been defined by a community plan adopted by the San Diego City Council. Copies of this plan are on file in the office of the San Diego City Clerk.

B. On May 20, 1985, by Resolution No. R-263212, the City Council of the City of San Diego ("Council") adopted the latest amendment to the Carmel Mountain Ranch Community Facilities Financing Plan ("CMRCFFP") for Carmel Mountain Ranch.

C. On November 12, 1985, by Ordinance No. O-16537, the Council adopted a Development Agreement ("Development Agreement") with Carmel which set forth, among other things, that Carmel would provide those public improvements, facilities and services as set forth in the CMRCFFP.

D. As the major property owner and developer of Carmel Mountain Ranch, Carmel is to provide substantial public improvements for that area, including participation

DOCUMENT NO. RR-285249

FILED JAN 24 1995

OFFICE OF THE CITY CLERK
SAN DIEGO, CALIFORNIA

in the financing of roadways, parks and other public improvements, as required by the CMRCFFP.

E. On September 13, 1994, by Resolution No. R-284603, the City Council of the City of San Diego ("Council") adopted the latest annual update to the Sabre Springs Public Facilities and Financing Plan and the Facilities Benefit Assessment ("SSFBA") for Sabre Springs. Sabre Springs is the community planning area located immediately to the south of Carmel Mountain Ranch. This community has also been defined by a community plan adopted by the San Diego City Council. Copies of the Sabre Springs plan are also on file in the office of the San Diego City Clerk.

F. Both the CMRCFFP and the SSFBA identify two park and recreation projects which mutually benefit both Carmel Mountain Ranch and Sabre Springs. These projects are the Community Recreation Building (CMRCFFP project no. 34, SSFBA project no. 36) ("Recreation Building") and the Community Swimming Pool (CMRCFFP project no. 35, SSFBA project no. 37) ("Pool"), herein collectively referred to as the "Project".

G. In addition to the CMRCFFP, the Council also adopted a Park Fee Ordinance. This ordinance, which was adopted on June 3, 1985, as Ordinance no. O-16437, established a means of collecting fees ("Park Fees") from residential properties being developed in Carmel Mountain Ranch to finance the cost of Carmel Mountain Ranch's share of the Recreation Building and the Pool. These fees are collected at the time building permits are issued for the residential units. This ordinance further provides that should sufficient funds not be generated by these park fees to provide needed park and recreation facilities, the Council will schedule any remaining needed facilities in the City Capital Improvements Program as funds are available.

H. With the Fiscal Year 1993 update to the SSFBA (May 1992), the City accelerated the procurement schedule for both the Recreation Building and the Pool. The current schedule for both projects, as depicted in the Fiscal Year 1995 update to the SSFBA, authorizes funds for the design in Fiscal Year 1994 and construction in Fiscal Year 1995.

I. At this time, the funds programmed to finance the combined cost of both the Recreation Building and the Pool are less than the anticipated costs. The funds being collected by the Park Fees and by the SSFBA are currently programmed to generate only 50 percent of the cost of the Pool. The other 50 percent was to come from an adjoining community. Carmel has been advised that these remaining funds will not be provided. In addition, there is no designated site for the Pool project. If a site needs to be purchased, additional funds will be required as land acquisition costs have not been included in either the CMRCFFP or the SSFBA.

J. The fees being collected as part of the CMR Park Fees have been deposited into a single Special Park Fund (No. 39091) which is maintained by the City. These funds are intended to be used to finance both the Recreation Building and the Pool. Consequently, any cost increases incurred by one of these projects will result in less funds being available for the other project.

K. The funds that have been budgeted by the SSFBA for the Recreation Building and the Pool projects have been established by a prior agreement between the City and Pardee Construction Company. This agreement, which was approved on August 5, 1991 as Document No. RR-278510, limits annual increases to Sabre Springs' share of the cost for the Recreation Building and the Pool to be no more than the percentage expressed by the Los Angeles/San Diego Construction Cost Index (CCI), as illustrated in Table 6 of the SSFBA.

L. Carmel is willing to provide the additional funding necessary to design and construct both the Recreation Building and the Pool projects. In order to provide this additional funding, a community plan amendment will be required for the Carmel Mountain Ranch community. The plan amendment will provide, among other things, for the site designation for the Community Pool facility, the elimination of the southerly neighborhood park, and the expansion of residential development in Carmel Mountain Ranch Unit No. 23. These, along with other modifications to the community plan, will make it financially feasible for Carmel to provide the needed funding for this Project and will make it possible for both facilities to be built in a timely manner. In that time is of the essence with this assignment, it is expected that the design for both Recreation Building and the Pool will be conducted concurrent with the review and approval of the community plan amendment.

M. Carmel is willing to designate a portion of Carmel Mountain Ranch Unit No. 33 as the site for the Pool, at no cost to the Project, so long as residential development is permitted at the site formally designated as the southerly neighborhood park site, said site being proposed for deletion as part of the Community Plan Amendment referred to in Recital L. above.

N. Paragraph 7.11 of the Development Agreement for Carmel Mountain Ranch provides for the private construction of the Community Recreation Building and Community Swimming Pool as turn-key facilities with reimbursement from Park Fees already then paid plus interest and a credit for future park fees. Specifically, this paragraph states that Carmel:

"...may construct the community recreation building and/or swimming pool as a turn-key facility. If there is future mutual agreement on such turn-key construction, said future agreement shall provide for the reimbursement (plus interest if accrued) of all park fees already then paid and a credit for future park fees to the extent necessary to reimburse Property Owner.

(Carmel) for the portion of the cost of construction beyond that allocable to the Carmel Mountain Ranch Community."

O. Carmel is willing to obtain building permits, public improvement permits and/or land development permits, whichever may be applicable for the construction of these projects, and the City is willing to grant such permits. Carmel is willing to promptly complete the Project according to the plans approved by the City through the use of competitive bids as described herein and the award of the contract to the lowest responsible bidder mutually approved by the City and Carmel contingent upon the prior approval of the Community Plan Amendment to the satisfaction of Carmel. Carmel is willing to accept cash reimbursement from the SSFBA district and from the Carmel Mountain Ranch Special Park Fund, together with credits against the future requirement to pay Park Fees, as compensation for its expenditures of the cost of said construction and improvements.

P. Carmel has commenced with the design of both the Recreation Building and the Pool. Upon approval of the Community Plan Amendment and the issuance of the necessary permits, Carmel will be in a position to commence the construction of both the Recreation Building and the Pool at a reduced cost and at the earliest possible date and the City's Park and Recreation Department has concurred with this finding.

Q. The execution and performance of this Agreement by both Carmel and the City is intended to satisfy the requirements of a separate agreement as set forth in paragraph 7.11 of the Development Agreement and Carmel's obligation to construct the Community Recreation Building and Community Swimming Pool as set forth in both the Development Agreement and the CMRCFFP.

NOW, THEREFORE, in consideration of the recitals and mutual obligations of the parties herein expressed, the City and Carmel agree as follows:

Condition Precedent. A condition precedent to this Agreement is that Community Plan Amendment has been approved by the City to the satisfaction of Carmel. Carmel shall provide the City with written notice of its satisfaction of the Community Plan Amendment within 72 hours of council action to approve the Community Plan Amendment.

1. Conveyance of Land for Community Swimming Pool.

1.1 Conveyance of Real Property. Carmel shall by grant deed, no later than ten (10) days following completion and acceptance of the Project by the City as defined in Paragraph 13 herein, convey that portion of Carmel Mountain Ranch Unit No. 33 (hereinafter referred to as Parcel "A") to the City free and clear of all encumbrances except:

1.1.1 Non-delinquent City and County general and specific taxes, other than those taxes prorated in accordance with Paragraph 1.3 below. Taxes owed will be determined by the County Tax Assessor's Office.

1.1.2 Any public improvement assessments hereafter imposed.

1.1.3 Any covenants, conditions, restrictions, reservations and existing easements of record as of the execution date of this Agreement or thereafter imposed and approved by City, which approval will not be unreasonably withheld.

1.1.4 Public rights-of-way and easements of record.

An abbreviated legal description of Parcel "A" is provided as Exhibit "A" to this Agreement.

1.2 Purchase Price. Carmel shall transfer Parcel "A" to the City at no cost to the Project.

1.3 Escrow. Carmel shall open an escrow with First American Title Insurance Company, herein called "Escrow Agent," at least 60 days prior to the date the conveyance of Parcel "A" is anticipated. The escrow instructions shall be provided to the City for its review and approval. The escrow instructions shall contain all pertinent terms and conditions of this Agreement. Said escrow instructions shall require the Escrow Agent to prorate (i.e. apportion) between the parties to the close of the escrow, City and County general and specific taxes and special district (if any) taxes, based on the latest information available to the Escrow Agent. Each party shall pay one-half of the Escrow Agent's fee and the usual and normal miscellaneous recording and other charges.

2. Project. Carmel agrees to design, construct, and complete both the Recreation Building and the Pool, e.g. the Project, in accordance with the City's standard plans. As set forth in the CMRCFFP and the SSFBA, the Community Recreation Building is to be approximately 10,800 square feet in size and complete with a multi-purpose hardwood gymnasium floor, meeting and activity rooms, kitchen facilities, rest rooms, and appropriate storage and support space. The Community Swimming Pool shall be a minimum 25 meter by 25 yard facility suitable for competitive swimming events and shall be supported by the appropriate shower and locker room facilities and pool side decking. The scope of work for both facilities shall include any on-site utilities, e.g. sewer, water, drainage, electric and gas, landscaping improvements and parking necessary to support each respective facility.

3. Total Project Cost.

3.1 Definition. Carmel shall provide for the total cost of the Project which is defined to be all direct and indirect costs necessarily incurred by Carmel and its contractor(s) in order to complete the Project to the City's satisfaction. Direct costs shall include the actual costs of Project construction including, but not limited to, all labor, materials, supplies, and equipment costs for the construction of both the Recreation

Building and the Pool, together with their respective supporting improvements. Indirect costs shall include, but not be limited to, initial planning services, design services, engineering, design review and presentations before planning groups, recreation councils and other required boards, professional services, soils testing, surveying, agreement preparation, project administration (in an amount not to exceed 12.5 percent of the construction costs), construction management, insurance premiums, bonds, and all other fees and charges (e.g. permit fees, inspection fees, utility connection and capacity fees, school fees, etc.).

3.2 Estimated Total Cost. The Estimated Total Cost for the Recreation building is currently one million six hundred fifty-one thousand four hundred dollars (\$1,651,400). The Estimated Total Cost for the Pool is currently one million four hundred thousand dollars (\$1,400,000). Collectively, the Estimated Total Cost for the entire Project is three million fifty-one thousand four hundred dollars (\$3,051,400) ("Estimated Total Cost"). This Estimated Total Cost includes a line item representing 10% of the overall estimate to serve as contingency for the Project. The Estimated Total Cost has been itemized by Carmel in a line-item budget as provided previously to the City. This Estimated Total Cost has been reviewed and approved by the Park and Recreation Department as meeting the criteria of Recital P. as being a cost that is less than that which the City would expend were it to construct the project itself. It is acknowledged by the parties hereto that the Estimated Total Cost is based on preliminary cost estimates and has been computed prior to a firm scope of work, the preparation of final plans or the receipt of competitive bids. Thus, the Estimated Total Cost is subject to change due to the final design and/or actual bid results received for the Project. It is further acknowledged by the parties hereto that the Estimated Total Cost is subject to change due to the varying conditions that may exist at the project site. The parties shall adjust the Estimated Total Cost as necessary to reflect the total actual costs and/or bids received for the Project.

3.3 Available Funds. At this time, the City currently has, on deposit, the funds shown in Figure 1 to finance the Total Project Cost. These funds ("Available Funds") include the funds on deposit plus Park Fees that will continue to be collected until commencement of construction and accrued interest. The Available Funds are currently earning interest at a rate of at least six percent. Consequently, the balance of Available Funds will continue to increase until such time as the City disburses funds to Carmel.

Listing of Available Funds	
Park Fees on deposit with the City, as of December 12, 1994	\$1,277,697
SSFBA Funds set aside for Recreation Building	\$804,400
SSFBA Funds set aside for Pool	\$376,700
	=====
	\$2,458,797

Figure 1

3.4 Change Orders. A

Change Order is a written order from Carmel and the City to the contractor performing the work authorizing a change in the work to be performed. Change Orders may be needed where changes in the Project work are made necessary due to unanticipated conditions encountered during construction or changes in the plans and specifications after construction begins. All Change Orders must be approved in writing by Carmel and City.

3.4.1 Carmel shall notify City in writing of the need for a Change Order and City shall either approve or reject said Change Order within five (5) working days of receiving Carmel's written notice. Change Orders may be approved by City staff. City's approval shall not be unreasonably withheld. City shall exercise good faith, and best efforts to grant approval(s) promptly. Following proper notice by Carmel, should the City fail to respond to Carmel's request for a change order within the prescribed period of time, the change order request shall be deemed to be approved by the City.

3.4.2 Notwithstanding the above, Carmel shall have the authority, without City's consent, to order minor changes in the work which (i) do not cost more

than \$5,000, or (ii) cause a significant increase in the construction period (defined in Paragraph 5 hereof) of the Project.

3.4.3 City Requested Changes. Notwithstanding the above, City may request Carmel to make a change(s) to the approved scope of work for the Project. If Carmel agrees to the requested change(s), then the cost of the added and/or modified scope of work shall be added to the Estimated Total Cost of the Project. If the City's requested change(s) is not acceptable to Carmel, City may still direct Carmel to perform the additional work provided the City agrees to finance this additional work with funds other than the Park Fees or the SSFBA (e.g. other than the Available Funds).

3.5 Other Cost Increases. Notwithstanding anything herein to the contrary, the Total Cost of completing the Project may be increased: (i) due to actual bids received exceeding the Estimated Total Cost, (ii) due to change orders approved for the project, (iii) due to acts of God, acts of any governmental authority, the elements, war, litigation, concealed or unknown conditions encountered in the completion of the Project, or other cause beyond Carmel's control, or (iv) due to other factors not the result of unreasonable conduct by Carmel.

3.6 Interest. If the City, on more than one invoice, is delinquent in reimbursing Carmel for the total costs of the Project, as required by this Agreement, interest shall accrue daily and shall be paid on said amount which is delinquent (on the second and any subsequent invoice which is delinquent) at the prime rate then being charged by the Bank of America National Trust and Savings Association, plus two percent (2%) per annum, floating from the due date of said payment until payment in full is received (in no event to exceed the maximum rate allowed by law). The interest rate shall be computed on the first day of each month during which a payment is delinquent. The cost associated with any interest payments shall not be financed with funds from either the Park Fees or the SSFBA (e.g. the Available Funds).

4. Plans and Specifications. This Agreement has been prepared precedent to the preparation of site improvement and grading plans, building plans, landscaping and irrigation plans, and other construction related plans and documents. Carmel agrees to provide complete plans, specifications and bid documents for the design and construction of the Project, which shall include site preparation, easement plats and documents, etc., which will be subject to City approval, with said approval not being unreasonably withheld, and will include, insofar as practicable, the City's standard specifications.

4.1 Design Review. Promptly following receipt of the plans and specifications, City shall notify Carmel in writing of any objections it may have to the documents and shall thereafter diligently and expeditiously process the documents for approval. Construction of the project shall not commence until the design has been approved by the City.

4.2 Issuance of Necessary Permits. The parties acknowledge that the construction work to be performed by Carmel in compliance with this Agreement is subject to the prior issuance of building permits and/or public improvement permits for both facilities. In the event that the City of San Diego, or any other governmental agency, does not issue the permits necessary to authorize the work to be performed or if such permits are canceled or suspended at no fault of Carmel, then Carmel is relieved from its obligation to construct those improvements covered by the denial of said permit(s). The City may elect to construct the improvements with the funds it deems appropriate. The City shall reimburse Carmel for all work completed up to the date of the denial of said permit(s). All plans, specifications and improvements completed to the date of the denial, suspension or cancellation of said permits(s) shall, following reimbursement to Carmel, become the property of the City. Once Carmel has received reimbursement for such plans, specifications and improvements, then Carmel shall open escrow within 60 days of receipt of said reimbursement with the Escrow Agent to transfer Parcel "A" to the City in accordance with the terms of Paragraph 1 above.

5. Timing of Project.

5.1 Commencement of Project. Carmel has already initiated the initial planning for the Project. Upon approval of this Agreement by the City Council, Carmel shall commence with the Design Phase of the Project. The Design Phase shall include both (i) the conceptual design, in which the review of schematic drawings shall be obtained from the Park and Recreation Department, the combined Carmel Mountain Ranch/Sabre Springs Recreation Council, and the Park and Recreation Board, North District, and (ii) the preparation of working drawings, in which the approvals of the Park and Recreation Department, the Development Services Department, and, if necessary, the Engineering Department will be obtained. Assuming no significant changes are introduced to the proposed scope of work, the Design Phase shall be completed within twelve (12) months from the execution date of this Agreement.

5.2 Community Plan Amendments. Concurrent with the Design Phase of the Project, the Community Plan amendment for Carmel Mountain Ranch shall be prepared by Carmel and processed with the Planning Department of the City.

5.3 Construction Phase. Within 90 days of approval of: (i) the working drawings by the City and the issuance of building permits and (ii) the Community Plan amendment for Carmel Mountain Ranch, whichever last occurs, Carmel shall cause construction to commence and shall use its best efforts to complete the construction of the Recreation Building and the Pool in the time frame set forth herein. Carmel shall use its best efforts to complete the construction of both facilities within twelve (12) months of the City's issuance of all the permits required to build the Project.

5.4 Completion. The Project shall be deemed complete at such time as it is finally inspected and accepted by the Inspection Team identified in Paragraph 11 below or when the status of construction is such that the Project can be used for the purpose intended, whichever shall first occur. Any Punch List items noted in the Final Inspection described below will be addressed within a thirty (30) day period. Acceptance by City of the completed Project shall not be unreasonably withheld. Following

completion of the Project, Carmel will provide as-built drawings by the design consultants verifying that the Project was constructed in accordance with the City-approved plans.

6. Equal Opportunity. Carmel shall comply with Title VII of the Civil Rights Act of 1964, as amended, the California Fair Employment Practices Act, and any other applicable federal and state laws and regulations hereinafter enacted. Carmel will not discriminate against any employee or applicant for employment based on race, religion, color, ancestry, age, gender, sexual orientation, disability, medical condition or place of birth.

7. Solicitation of Bids. At the appropriate time, Carmel shall solicit sealed bids for the construction of the Project. Such solicitation shall be by publication in a local newspaper of choice, but must include notice in the *San Diego Daily Transcript*. Carmel may also directly solicit sealed bids for the construction of the Project. Bids shall be solicited from at least three (3) qualified contractors and the bidding response time shall not be less than twenty (20) working days. The bidding contractors will not be present at the bid opening. The City's representative(s) shall be provided a copy of the tabulation of bid results. Contract(s) for the construction of the Project shall be awarded to the qualified contractor(s) submitting the lowest responsible bid(s), as mutually determined by Carmel and the City's authorized representative(s).

8. Reimbursement.

8.1 Right to Reimbursement. The Total Cost of constructing the Project shall be advanced by Carmel. The City shall reimburse Carmel for the amount described in Paragraph 3.3 as the Available Funds prior to Carmel expending any of its funds.

8.2 Method of Reimbursement. Carmel shall submit reimbursement requests to the City for all work performed for which Carmel was not previously reimbursed. Said reimbursement requests can be submitted as frequently as monthly

and shall be submitted on or before the first of the month in which reimbursement is requested.

8.3 Amount of Reimbursement. The amount requested for reimbursement shall be for all costs described in Paragraph 3 herein incurred during the period for which reimbursement is requested. Carmel shall supply copies of invoices and conditional mechanics' lien releases in connection with each reimbursement request.

8.4 Reimbursement by the 25th. The City may cause its inspector to verify whether or not the materials and work for which reimbursement is being requested have been installed and performed as represented in the reimbursement request. In any event, City will make such reimbursement on or before the 25th day of the month following submission of the reimbursement request, unless City has determined that the reimbursement request is improper or that the work included in the reimbursement request has not been performed in accordance with this agreement.

8.5 Reimbursement Requests Not Approved. In the event that the City determines that the reimbursement request is improper or that the work included in the reimbursement request has not been performed in accordance with this Agreement, the City shall so advise Carmel, in writing, on or before the fifth day of the month following submission of the reimbursement request. Said notice shall advise Carmel as to what was inappropriate with the reimbursement request. Once Carmel has remedied the deficiency(ies) associated with the disputed reimbursement request and has resubmitted the reimbursement request to the City for payment, the City shall make reimbursement to Carmel for the amount identified in the request on or before the 25th day following receipt of the reimbursement request.

9. Reallocation of Savings -- Recordkeeping.

9.1 Reallocation of Savings: Costs in Excess of Budget. With the consent of the City, which consent shall not be unreasonably withheld, Carmel may re-

allocate savings realized with respect to particular line items on the proposed Project budget to pay for cost overruns, if any, in other line items on the proposed budget.

9.2 Recordkeeping. Carmel shall keep an accurate record of the actual cost of the construction of the Project in accordance with generally accepted accounting procedures. Carmel shall allow the City's authorized representatives to examine and duplicate any records relevant to the verification of the actual cost of constructing the Project including, without limitation, all contract bids and invoices. Any changes that occurred during the course of construction shall be properly documented. Backup documentation shall be kept by Carmel for three (3) years after the completion of the Project and be provided to City for its review.

10. Standards of Construction. All construction for the Project will be accomplished in a good and workmanlike manner, lien free and in compliance with (i) the approved Plans (working drawings and specifications), and (ii) the Standard Specifications for Public Works Construction, current edition (including the City of San Diego Standard Special Provisions) ("Green Book"). In the event of conflict between the approved Plans and the Green Book, the former will govern.

11. Final Inspection. The Project shall be inspected by a team composed of representatives from (a) the Engineering Department, (b) the Park and Recreation Department, (c) Development Services Department, (d) Carmel and (e) the Project Architect at the stages listed below:

- a. A "Preliminary Walk-Through" Inspection shall be conducted within five (5) working days after notice by Carmel of completion of the construction requirements for the Project. This "informal" inspection will be conducted by the representative of the Park and Recreation Department, the Building Inspector, and Carmel's construction superintendent. This inspection will confirm that the Project is complete and ready for a Final Inspection.

b. The Final Inspection for the Project shall be scheduled within 10 calendar days following a successful Preliminary Walk-Through Inspection. A list of correction items, (the "Punch List") shall be prepared at this inspection. Carmel shall correct these items within thirty (30) calendar days of the date of the Final Inspection. Upon completion of the work required by the Punch List, Carmel will file a Notice of Completion with the County Recorder of San Diego County.

12. Plant Maintenance Period. Carmel shall commence the plant maintenance period immediately following installation of all landscaping materials and shall continue plant maintenance for a minimum of sixty (60) calendar days or until the Notice of Completion is recorded, whichever occurs last. Thereafter, the City will be responsible for all plant maintenance.

13. Acceptance. Upon completion of the Punch List noted during the Final Inspection, the City shall accept the Project as being complete and shall direct the Escrow Agent to close the escrow and transfer title to Parcel "A" to the City. However, until such time as the City accepts the Project and takes title to Parcel "A", the Project shall not be opened for use by the general public. Notwithstanding the above, the City may elect to accept the Project and transfer title to the Premises prior to the completion of the Plant Maintenance Period.

14. City to Provide Maintenance. Immediately following the completion of the Plant Maintenance Period, City shall be responsible for all irrigation and maintenance of plant material and park improvements. Carmel shall not be responsible for the repair of any of the Project improvements, the replacement of any plant material, or for any damage resulting from the public's access to the Project as a result of the City not performing its responsibilities. Should the City request that Carmel perform the City's maintenance function for a certain period of time, a separate contract authorization will be issued for this purpose. The cost for performing this additional maintenance shall not

be included in the Total Project Cost nor shall it be financed with funds from the Park Fees or the SSFBA.

15. Dedication Ceremony. Carmel shall have the opportunity to conduct and host a public dedication ceremony ("Ceremony") on the premises of each facility following the City's acceptance of the Project. The Public may be invited to this Ceremony and would be permitted to utilize the premises of each facility following the Ceremony.

16. Delay Beyond Carmel's Control. If delays occur in the construction of the Project, through events or circumstances not within the direct control of Carmel, Carmel will not be considered to be in default of its obligations to construct the Project. Carmel shall be excused for, among other things, any delays or defaults in the performance of this Agreement unavoidably caused by the City or any other governmental authority, acts of God, the elements, war, litigation, strikes, walkouts or other causes beyond Carmel's control.

17. City Right of Inspection. City, upon reasonable notice, shall have the right to inspect all books and records of Carmel relating to the Project and may perform any audit it cares to during the construction period and for a period of three (3) years following City's acceptance of the Project. Carmel shall retain all such records for those three (3) years.

18. Indemnity. Carmel agrees to defend, indemnify, protect and hold City and its agents, officers and employees harmless from and against any and all claims asserted or liability established for damages or injuries to any person or property, including injury to Carmel's employees, agents or officers which arise from or are connected with and are caused or claimed to be caused by the acts or omissions of Carmel, and its agents,

officers or employees, in performing the work or services herein, and all expenses of investigating and defending against same; provided, however, that Carmel's duty to indemnify and hold harmless shall not apply to those incidents or claims arising from the sole negligence of the City, its officers, or employees. City and Carmel agree that, in the event of any joint or concurrent negligence, they will apportion any established or agreed upon liability proportionate to their respective degree of fault. This provision shall remain in full force and effect until twelve (12) months after the City accepts the Project pursuant to this Agreement.

19. Arbitration. Any dispute or controversy arising under, out of, in connection with or in relation to this agreement, and any amendments thereof, or the breach thereof, shall be determined and settled by binding arbitration by a neutral arbitrator selected by the parties, or appointed by the court if the parties fail to select or agree upon an arbitrator, to be held in San Diego, California, in accordance with California Code of Civil Procedure Section 1280, et. seq. Judgement upon award may be entered in any court of competent jurisdiction.

20. Omitted.

21. Termination of Agreement. The Agreement shall be deemed complete and, thus, terminated upon fulfillment of both parties' obligations as set forth herein. Said Agreement shall be deemed complete upon City's acceptance of this facility and final payment by City to Carmel for work performed as part of this Agreement. Said release shall be in recordable form if requested by Carmel.

22. Amendments: Consents. No amendment, modification, supplement, termination or waiver of any provision of this Agreement shall be effective unless

executed in writing by both parties and then only in the specific instance and for the specific purpose given.

23. Notices. Any demand upon or notice required or permitted to be given by one party to the other party shall be in writing. Except as otherwise provided by law, any demand upon or notice required or permitted to be given by one party to the other party shall be effective (a) on personal delivery, (b) on the second business day after mailing by certified or registered U.S. Mail, return receipt requested or (c) on the succeeding business day after mailing by Express Mail or after deposit with a private delivery service of general use (e.g., Federal Express) postage or fee prepaid as appropriate, addressed to the party at the address shown below:

CITY MANAGER
CITY OF SAN DIEGO
Mail Sta. 9A
202 "C" Street
San Diego, California 92101

with copies to

DIRECTOR, PARK AND RECREATION DEPARTMENT
CITY OF SAN DIEGO
Mail Sta. 9B
202 "C" Street
San Diego, California 92101

and

DEPUTY DIRECTOR, LONG RANGE AND FACILITIES PLANNING DIVISION
PLANNING DEPARTMENT
CITY OF SAN DIEGO
Mail Sta. 4A
202 "C" Street
San Diego, California 92101

AND

CARMEL MOUNTAIN RANCH
15090 Avenue of Science, Suite 201
San Diego, California 92128
ATTN: KATHLEEN RISER

with a copy to:
CARMEL MOUNTAIN RANCH
c/o The Presley Companies
19 Corporate Plaza Drive
Newport Beach, CA 92660
ATTN: NANCY HARLAN, ESQ.

Notice of change of address shall be given by written notice in the manner set forth in this paragraph.

24. Successors in Interest. This Agreement and all rights and obligations contained herein shall be in effect whether or not any or all parties to this Agreement have been succeeded by another entity, and all rights and obligations of the parties signatory to this Agreement shall be vested and binding on their successors in interest.



25. Warranties. Carmel warrants that the work, materials and construction related to the Project shall conform to the standards established by the City in the Green Book, and all supplements thereto including Section 6.11, for the period of one year following City's acceptance of the Project. However, this warrantee shall not apply to the plant materials. The provisions contained herein shall not be deemed to limit such other rights the parties shall have or may have, according to law, to seek damages or other relief or any acts or omissions of any contractor associated with this Agreement or the construction or design of the Project.

26. Conveyance Not a Violation. City represents to Carmel that the Conveyance of Parcel "A" to City pursuant to this Agreement shall not constitute a violation of the State Subdivision Map Act or the City's Subdivision Ordinance.

27. Turnover of Documents. Carmel shall provide to the City reproducible copies on polyester drawing film of the "as-built drawings" and related plans and specifications, operating manuals and warranty materials such as would ordinarily be applicable to the City's operation and maintenance of the park improvements, upon acceptance of the Project by the City.

28. Termination of Park Fees. Upon commencement of construction of the Project, the City agrees to suspend collecting Park Fees from those residential properties owned by CARMEL and located within Carmel Mountain Ranch which have not yet paid Park Fees. The properties which have not paid Park Fees and which would be entitled to this credit against the future payment of Park Fees include Carmel Mountain Ranch Unit Nos. 18, 19 and 23.

29. Further Assurances. City and Carmel each agree to execute and deliver such additional documents and issue such governmental permits as may be required to effectuate the purposes of this Agreement.

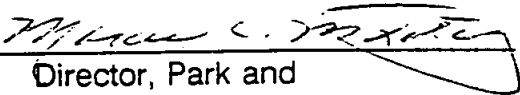
REIMBURSEMENT AGREEMENT
Carmel Mountain Ranch/Sabre Springs

Community Swimming Pool
Community Recreation Building

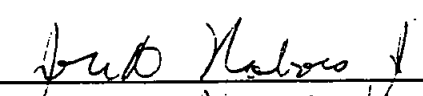
IN WITNESS WHEREOF, this Agreement is executed by The City of San Diego acting by and through its City Manager pursuant to Resolution No. R-285249 authorizing such execution, and by Carmel Mountain Ranch.

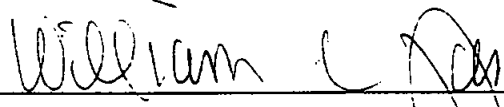
Dated this date: JAN 24 1995

THE CITY OF SAN DIEGO, a Municipal Corporation

By: 
Director, Park and Recreation Department,
for the City Manager

CARMEL MOUNTAIN RANCH, a General Partnership;
By: The Presley Companies, a California Corporation, General Partner

By: 
Vice President

By: 
Vice President

I HEREBY APPROVE the form and legality of the foregoing Agreement this 24th day of January, 19 95.

John W. Witt, City Attorney

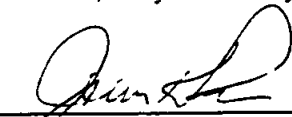
By: 
Chief Deputy City Attorney

Exhibit "A"

Legal Description of Parcel "A"

Being the southerly portion of Parcel 4 of Parcel Map No. 14678, located in the City of San Diego, County of San Diego, State of California, said parcel map being recorded by the County Recorder of said county on February 12, 1987 as File no. 87-079344 of Official Records. Said Parcel "A" consists of 1.3 acres, more or less.

RESOLUTION NUMBER R- 285249

ADOPTED ON JAN 24 1995

BE IT RESOLVED, by the Council of The City of San Diego, that the City Manager be and he is hereby authorized and empowered to execute, for and on behalf of said City, a reimbursement agreement with Carmel Mountain Ranch, a general partnership, for a community recreation building and swimming pool, under the terms and conditions set forth in the Agreement on file in the office of the City Clerk as Document No. RR- 285249.

APPROVED: JOHN W. WITT, City Attorney

By


John K. Riess
Deputy City Attorney

JKR:pev
01/11/95
Or.Dept:Plan.
R-95-1046
Form=r.auagr

Passed and adopted by the Council of the City of San Diego on JAN 24 1995 by the following vote:

YEAS: MATHIS, ROBERTS, KEHOE, STEVENS, WARDEN, STALLINGS, MCCARTY,

VARGAS

NAYS: NONE.

NOT PRESENT: MAYOR GOLDING

AUTHENTICATED BY:

SUSAN GOLDING

Mayor of The City of San Diego, California

CHARLES G. ABDELNOUR

City Clerk of The City of San Diego, California

(SEAL)

By: Elise Harmon, Deputy

I HEREBY CERTIFY that the above and foregoing is a full, true and correct copy of RESOLUTION

No. R- 285249, passed and adopted by the Council of The City of San Diego, California
on JAN 24 1995.

CHARLES G. ABDELNOUR

City Clerk of The City of San Diego, California

(SEAL)

By: Elise Harmon, Deputy

2314

ORIGINAL

RECEIVED
CITY CLERK

EX-107 20 71 11 55
SAN DIEGO, CALIF.

DEVELOPMENT AGREEMENT

Date: August 7, 1985

Submitted by: Carmel Mountain Ranch

DOCUMENT NO. 00-16537

FILED NOV 12 1985

OFFICE OF THE CITY CLERK
SAN DIEGO, CALIFORNIA

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12.6 Incorporation of Recitals

DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT (hereinafter referred to as "Agreement") is made and entered into this NOV 12 1985 day of , 1985, by and between THE CITY OF SAN DIEGO, a municipal corporation (hereinafter referred to as "City"), and Carmel Mountain Ranch, a partnership (hereinafter referred to as "Property Owner").

1. RECITALS: This Agreement is predicated upon the following facts:

1.1 Code Authorization: The City of San Diego, a charter city, is authorized pursuant to Government Code Sections 65864 through 65869.5 to enter into binding development agreements with persons having legal or equitable interest in real property for the development of such property in order to establish certainty in the development process. The City further enters into this Agreement pursuant to its charter and self-rule powers and San Diego Municipal Code Sections 105.0101 et seq.

1.2 Property Owner: Property Owner is the owner of certain real property located in the City of San Diego, County of San Diego, California, more particularly described in Exhibit "A," attached hereto and incorporated herein, which real property is the subject matter of this Agreement. Said property consists of approximately 1,388 acres of property within the Carmel Mountain Ranch community planning area. The property is located immediately east of Interstate 15 and south of Rancho Bernardo in the City of San Diego.

1.3 Interest of Property Owner: Property Owner represents that it has an equitable or a legal interest in the real property and that all other persons holding legal or equitable interests in the real property are to be bound by the Agreement.

1.4 Intent of Parties: The parties desire to enter into this Agreement relating to the above-described real property in conformance with the provisions of the Government Code in order to achieve the development of land uses permitted under Section 6 of this Agreement and the provision of public services, public uses and urban infrastructure all in the promotion of the health, safety and general welfare of the City of San Diego. The parties also desire to enter into this Agreement in order to satisfy the requirements of the Carmel Mountain Ranch Community Facilities Financing Plan and the City Council policies requiring the

financing of the infrastructure in the "planned urbanized" areas of the City as designated in the City of San Diego Progress Guide and General Plan. It is also the intent of the parties to satisfy the conditions of all existing tentative maps and planned development permits requiring the approval of a financing plan and implementation thereof.

1.5. Planning Commission Hearing: On AUG 29 1985, 1985, the Planning Commission of The City of San Diego, after giving notice pursuant to Government Code Sections 65854, 65854.5 and 65856 held a public hearing on Property Owner's application for the Agreement. The City Council of the City, after providing public notice as required by law, similarly held a public hearing on OCT 29 1985, 1985.

1.6 City Council Findings: The City Council has found that the Agreement is consistent with the Progress Guide and General Plan, the Community Plan, as well as all other applicable plans, policies and regulations of The City of San Diego.

1.7 City Ordinance: On NOV 12 1985, 1985, the City Council of the City adopted Ordinance No. 0-16537 approving the Agreement with the Property Owner. The ordinance thereafter took effect on Dec 12, 1985.

2. DEFINITIONS: In this Agreement, unless the context otherwise requires:

2.1 Project: Is the development as represented by the Carmel Mountain Ranch Community Plan adopted by the City Council on August 14, 1984 by Resolution Nos. RR-261374 and RR2-261375 approved by the City. In addition to the adopted Carmel Mountain Ranch Community Plan, the City also has granted the following development approvals for portions of the property, attached hereto as Exhibits "B" through "K":

Portion of Property Covered
by Development Approval

Development Approval Nos.

Phase II Industrial Park	Tentative Map No. 84-0489 PID No. 84-0489
Regional Shopping Center	Tentative Map No. 83-0206; PCD No. 83-0206; Rezoning Ordinance No. 0-16066 (New Series)
Golf Course	Conditional Use Permit Nos. 84-0114 and 84-0114.1
Hotel Site	Tentative Map No. 84-0857 Tentative Map No. 85-0546 (Financial Map)
Unit 1 Residential	Tentative Map No. 84-0203 Final Map No. 11112
Unit 2 Residential	Tentative Map No. 84-0203 (Revised) Final Map No. 11321
Unit 5 Residential	Tentative Map No. 84-0728 PRD No. 84-0728
Unit 6 Residential	Tentative Map No. 84-0911
Unit 7 Residential	Tentative Map No. 84-0912 Tentative Map No. 84-0552 (Financial Map)
Unit 8 Residential	Tentative Map No. 85-0400
Unit 9 Residential	Tentative Map No. 85-0575 (Financial Map)
Unit 10 Residential	Tentative Map No. 85-0401
Unit 11 Residential	
Unit 12 Residential	
Unit 15 Residential	Tentative Map No. 85-0610 (Financial Map)
Master Rezoning	Ordinance No. 0-16281 (New Series)

Convenience Center

Tentative Map No. 85-0356

2.2 Property Owner: Means the person, persons or entity having a legal or equitable interest in the real property as described in Subsection 2.3 and includes, as provided in this Agreement, the Property Owner's successors-in-interest.

2.3 Real Property: Is the real property referred to in Exhibit "A."

3. EXHIBITS: The following documents are referred to in this Agreement, and attached hereto and are incorporated herein as though set forth in full:

<u>Exhibit Designation</u>	<u>Descriptions</u>	<u>Referred to in Section</u>
A.	Real Property. Legal Description and Location Map.	1.2, 2.3, 4.1
B.	Phase II Industrial Park. Tentative Map No. 84-0489 PID No. 84-0489	2.1, 6.1
C.	Regional Shopping Center. Tentative Map No. 83-0206 PCD No. 83-0206, Rezoning Ordinance No. 0-16066 (New Series)	2.1, 6.1
D.	Golf Course. Conditional Use Permit Nos. 84-0114 and 84-0114.1	2.1, 6.1
E.	Hotel Site. Tentative Map No. 84-0857 Tentative Map No. 85-0546 (Financial Map)	2.1, 6.1
F.	Unit 1 Residential. Tentative Map No. 84-0203 Final Map No. 11112	2.1, 6.1
G.	Unit 2 Residential. Tentative Map No. 84-0203 (Revised) Final Map No. 11321	2.1, 6.1

H.	Unit 5 Residential. Tentative Map No. 84-0728 PRD No. 84-0728	2.1, 6.1
I.	Unit 6 Residential. Tentative Map No. 84-0911	2.1, 6.1
J.	Unit 7 Residential. Tentative Map No. 84-0912 Tentative Map No. 85-0552 (Financial Map)	2.1, 6.1
K.	Unit 8 Residential. Unit 9 Residential. Tentative Map No. 85-0400 Tentative Map No. 85-0610 (Financial Map)	2.1, 6.1
L.	Unit 10 Residential. Unit 11 Residential. Unit 12 Residential. Tentative Map No. 85-0401	2.1, 6.1
M.	Master Rezoning. Ordinance No. 0-16281 (New Series)	2.1, 6.1
N.	Convenience Center. Tentative Map No. 85-0356	2.1, 6.1
O.	Carmel Mountain Ranch Community Plan(s). Doc- ment Nos. RR-261374 and RR-261375.	6.1, 6.1.1, 6.1.3, 6.2, 6.3, 6.4, 7.2
P.	Mitigated Negative Declaration (EQD. No. 84-0222)	6.1.2
Q.	The Carmel Mountain Ranch Community Public Facilities Financing Plan. Document No. RR-263212	6.4, 6.6.1, 6.6.2 6.6.4, 6.6.5, 7.1, 7.11, 7.14, 7.15, 7.15.3, 7.5.1
R.	Design Review Process	7.15

- S. Carmel Mountain Ranch Park 7.11
Fee Ordinance
- T. Unit 15 Residential. 2.1, 6.1
Tentative Map No. 85-0610
(Financial Map)

4. GENERAL PROVISIONS:

4.1 Property Subject to the Agreement: The real property which is the subject of this Agreement is approximately 1,388 acres and is located immediately east of Interstate 15 and south of Rancho Bernardo in the City of San Diego, and is more particularly described in and shown in Exhibit "A".

4.2 Duration of Agreement: The term of this Agreement shall commence upon the effective date of the ordinance authorizing its execution. This Agreement shall expire on the date fifteen (15) years thereafter, unless extended by written mutual agreement. City and Property Owner acknowledge that the California Subdivision Map Act (California Government Code Section 66410 et seq.) and the San Diego City Subdivision Map Ordinance (City of San Diego Municipal Code Section 102.0200 et seq.) contain certain periods for the expiration and extension of tentative maps and tentative parcel maps. The term of this Agreement shall not extend or reduce such periods.

4.3 Assignment: The rights and obligations of Property Owner under this Agreement may be transferred or assigned, provided such transfer or assignment is in writing and made as a part of the transfer, assignment, sale or lease of all or a portion of the real property. Any such assignment shall be subject to the provisions of this Agreement. During the term of this Agreement, any such assignee or transferee of the rights and obligations under this Agreement shall observe and perform all of the duties and obligations of Property Owner contained in this Agreement as such duties and obligations pertain to the portion of the real property so transferred or assigned. Property Owner shall give to City a notice within thirty (30) days of any such assignment or transfer. Upon delivery by Property Owner to City of a written assumption by such assignee or transferee of the rights and obligations under this Agreement, City immediately shall release Property Owner from such obligations. City acknowledges that Property Owner may sell, transfer, assign or lease portions of the property to various persons and entities without assigning or transferring the rights or obligations under this Agreement. So long as Property Owner (or its successor-in-interest under this numbered paragraph 4.3) remains

responsible for the performance of the obligations under this Agreement, City, if requested by Property Owner (or its successor-in-interest under this paragraph 4.3), shall certify that the portion of the property sold, transferred, assigned or leased is not subject to any covenant to perform the obligations under this Agreement or lien or encumbrance under this Agreement except that, notwithstanding anything to the contrary in this numbered paragraph 4.3, the obligation to pay a fair and reasonable share of the fees necessary to construct the community recreation building and the community swimming pool and to pay any sewer reimbursement fee as required under paragraph 7.11 of this agreement shall be a covenant running with the land.

4.4 Amendment or Cancellation of Agreement: This Agreement may be amended from time-to-time by the mutual consent of the parties hereto but only in the same manner as its adoption by an ordinance as set forth in Government Code Sections 65867, 65867.5 and 65868, and San Diego Municipal Code Section 105.0109. The term "this Agreement" or "Development Agreement" herein shall include any such amendment properly approved and executed.

4.5 Unforeseen Circumstances: These provisions provide a mechanism for the identification of those circumstances which justify the modification, termination or suspension of this Agreement. If, as a result of facts, events or circumstances presently unknown, unforeseeable and which could not have been known to the parties to this Agreement, the City determines that the health, safety and general welfare of the City require the modification, suspension or termination of this Agreement, the City shall (1) notify the Property Owner in writing of (a) the City's determination, (b) the reasons for the City's determination and all facts upon which such reasons are based, and (c) forward to the Property Owner (a minimum of ten (10) days prior to the hearing) all documents relating to such determination and reasons therefor; (2) notify Property Owner, in writing, at least fourteen (14) days prior to the date, the time and place of the hearing; and (3) hold a hearing on the determination at which hearing Property Owner shall have the right to offer witnesses, reports and oral and written testimony, and further have the right to examine witnesses, City staff or other persons. The City shall have the obligation, based upon clear and convincing evidence, of establishing that: (a) the circumstances were unknown, unforeseeable and could not have been known; (b) the health, safety and general welfare of the community require the suspension, modification or termination of the Agreement as opposed to any other alternative; and (c) the City, to the extent feasible, has provided the Property Owner with an equitable program to reimburse to Property Owner unused fees, and provided equi-

table reimbursement for dedications or improvements not required by the extent of development as of the date of such suspension, modification or termination. In the event the City Council should fail to make such findings, then this Agreement shall not be so terminated, modified or suspended. The unforeseen circumstances which shall cause the operation of this provision shall not be the result of changes in state or federal law. In the event of changes in state or federal law, the provisions of Section 5 shall govern.

4.6 Enforcement: Unless amended or cancelled as provided in Subsections 4.4 or 4.5, this Agreement is enforceable by any party to it despite a change in the applicable general or specific plans, zoning, subdivision or building regulations adopted by City which alter or amend the rules, regulations or policies governing permitted uses of the land, density and design.

4.7 Hold Harmless: Property Owner agrees to and shall hold City, its officers, agents, employees and representatives harmless from liability for damage or claims for damage for personal injury including death and claims for property damage which may arise from the direct or indirect operations of the Property Owner or those of its contractors, subcontractors, agents, employees or other persons acting on his behalf which relate to the project. Property Owner agrees to and shall defend City and its officers, agents, employees and representatives from actions for damages caused or alleged to have been caused by reason of Property Owner's activities in connection with the project. This hold harmless agreement applies to all damages and claims for damages suffered or alleged to have been suffered by reason of the operations referred to in this paragraph, regardless of whether or not City approved plans or specifications, or both, for the project.

The Property Owner further agrees to indemnify, hold harmless, pay all costs and provide a defense for City in any action by a third party challenging the validity of the Agreement.

The provisions of this numbered paragraph 4.7 shall not apply to the extent such damage, liability or claim is proximately caused by the sole intentional or negligent act of City, its officers, agents, employees or representatives.

4.8 Binding Effect of Agreement: To the extent provided in paragraph 4.3, the burdens of this Agreement bind and the benefits of the Agreement inure to the parties' successors-in-interest.

4.9. Relationship of Parties: It is understood and acknowledged that the contractual relationship between City and Property Owner is such that Property Owner is an independent contractor and not an agent of City.

4.10 Notices: All notices, demands and correspondence required or provided for under this Agreement shall be in writing and delivered in person or dispatched by certified mail, postage prepaid. Notice required to be given to City shall be addressed as follows:

The City of San Diego
City Administration Building
202 "C" Street, 9th Floor
San Diego, CA 92101
Attn: City Manager

Notices required to be given to Property Owner shall be addressed as follows:

Carmel Mountain Ranch
9968 Hibert Street
Suite 100
San Diego, California 92131
Attention: Michael Stewart

Copy to:

James R. Dawe
3003 Fourth Avenue
San Diego, California 92103

Any notice delivered by mail shall be deemed received forty-eight (48) hours after its deposit in the United States mail, postage prepaid, addressed to the party as described above. A party may change its address by giving notice in writing to the other party. Thereafter, notices, demands and other pertinent correspondence shall be addressed and transmitted to the new address.

5. CONFLICTS OF LAW:

5.1 Conflict of City and State or Federal Laws: In the event that state or federal laws or regulations enacted after this Agreement has been entered into prevent or preclude compliance with one or more provisions of this Agreement or require changes in plans, maps or permits approved by the City, the parties shall:

5.1.1 Notice and Copies: Provide the other party with written notice of such state or federal restriction,

provide a copy of such regulation or policy and a statement of conflict with the provisions of this Agreement.

5.1.2 Modification Conferences: The parties shall within thirty (30) days, meet and confer in good faith in a reasonable attempt to modify this Agreement to comply with such federal or state law or regulation in a manner consistent with the intent and objectives of this Agreement, to the extent feasible.

5.2. Council Hearings: Thereafter, regardless of whether the parties reach an agreement on the effect of such federal or state law or regulation upon this Agreement, the matter shall be scheduled for hearing before the Council. Ten (10) days' written notice of such hearing shall be given, pursuant to Government Code Section 65854.5 and San Diego Municipal Code Section 105.0104. The Council, at such hearing, shall determine the exact modification or suspension which shall be necessitated by such federal or state law or regulation. Property Owner, at the hearing, shall have the right to offer oral and written testimony. Any modification or suspension shall be taken by the affirmative vote of not less than a majority of the authorized voting members of the Council. Any suspension or modification may be subject to judicial review in conformance with Subsection 10.5 of this Agreement.

5.3 Cooperation in Securing Permits: The City shall cooperate with the Property Owner in the securing of any permits which may be required as a result of such modifications or suspensions.

6. DEVELOPMENT OF THE SUBJECT PROPERTY:

6.1 Permitted Uses: The subject property shall be used and developed only for residential, industrial, commercial, recreational, open space and municipal purposes as more particularly set forth in or allowed by the Carmel Mountain Ranch Community Plan, the master rezoning, and the other development approvals attached hereto as Exhibits "B" through "O", and for such other uses that may be mutually agreed upon by the parties hereto in accordance with the applicable provisions of the Government Code relating to the amendment of development agreements. City acknowledges that, from time to time, Property Owner may seek to obtain, in accordance with the applicable provisions of state and local law, minor amendments to the development approvals attached hereto as Exhibits "B" through "O", without the need for an amendment to this Agreement. Unless the Municipal Code otherwise requires, the determination of whether an amendment to a development approval is a minor amendment for purposes of this Agreement shall be made by

the decision making body having the original authority to approve or disapprove the amendment to the development approval.

The development of the permitted uses shall be restricted by the requirement to obtain planned development permits (including planned industrial developments (PID's), planned residential developments (PRD's) and planned commercial developments (PCD's)) as required under the Carmel Mountain Ranch Community Plan.

6.1.1 Future Discretionary Review: City shall have the right to review applications for future discretionary approvals by applying the rules, regulations and policies in effect City-wide at the time such applications are made; provided, however, such rules, regulations and policies do not conflict with the provisions governing permitted uses of land, number of residential units, amount of square footage of non-residential uses, density and design contained in the Carmel Mountain Ranch Community Plan and the Master Rezoning.

6.1.2 Future Compliance with the California Environmental Quality Act: All applications for discretionary approval shall be subject to the requirements of the California Environmental Quality Act as it is in effect at the time any such application is submitted. City and Property Owner acknowledge that, although the Carmel Mountain Ranch Community Plan provides the framework for full mitigation of potential impacts of the development of the Carmel Mountain Ranch community, detailed mitigation measures and precise methods of implementation will be addressed during the review of applications for discretionary approval. Such mitigation measures and methods of implementation either shall be incorporated into the project design for which the application is made or imposed as a condition of approval of the application in accordance with the requirements of the Mitigated Negative Declaration for the Carmel Mountain Ranch Community Plan and Master Rezoning.

6.1.3 Effect of Future Development Approvals on Development Agreement: The future approval of any planned development permit, tentative map or other discretionary or ministerial approval will not require an amendment to this development agreement provided that such approvals are substantially in conformance with the Carmel Mountain Ranch Community Plan and the Master Rezoning. Any review or approval of the planned development permits or tentative maps referred to in

subparagraph 6.1.1 shall not prevent development in accordance with paragraphs 6.1 and 6.2 of this Agreement.

6.2 Permitted Density of Development: The subject property shall be developed to the density or level of intensity indicated in the approved plans, permits, or other regulatory devices listed in Subsection 26.1 2.1. In some instances, because of the density range allowed under the City's zone classifications, the total number of dwelling units allowed on specified parcels under the master rezoning of the property could exceed the number of units allowed under the Carmel Mountain Ranch Community Plan. It is the intent of the parties to limit the total number of dwelling units of the parcels specified as parcel nos. 23, 25, 26, 29, 32 and 33 on Table 1 of the Carmel Mountain Ranch Community Plan as described on said Table 1. City acknowledges that the boundaries of the parcels shown on the Carmel Mountain Ranch Community Plan maps are approximate and are subject to minor variation prior to recordation of final map(s) for the Project provided that Property Owner complies with the applicable procedures for subdivision maps.

6.3 Maximum Height and Size of Structures: The maximum height and size of structures to be constructed upon the subject property shall be governed by the Design Element of the Carmel Mountain Ranch Community Plan and the existing planned development permits.

6.4 Reservations or Dedications of Land for Public Purposes: Reservations or dedications of portions of the subject property have been set forth on final and tentative subdivision maps described in Paragraph 2.1 of this Agreement. Other reservations or dedications of portions of the subject property may, from time-to-time, be required by the City in accordance with or as a part of subdivision map approvals subject to this Agreement. Such reservations and dedications are to be imposed in accordance with the ordinances and standards in effect upon the commencement of this Agreement and in accordance with the requirements of the Carmel Mountain Ranch Community Plan and Community Facilities Financing Plan.

6.5 Rules, Regulations, Official Policies: The City rules, regulations, ordinances, laws, general plans, and official policies governing development, density, permitted uses, growth management, environmental consideration, and design criteria for purposes of this Agreement shall be those in force and effect upon the commencement of the term of this Agreement.

6.5.1 Application of Subsequently Enacted Rules, Regulations, etc: The City may, hereafter, during the term of this Agreement apply only such newer City enacted or modified rules, regulations, ordinances, laws, general or specific plans, and official policies which are not in conflict with those in effect on the date of this Agreement and application of which would not prevent development in accordance with Subsections 6.1 and 6.2. However, this section shall not preclude the application to the subject property of changes in City laws, regulations, plans or policies specifically mandated and required by changes in state or federal laws or regulations. In such an event, the provisions of Section 5 of this Agreement are applicable.

6.5.2 Application of Subsequently Revised Fees and/or Improvement Standards: Application, processing and inspection fees, improvement standards as set forth in the City subdivision regulations and construction standards and specifications that are revised during the term of this Agreement shall apply to the development pursuant to this Agreement provided that: (1) such fees, standards and specifications apply to all public works within the City, (2) their application to the property is prospective only as to applications for building and other development permits or approvals of tentative subdivision maps not yet accepted for processing, and (3) their application would not prevent development in accordance with Subsections 6.1 and 6.2.

6.6 Time for Construction and Completion of Project:

6.6.1 Beginning Construction: Property Owner and City acknowledge that Property Owner has begun construction of the project. Property Owner shall commence construction of the public facilities required to be constructed or caused to be constructed by Property Owner under the Carmel Mountain Ranch Community Facilities Financing Plan in accordance with the thresholds contained in said Financing Plan. Nothing in this Agreement shall prevent Property Owner from accelerating the timing of the construction of the project so long as Property Owner provides the public facilities as required under the Community Facilities Financing Plan.

6.6.2 Completion of Project: Property Owner anticipates developing the property in accordance with the phasing schedule contained in the Carmel Mountain Ranch Community Plan. In addition, Property Owner, after beginning the construction in accordance with the thresholds contained in the Carmel Mountain Ranch

Community Facilities Financing Plan, shall diligently prosecute to completion the construction of the public facilities which Property Owner is required to construct or cause to be constructed under the Carmel Mountain Ranch Community Facilities Financing Plan.

6.6.3 Progress Reports Until Construction of Project is Complete: Property Owner shall make reports of the progress of construction in such detail and at such time as the City Engineer of City reasonably requests.

6.6.4 City to Receive Notice of Commencement of Construction: Property Owner shall furnish City appropriate written notice by Property Owner to show the commencement of construction of any turnkey public facilities required to be constructed by Property Owner under the Financing Plan.

6.6.5 Certificate of Completion: Promptly after completion of any public facility required to be constructed by Property Owner under the Financing Plan, City shall provide Property Owner with an instrument so certifying. The certification is conclusive determination that the obligation of Property Owner under this Agreement has been met. The certification shall be in such form as will enable it to be recorded in the official records of the County of San Diego. Acceptance by City of a deed or other evidence of conveyance shall be deemed to be evidence of completion of the public facility which is the subject of the deed or other evidence of conveyance.

7. DEVELOPMENT PROGRAM:

7.1 Public Improvement Facilities and Services: Property Owner and its successors in interest agree to provide the public improvements, facilities and services as required by the Community Facilities Financing Plan for the project, attached hereto as Exhibit "N."

7.2 Property Owner: Property Owner shall phase the public community facilities required to be constructed or caused to be constructed by Carmel Mountain Ranch under the Carmel Mountain Ranch Community Plan and the Carmel Mountain Ranch Community Facilities Financing Plan according to the thresholds contained therein. City acknowledges that the development schedule contained in the Carmel Mountain Ranch Community Plan and Community Facilities Financing Plan may be subject to revision from time-to-time as appropriate because of changes in circumstances, including, without limitation, changes in market conditions. Such revisions

are deemed to be within the framework of this Agreement as presently drafted and executed and do not constitute amendments requiring new notice and hearing under local law.

7.3 City: The City hereby agrees that it will accept from Property Owner for processing and review all development applications for development permits or other entitlements for the use of the real property in accordance with this Agreement, provided that said applications are submitted in accordance with City's rules and regulations.

7.4 Cooperation in Securing Government Permits/ Conflict of Laws: The City shall cooperate with Property Owner in securing for Property Owner all permits which may be required by the City or any other governmental agency.

7.5 Financing of Required Improvements:

7.5.1 Public Facilities Financing Plan: (IF FBA APPLICABLE.) The City has in effect a Public Facilities Financing Plan for the Carmel Mountain Ranch Community Plan area. Said financing plan was adopted on May 20, 1985, by Resolution No. R-263212. Said plan sets forth a description of public facilities needs, a development phasing element and facilities financing plan element. The latter last includes an itemization of required improvements, costs, and the particular financing method to be utilized for each improvement, including, but not limited to subdivision improvement requirements, construction by Property Owner of community facilities (combined, as indicated in the Carmel Mountain Ranch Community Facilities Financing Plan, where appropriate by reimbursement agreement) and maintenance districts. The Carmel Mountain Ranch Community Public Facilities Financing Plan is attached hereto as Exhibit "R" and incorporated by this reference.

7.5.2 Facilities Benefit Assessments: (NOT APPLICABLE)

7.5.3 Duty to Pay Facilities Benefit Assessment or Fee in Lieu: (IF FBA APPLICABLE.) (NOT APPLICABLE)

7.6 FBA Annual Review: (NOT APPLICABLE)

7.7 Duty to Finance other Required Public Facilities: (NOT APPLICABLE)

7.8 Duty to Construct: (NOT APPLICABLE)

7.9 Payments Made Pursuant to FBA: (NOT APPLICABLE)

7.10 Release of FBA: (NOT APPLICABLE)

7.11 Duty to Pay Fees to Construct Public Facilities:
(NO FBA DISTRICT.) Because a Facilities Benefit Assessment District has not been established for the Carmel Mountain Ranch Community and because Property Owner is interested in proceeding with development of this project immediately, Property Owner agrees to pay City its fair and reasonable share of fees necessary to construct the community recreation building and the community swimming pool as described in the Carmel Mountain Ranch Community Facilities Financing Plan. The fees to be paid for the community recreation building and community swimming pool shall be deemed to be park fees and shall be payable at the time of residential building permit issuance in accordance with the schedules contained in the Carmel Mountain Ranch Community Facilities Financing Plan. Said fees have been incorporated into a special park fee ordinance which is attached hereto as Exhibit "T" and the community will be exempt from all other park fees.

The parties recognize that the construction of the community recreation building and swimming pool public facilities described in Exhibit "R" is dependent upon many variables. The City shall use its best efforts to act in conformance with the implementation schedules contained in Exhibit "R C" to this Agreement, or any revised schedules as they reflect the actual cash flow, status of development, or other factors. Notwithstanding anything to the contrary in this Agreement, City and Property Owner may agree in the future on mutually satisfactory provisions and without the necessity of amendment to this Agreement that Property Owner may construct the community recreation building and/or swimming pool as a turn-key facility. If there is future mutual agreement on such turn-key construction, said future agreement shall provide for the reimbursement (plus interest if accrued) of all park fees already then paid and a credit for future park fees to the extent necessary to reimburse Property Owner for the portion of the cost of construction beyond that allocable to the Carmel Mountain Ranch Community.

In addition to the special park fees described in this numbered paragraph 7.11, Property Owner shall construct or pay for its appropriate share of the construction of major sewer and water facilities as required under the Carmel Mountain Ranch Community Facilities Financing Plan. In the event someone other than Property Owner originally pays for such construction, Property Owner shall provide reimbursement payments which shall be payable at the time building permits are issued for development in the community.

7.12 Payment of Fees: (NO FBA DISTRICT.) The fees described in Subsection 7.11 above shall be paid to the City by Property Owner or its successors in interest, at the time building permits for the project are issued by City.

7.13 Release of Obligation: Upon the payment of fees by Property Owner or its successors in interest, City shall release the lots to which said fees are applicable from the obligations of this Agreement. This is to be accomplished by the City providing to Property Owner upon written request a release of obligation for said lot or lots to be recorded in a form acceptable to County Recorder.

7.14 Imposition on Other Owners: (UTILIZE IN FBA AND NON-FBA AREAS.) In order to finance capital facilities described in Exhibit "R C", City will shall use its best efforts to collect like or similar fees from other property owners in the area benefitted. This will be done in order that Property Owner will not be placed in an unfair, disadvantageous or noncompetitive situation.

7.15 Turnkey Facilities: Property Owner shall, in accordance with the conditions and provisions of the Carmel Mountain Ranch Community Facilities Financing Plan, develop on a turnkey basis the following facilities:

Neighborhood/Community Park (CMR 19)

Neighborhood Park (CMR 27)

Neighborhood Park (CMR 31)

Fire Station (CMR 12)

Library (CMR 30)

The development of the turnkey facilities shall be in accordance with the design review guidelines contained in Exhibit "S", entitled "Design Review Process" and attached hereto.

7.15.1 Dedication of Land: The Carmel Mountain Ranch Community Facilities Financing Plan provides for the dedication of land for and the construction of the turnkey facilities in connection with the thresholds contained therein. Before recordation of the final map by which the relevant threshold will be exceeded, City and Property Owner shall make appropriate arrangements so that the required facility will be available for use concurrent with the need generated by exceeding the threshold. Since Property Owner will be retaining ownership of the land until such time as the facility

is constructed, neither the conveyance of the land and improvements nor the construction shall be a condition to the recordation of the final map. The final map instead is intended to trigger the requirement under this Agreement to arrange for the dedication of land (by an irrevocable offer to dedicate the land if it is feasible at the time of recordation of the final map to provide an adequate legal description of the property to be so offered for dedication), the commencement of construction and the diligent prosecution to completion of construction of the turnkey facility. Failure to convey the land, commence construction or diligently prosecute to completion of construction of the facility as required under this Agreement may constitute a default under this Agreement for which City shall be entitled to pursue appropriate enforcement remedies as provided in paragraph 10 of this Agreement. Any land or improvements conveyed in accordance with the requirements of this Agreement shall be free and clear of all monetary liens and encumbrances and all other liens and encumbrances which would interfere with the intended use unless City otherwise agrees. Upon completion of a turn-key facility and, if applicable, satisfaction of the threshold described in the Carmel Mountain Ranch Community Facilities financing plan, City shall accept the offer of dedication of the public facility.

7.15.2 Commencement of Construction: For purposes of the requirement of Property Owner to commence construction of a turn-key facility the phrase "commencement of construction" shall mean that Property Owner either has begun grading of the project site or has obtained a building or land development permit for the development of the turn-key facility. Property Owner is required under paragraph 6.2.2 of this Agreement to diligently prosecute to completion the construction of the turnkey facilities.

7.15.3 Additional Facilities and Equipment: Property Owner shall provide the funds for the procurement of a triple combination pumper apparatus in accordance with the provisions and conditions of the Carmel Mountain Ranch Community Facilities Financing Plan. Property Owner shall provide an irrevocable letter of credit (or other security acceptable to City) when the City Council is ready to let the contract for the apparatus for use in the Carmel Mountain Ranch community. Within 30 days after the issuance of the building permit for the fire station, Property Owner shall provide the funds sufficient to pay for the procurement of a triple combination pumper apparatus in

accordance with the provisions and conditions of the Carmel Mountain Ranch Facilities Financing Plan. Within 30 days after the issuance of the building permit for the library, Property Owner shall provide the funds sufficient to procure the equivalent to a fiscal year 1985 initial stock of 32,000 volumes as provided in the Carmel Mountain Ranch Community Facilities Financing Plan.

It is the intent of the parties hereto that this Agreement provide all necessary assurance and security that the turnkey facilities will be constructed as required under and subject to the conditions and provisions of Carmel Mountain Ranch Community Facilities Financing Plan.

8. INSURANCE:

NOTE: Section 8 of the City's model agreement has been deleted in its entirety.

9. ANNUAL REVIEW:

9.1 City and Property Owner Responsibilities: City shall, at least every twelve (12) months during the term of this Agreement, review the extent of good faith substantial compliance by Property Owner with the terms of this Agreement. Pursuant to Government Code Section 65865.1, as amended, and San Diego Municipal Code Section 105.0108, Property Owner shall have the duty to demonstrate its good faith compliance with the terms of this Agreement at such periodic review. The parties recognize that this Agreement and the documents incorporated herein could be deemed to contain thousands of requirements (i.e., construction standards, landscape standards, etc.) and that evidence of each and every requirement would be a wasteful exercise of the parties' resources. Accordingly, Property Owner shall be deemed to have satisfied its duty of demonstration when it presents evidence of its good faith and substantial compliance with the major provisions of Section 6. of this Agreement, including information concerning the uses, numbers, types, densities, heights and sizes of structures completed and of any reservations and dedications to the City. Either party may address any requirement of this Agreement during the review. However, ten (10) days' written notice of any requirement to be addressed shall be made by the requesting party. If at time of review an issue not previously identified in writing is required to be addressed, the review at the request of either party shall be continued to afford sufficient time for analysis and preparation.

9.2 Opportunity to be Heard: Upon written request to City by Property Owner, the Property Owner shall be permitted an opportunity to be heard orally and/or in writing at a noticed public hearing regarding its performance under this Agreement. The Property Owner shall be heard before each appropriate Commission and the City Council at any required hearing concerning a review of action on the Agreement without the necessity of a written request to be heard.

9.3 Information to be Provided Property Owner: The City shall, to such an extent as is practical, deposit in the mail to Property Owner a copy of staff reports and related exhibits concerning contract performance a minimum of ten (10) calendar days prior to any such review or action upon this Agreement by the Planning Commission or the City Council.

10. ENFORCED DELAY, DEFAULT, REMEDIES AND TERMINATION:

10.1 General Provisions: In the event of default or breach of this Agreement or of any of its terms or conditions, the party alleging such default or breach shall give the breaching party not less than thirty (30) days Notice of Default in writing. The time of notice shall be measured from the date of certified mailing. The Notice of Default shall specify the nature of the alleged default, and, where appropriate, the manner and period of time in which said default may be satisfactorily cured. During any period of curing, the party charged shall not be considered in default for the purposes of termination or institution of legal proceedings. If the default is cured, then no default shall exist and the noticing party shall take no further action.

10.1.1 Option to Institute Legal Proceedings or to Terminate: After proper notice and the expiration of said cure period, the noticing party to this Agreement, at its option, may institute legal proceedings pursuant to Subsection 10.5 hereof or give Notice of Intent to Terminate this Agreement pursuant to Government Code Section 65868. Following Notice of Intent to Terminate, the matter shall then be scheduled for consideration and review by the City Council within thirty (30) days, in the manner set forth in Government Code Sections 65865, 65867 and 65868, as amended.

10.1.2 Notice of Termination: Following consideration of the evidence presented before the City Council, either party alleging a default by the other party may, at its option, give written Notice of Termination of this Agreement to the other party by certified mail. Written Notice of Termination of this

Agreement shall be effective immediately upon certified mailing to the defaulting party.

10.1.3 Waiver: Failure or delay in giving Notice of Default pursuant to this section shall not constitute a waiver of any default. Except as otherwise expressly provided in this Agreement, any failure or delay by the other 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.

10.2 Default by Property Owner: Government Code Section 65865.1, as amended, requires the Property Owner to demonstrate its good faith compliance with the terms of this Agreement at least annually. Such a periodic review may result in amendment or termination of this Agreement provided a default has been established under the terms of Section 9 of this Agreement.

10.3 Default by City: In the event that the City defaults on this Agreement, the City agrees that Property Owner in no event shall be obligated to proceed with or complete the project or any phase thereof. In the event of default by the City any resulting delays in Property Owner's performance shall not constitute grounds for termination or cancellation of this Agreement.

10.4 Enforced Delay, Extension of Time of Performance: In addition to specific provisions of this Agreement, performance by either party hereunder shall not be deemed to be in default where delays or defaults are due to war, insurrection, strikes, walkouts, riots, floods, earthquakes, fires, casualties, acts of God, governmental restrictions imposed or mandated by other governmental entities, enactment of conflicting state or federal laws or regulations, new or supplementary environmental regulations, litigation, or similar bases for excused performance. If written notice of such delay is given to City within thirty (30) days of the commencement of such delay, an extension of time for such cause shall be granted in writing for the period of the enforced delay, or longer as may be mutually agreed upon. Such an extension shall commence to run from the time of commencement of cause.

10.5 Institution of Legal Action: In addition to any other rights or remedies, either party may institute legal action to cure, correct or remedy any default, to enforce any covenants or agreements herein or to enjoin any threat-

ened or attempted violation thereof; to recover damages for any default; or to obtain any remedies consistent with the purpose of this Agreement. Such legal actions must be instituted in the Superior Court of the County of San Diego, State of California, or in the Federal District Court in the Southern District of California.

10.6 Applicable Laws/Attorney's Fees: This Agreement shall be construed and enforced in accordance with the laws of the State of California. Should any action be brought in any court of competent jurisdiction, the prevailing party in such action shall be entitled to recover all attorney's fees, court costs and necessary disbursements in connection with such litigation.

11. ENCUMBRANCES AND RELEASES ON REAL PROPERTY:

11.1 Discretion to Encumber: The parties hereto agree that this Agreement shall not prevent or limit Property Owner, in any manner, at Property Owner's sole discretion, from encumbering the property or any portion of any improvement thereon by any mortgage, deed of trust or other security device securing financing with respect to the property. City acknowledges that the lenders providing such financing may require certain modifications and City agrees, upon request, from time-to-time, to meet with Property Owner and/or representatives of such lenders to negotiate in good faith any such request for modification. City further agrees that it will not unreasonably withhold its consent to any such requested modification. Any mortgagees or trust deed beneficiaries of the property shall be entitled to the following rights and privileges. City further agrees that Property Owner's obligation hereunder to construct turnkey facilities is not and shall not be deemed to be a covenant running with the property or a lien or encumbrance against the property.

11.2 Entitlement to Written Notice of Default: The mortgagee of a mortgage or beneficiary of a deed of trust, and their successors and assigns, or any mortgage or deed of trust encumbering the property, or any part thereof, which mortgagee, beneficiary, successor or assign has requested in writing to the City, shall be entitled to receive written notification from the City of any default by Property Owner in the performance of Property Owner's obligations under this Agreement which is not cured within thirty (30) days.

11.3 Property Subject to Pro Rata Claims: Any mortgagee who comes into possession of the property, or any part thereof, pursuant to foreclosure of the mortgage or deed of trust, or deed in lieu of such foreclosure, shall take the property, or part thereof, subject to any pro rata claims for payments or charges against the property, or part thereof secured by

such mortgage which accrue prior to the time such mortgagee comes into possession of the property, or part thereof.

11.4 Releases: City hereby covenants and agrees that upon payment of all fees required under this Agreement with respect to the property, or any portion thereof, City shall execute and deliver to Property Owner upon written request appropriate release or releases of further obligations to pay such fees in form and substance acceptable to the County Recorder or as may otherwise be necessary to effect such release.

12. MISCELLANEOUS PROVISIONS:

12.1 Rules of Construction:

The singular includes the plural; the masculine gender includes the feminine; "shall" is mandatory, and "may" is permissive.

If there is more than one signer of this Agreement their obligations are joint and several.

The time limits set forth in this Agreement may be extended by mutual consent of the parties in accordance with the procedures for adoption of an agreement.

12.2 Severability: The parties hereto agree that the provisions are severable. If any provision of this Agreement is held invalid, the remainder of this Agreement shall be effective and shall remain in full force and effect unless amended or modified by mutual consent of the parties.

12.3 Entire Agreement, Waivers and Amendments: This Agreement constitutes 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 negotiation 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 or of Property Owner. All amendments hereto must be in writing signed by the appropriate authorities of the City and Property Owner, in a form suitable for recording in the Office of the Recorder, County of San Diego. Within ten (10) days of the date of this Agreement or subsequent thereto, a copy shall be recorded in the official records of San Diego County, California. Upon the completion of performance of this Agreement or its earlier revocation and termination, a statement evidencing said completion or revocation signed by the appropriate agents of Property

Owner and the City shall be recorded in the official records of San Diego County, California.

12.4 Administrative Costs: Property Owner agrees that reasonable administrative cost may be incurred by City in administering this agreement. Reimbursement for these costs will be made by Property Owner upon submittal of billing by City. Billing is to be made by City at least annually. Reimbursement requests are not to exceed \$15,000 (in 1985 dollars) per year.

12.5 Project is a Private Undertaking: It is specifically understood and agreed to by and between the parties hereto that: (1) the project is a private development; (2) the City has no interest or responsibilities for or duty to third parties concerning any improvements until such time and only until such time that the City accepts the same pursuant to the provisions of this Agreement or in connection with the various subdivision map approvals; (3) Property Owner shall have full power over and exclusive control of the real property herein described subject only to the limitations and obligations of Property Owner under this Agreement; and (4) the contractual relationship between the City and Property Owner is such that Property Owner is an independent contractor and not an agent of the City.

12.6 Incorporation of Recitals: The recitals are specifically incorporated into this Agreement.

IN WITNESS WHEREOF, this Agreement has been executed by the Parties on the day and year first above written, as authorized by Ordinance No. 0-16537 of the City Council.

CITY:

THE CITY OF SAN DIEGO,
a municipal corporation

By

David Murphy

ASSISTANT TO THE City Manager

PROPERTY OWNER:

CARMEL MOUNTAIN RANCH,
a general partnership

By: Carmel Mountain Properties,
a California corporation
Partner

By:

M. D. Stewart
M. D. Stewart, Vice President

By:

R. S. Bennett
R. S. Bennett, President

[Signatures continued on following page]

By: HOME CAPITAL CORPORATION,
a California corporation
Partner

By: Kent J. MacDiarmid
Kent J. MacDiarmid Title
Project Manager

By: Michael B. McCook
Michael B. McCook Title
Chief Operating Officer

By: HUMBOLDT FINANCIAL SERVICES
CORP., a California
corporation
Partner

By: Kent J. MacDiarmid
Kent J. MacDiarmid Title
Project Manager

By: Michael B. McCook
Michael B. McCook Title
Chief Operating Officer

I HEREBY APPROVE the form and legality of the foregoing
Agreement this 25th day of November, 1983.

JOHN W. WITT, City Attorney

By: Janis Sammartino Gardner
Janis Sammartino Gardner
Deputy City Attorney

0-16537

CARMEL MOUNTAIN RANCH

THAT PORTION OF RANCHO LOS PENASQUITOS, IN THE CITY OF SAN DIEGO, COUNTY OF SAN DIEGO, STATE OF CALIFORNIA, ACCORDING TO MAP ACCOMPANYING THE PATENT TO SAID RANCHO, RECORDED IN BOOK 2, PAGE 385 OF PATENTS, INCLUDING A PORTION OF POMPEII FARMS, CO., POMPEII SUBDIVISION ACCORDING TO MAP NO. 1738, FILED SEPTEMBER 19, 1922, DESCRIBED AS FOLLOWS:

BEGINNING AT CORNER NO. 7 OF SAID RANCHO PENASQUITOS, SAID POINT BEING THE NORTHWEST CORNER OF SECTION 2, TOWNSHIP 14 SOUTH, RANGE 2 WEST, SAN BERNARDINO MERIDIAN, AND ALSO BEING THE TRUE POINT OF BEGINNING; THENCE ALONG THE EAST LINE OF SAID RANCHO AND ALONG THE WEST LINE OF SAID SECTION 2, S 1°17'14" W 5105.75 FEET TO THE NORTHWEST CORNER OF SECTION 11, TOWNSHIP 14 SOUTH, RANGE 2 WEST; THENCE CONTINUING ALONG THE EAST LINE OF SAID RANCHO AND ALONG THE WEST LINE OF SAID SECTION 11; S 1°23'20" W 5408.43 FEET TO CORNER NO. 6 OF SAID RANCHO AND TO THE NORTHEAST CORNER OF SECTION 15, TOWNSHIP 14 SOUTH, RANGE 2 WEST, THENCE ALONG THE SOUTH LINE OF SAID RANCHO AND ALONG THE NORTH LINE OF SAID SECTION 15 N 88°43'02" W., 5323.44 FEET TO CORNER NO. 5 OF SAID RANCHO SAID POINT BEING THE NORTHEAST CORNER OF SECTION 16, TOWNSHIP 14 SOUTH, RANGE 2 WEST; THENCE S 88°39'23" W 3285.91 FEET TO A POINT IN THE SOUTHEASTERLY LINE OF INTERSTATE ROUTE 15 ACCORDING TO SAID MAP 10382; THENCE IN A GENERAL NORTHEASTERLY DIRECTION ALONG SAID SOUTHEASTERLY LINE THE FOLLOWING COURSES AND DISTANCES: N 28°24'58" E., 154.49 FEET; N 30°54'40" E., 975.92 FEET; N 25°58'47" E., 585.22 FEET; S 37°12'29" E., 60.38 FEET; N 45°29'25" E., 81.49 FEET; N 48°59'13" W., 64.54 FEET; N 19°59'09" E., 225.43 FEET; N 29°21'04" E., 925.08 FEET; N 77°36'20" E., 114.88 FEET; N 18°54'53" W. 103.30

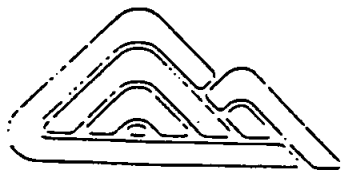
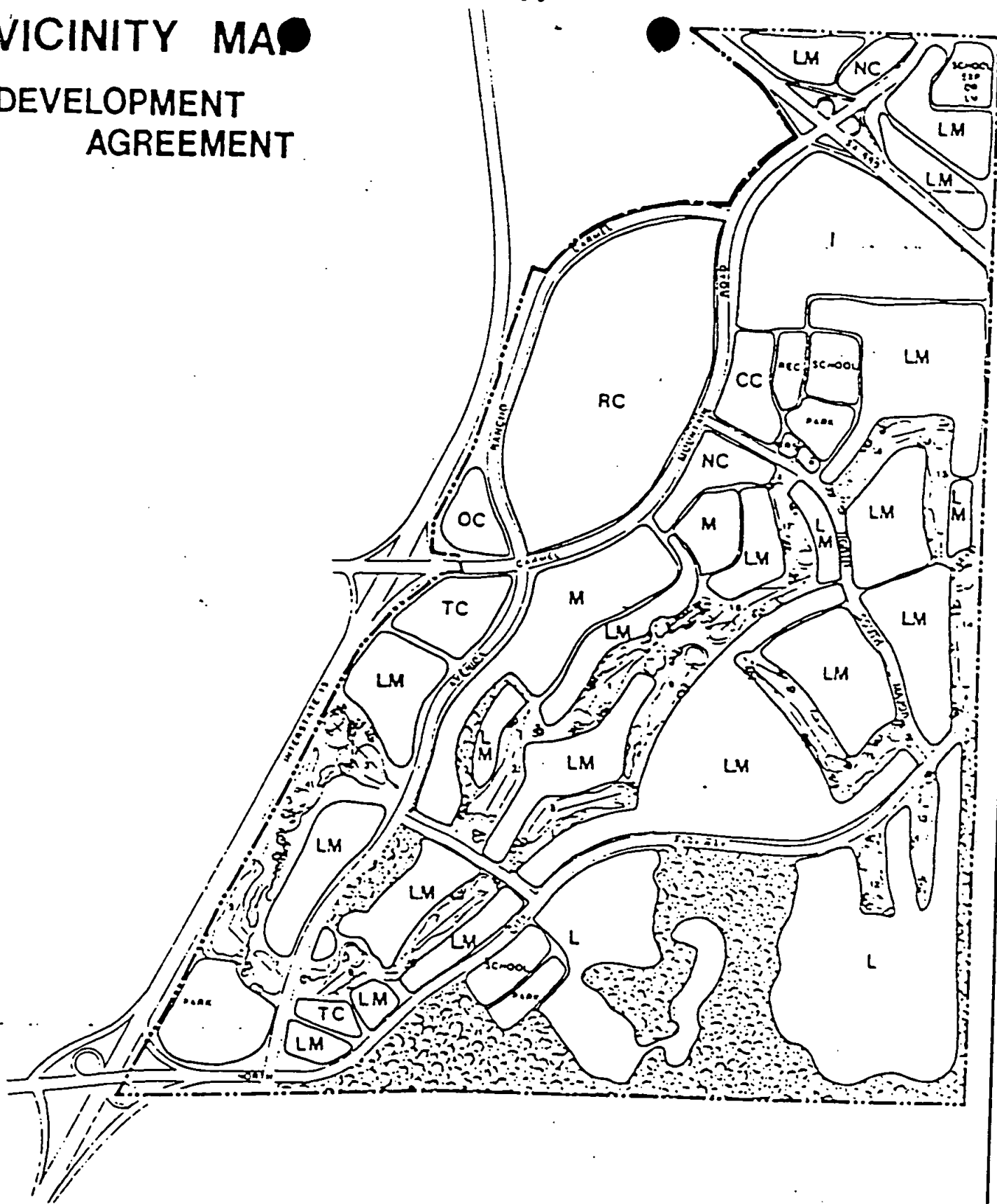
FEET; N 28°18'37" E., 679.92 FEET; N 27°06'26" E., 875.11
FEET; N 56°50'07" E., 136.53 FEET; N 38°56'36" W., 64.92
FEET; N 31°21'22" E., 355.30 FEET; N 42°25'15" E., 491.35
FEET; N 54°08'14" E., 547.88 FEET; S 88°52'58" E., 138.39
FEET; N 1°07'02" E., 62.20 FEET; N 70°11'01" E., 46.89
FEET; N 13°52'22" W., 149.00 FEET; S 84°55'14" W., 140.81
FEET; N 76°00'44" W., 124.98 FEET; N 5°28'26" E., 325.54
FEET; N 28°18'01" E., 856.10 FEET; N 19°58'08" E., 708.62
FEET; N 7°22'15" E., 158.47 FEET; N 18°03'57" E., 995.31
FEET TO A POINT IN THE WESTERLY SUBDIVISION BOUNDARY OF
RANCHO CARMEL UNIT NO. 2, ACCORDING TO SAID MAP 10382;
CONTINUING ALONG THE SOUTHEASTERLY LINE OF SAID INTERSTATE
ROUTE 15 AND ALONG SAID WESTERLY BOUNDARY OF RANCHO CARMEL
UNIT NO. 2 THE FOLLOWING COURSES AND DISTANCES: N 14°29'32"W.,
304.81 FEET; N 4°09'34" E., 188.46 FEET; N 18°07'20" W.,
163.74 FEET; N 5°31'29" W., 489.27 FEET; N 14°59'49" W.,
276.09 FEET; N 28°15'31" W., 158.08 FEET; N 10°41'20" W.,
488.56 FEET; N 14°48'19" E., 294.75 FEET TO THE NORTHERLY
LINE OF SAID RANCHO LOS PENASQUITOS; THENCE S 89°45'01" E.,
ALONG SAID NORTHERLY LINE 1039.28 FEET; THENCE CONTINUING
ALONG SAID NORTHERLY LINE S 88°42'24" E., 4003.20 FEET TO
THE TRUE POINT OF BEGINNING.

EXCEPTING THEREFROM THAT PORTION LYING WITHIN THE BOUNDARY
OF RANCHO CARMEL UNIT NO. 2 ACCORDING TO MAP THEREOF NO. 10382
FILED IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY
APRIL 29, 1982.

THE MCINTIRE GROUP
AUGUST 29, 1984

VICINITY MAP

DEVELOPMENT AGREEMENT



Carmel Mountain Ranch



DEVELOPMENT APPROVALPhase II Industrial Park

(Tentative Map No. 84-84-0489)
(PID No. 84-0489)

DEVELOPMENT APPROVALRegional Shopping Center

(Tentative Map No. 83-0206)

(PCD No. 83-0206)

(Rezoning Ordinance No. 0-16066 [New Series])

DEVELOPMENT APPROVALGolf Course

(Conditional Use Permit Nos. 84-0114 and 84-0114.1)

DEVELOPMENT APPROVAL

Hotel Site

(Tentative Map No. 84-0857)

(Tentative Map No. 85-0546 (Financial Map))

DEVELOPMENT APPROVAL

Unit 1 Residential

(Tentative Map No. 84-0203)
(Final Map No. 11112)

DEVELOPMENT APPROVAL

Unit 2 Residential

(Tentative Map No. 84-0203)

(Revised)

(Final Map No. 11321)

DEVELOPMENT APPROVALUnit 5 Residential

(Tentative Map No. 84-0728)
(PRD No. 84-0728)

DEVELOPMENT APPROVAL

Unit 6 Residential

(Tentative Map No. 84-0911)

DEVELOPMENT APPROVAL

Unit 7 Residential

(Tentative Map No. 84-0912)

(Tentative Map No. 85-0546 (Financial Map))

DEVELOPMENT APPROVALUnit 8 ResidentialUnit 9 Residential

(Tentative Map No. 85-0400)

(Tentative Map No. 85-0610 (Financial Map))

DEVELOPMENT APPROVALUnit 10 ResidentialUnit 11 ResidentialUnit 12 Residential

(Tentative Map No.. 85-0401)

DEVELOPMENT APPROVALMaster Rezoning

(Ordinance No. 0-16281)
(New Series)

DEVELOPMENT APPROVALConvenience Center

(Tentative Map No. 85-0356)

CARMEL MOUNTAIN RANCH COMMUNITY PLAN
(RR-261374 and RR-261375)

MITIGATED NEGATIVE DECLARATION
(EQD No. 84-0222)

CARMEL MOUNTAIN RANCH
COMMUNITY FACILITIES FINANCING PLAN

(RR- _____)

CARMEL MOUNTAIN RANCH
PARK FEE ORDINANCE

2367

DEVELOPMENT APPROVAL

Unit 15 Residential

(Tentative Map No. 85-0610 (Financial Map))

ORDINANCE NUMBER O-16537 (NEW SERIES)ADOPTED ON NOV 12 1985

AN ORDINANCE APPROVING THE DEVELOPMENT
AGREEMENT BETWEEN THE CITY OF SAN DIEGO AND
CARMEL MOUNTAIN RANCH.

WHEREAS, Carmel Mountain Ranch, a partnership, ("Owner") is the owner or equitable owner of that certain real property consisting of approximately 1,388 acres located within the Carmel Mountain Ranch Community planning area; and

WHEREAS, The City of San Diego, a charter city, is authorized pursuant to Government Code Sections 65864 - 65869.5 to enter into binding development agreements with persons having legal or equitable interests in real property for the development of such property in order to establish certainty in the development process. The City further enters into this Development Agreement pursuant to its Charter and self-rule powers and San Diego Municipal Code Sections 105.0101 et seq.; and

WHEREAS, the parties desire to enter into this Development Agreement relating to the above-described real property in conformance with the provisions of the Government Code in order to achieve the development of private land uses together with the provision of public services, public uses, and urban infrastructure all in the promotion of the health, safety, and general welfare of the City of San Diego; and

WHEREAS, the property is located within the boundaries of the Carmel Mountain Ranch Community planning area. This community

plan was adopted by the Council on August 14, 1984, by Resolution No. R-261374. In conjunction with the adoption of the community plan, the Council certified the information contained in the Environmental Impact Report and approved the findings of the environmental document in compliance with the California Environmental Quality Act of 1970; and

WHEREAS, development of the subject property will be in conformance with the Carmel Mountain Community Plan and Master Rezoning 0-16281, Rezoning 0-16066 and with approved planned development permits, conditional use permits and tentative and final maps. The environmental effects of development permitted pursuant to the agreement were addressed in Mitigated Negative Declaration Nos. 84-0222 (and Addendum 85-0356), 84-489, 84-0114, 84-0203 (and Addendum 84-0934), 84-0911, 84-0912 and 84-0728 and Environmental Impact Report No. 79-0731, which have been certified by the City; and

WHEREAS, because of the complexities of financing the urban infrastructure, certainty in the development process is desirable. The phasing, timing and development of the public infrastructure including, but not limited to, parks, libraries, fire stations, transportation facilities, sewer and water facilities, other utilities, and open space maintenance necessitates a significant commitment of resources, planning and effort by property owners and the City in order for the public facilities financing to be successfully completed. Accordingly, in return for the participation and commitment to provide a pro ratio share of public facilities, including the provision of many

facilities by the developer on a turnkey basis, and the significant contribution of private resources for public purposes, the City in return, desires to make a commitment for certainty in the development process; and

WHEREAS, pursuant to the terms of the Development Agreement, Owner will provide substantial public improvements and benefits to the City including participation in the public facilities financing plan for the Carmel Mountain Ranch Community. In consideration of the public improvements and benefits to be provided by Owner pursuant to the Development Agreement, in consideration of Owner's agreement to finance public facilities, and in order to strengthen the public planning process and reduce the economic costs of development, by the Development Agreement the City intends to give Owner assurance that Owner can proceed with the development of the subject property for the term of the Development Agreement pursuant to the Development Agreement; and

WHEREAS, on August 29, 1985, the Planning Commission of The City of San Diego, after giving notice pursuant to Government Code Sections 65854, 65854.5, 65856, and Section 105.0103 of the San Diego Municipal Code held a public hearing on the application for the Development Agreement; and

WHEREAS, the Council of The City of San Diego, after providing public notice as required by law, held a public hearing on Owner's application, wherein all persons desiring to be heard were heard, and pursuant to said public hearing the Council recommended approval of the Development Agreement; and

WHEREAS, the Council finds that the Development Agreement is consistent with the Progress Guide and General Plan and the Carmel Mountain Ranch Community Plan, as well as all other applicable policies and regulations of The City of San Diego; and

WHEREAS, the Council has reviewed and considered the Development Agreement and determined the content of the Development Agreement to be complete and correct; NOW, THEREFORE,

BE IT ORDAINED, by the Council of The City of San Diego, as follows:

Section 1. The Council finds and determines the facts stated above to be true.

Section 2. The Council further finds with respect to the Development Agreement that:

A. It is consistent with the objectives, policies, programs and uses specified in the Progress Guide and General Plan and the Carmel Mountain Ranch Community Plan.

B. It will not be detrimental to the public health, safety and general welfare.

C. It will promote the orderly development of property or the preservation of property values in accordance with good land use practice.

Section 3. The Council hereby approves the Carmel Mountain Ranch Development Agreement, Case No. 84-0676, a copy of which is on file in the office of the City Clerk as Document No.

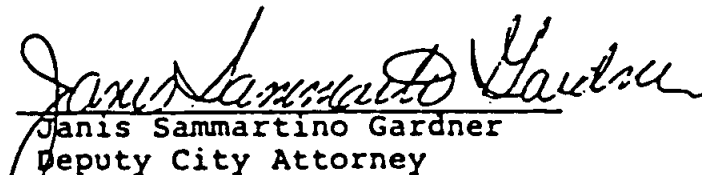
00-16537, and authorizes and directs the City Manager to execute said Development Agreement in the name of The City of San Diego not later than 15 days following the effective date of this

ordinance. Failure of Owner to execute the Development Agreement within 30 days, shall render this action null and void. The City Clerk is directed to record said Development Agreement and this ordinance with the County Recorder of San Diego County within ten days after its execution.

Section 4. This ordinance shall take effect and be in force on the thirtieth day from and after its passage.

APPROVED: John W. Witt, City Attorney

By


Janis Sammartino Gardner
Deputy City Attorney

JSG:ta:600.2
9/25/85
Or.Dept:Plan.
O-86-53
Form=o.devagr

2373

Diego on November 12, 1985

Gotch, Martinez,

DOGER HEDGECOCK

City of San Diego, California

S. ABDELNOUR

City of San Diego, California

EN BOVARD, Deputy

All, true and correct copy
City of San Diego, California.

passed until twelve calendar
and the day of its final
November 12, 1985

~~1 prior to its final passage.~~

in full was dispensed with
elected to the Council, and
h member of the Council and
or printed copy of said

S. ABDELNOUR

City of San Diego, California

Bovard, Deputy

RECORDING REQUESTED BY Jan Johnson
AND MAIL TO: City Clerk, Room Station 12A

85-464528
85-464528

RECORDED IN
OFFICIAL RECORDS
OF SAN DIEGO COUNTY

1985 DEC 10 AM 9:05

VERA L. LYLE
COUNTY RECORDER

RF	63
AR	61
TLR	
MG	1

DOCUMENT NO. 00-16537

FILED Nov. 12, 1985

OFFICE OF THE CITY CLERK
SAN DIEGO, CALIFORNIA

(DEV'E AGREEMENTS - Carmel Mountain Ranch)

Agree. w/Carmel Mountain Ranch for development
of property.

cc: Auditor MS 7C

Planning - Bob Korch (Dup. Orig.) MS 4A

E&D - Jim Foley MS 406

12/2/85

2374

Unit Map

REPORT K-MART Price City

35 UNIT NUMBER - TYP

1-23

RESIDENTIAL USE

30-38

COMMERCIAL USE

40-41

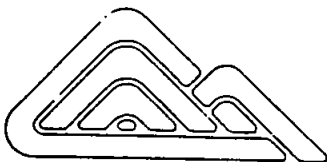
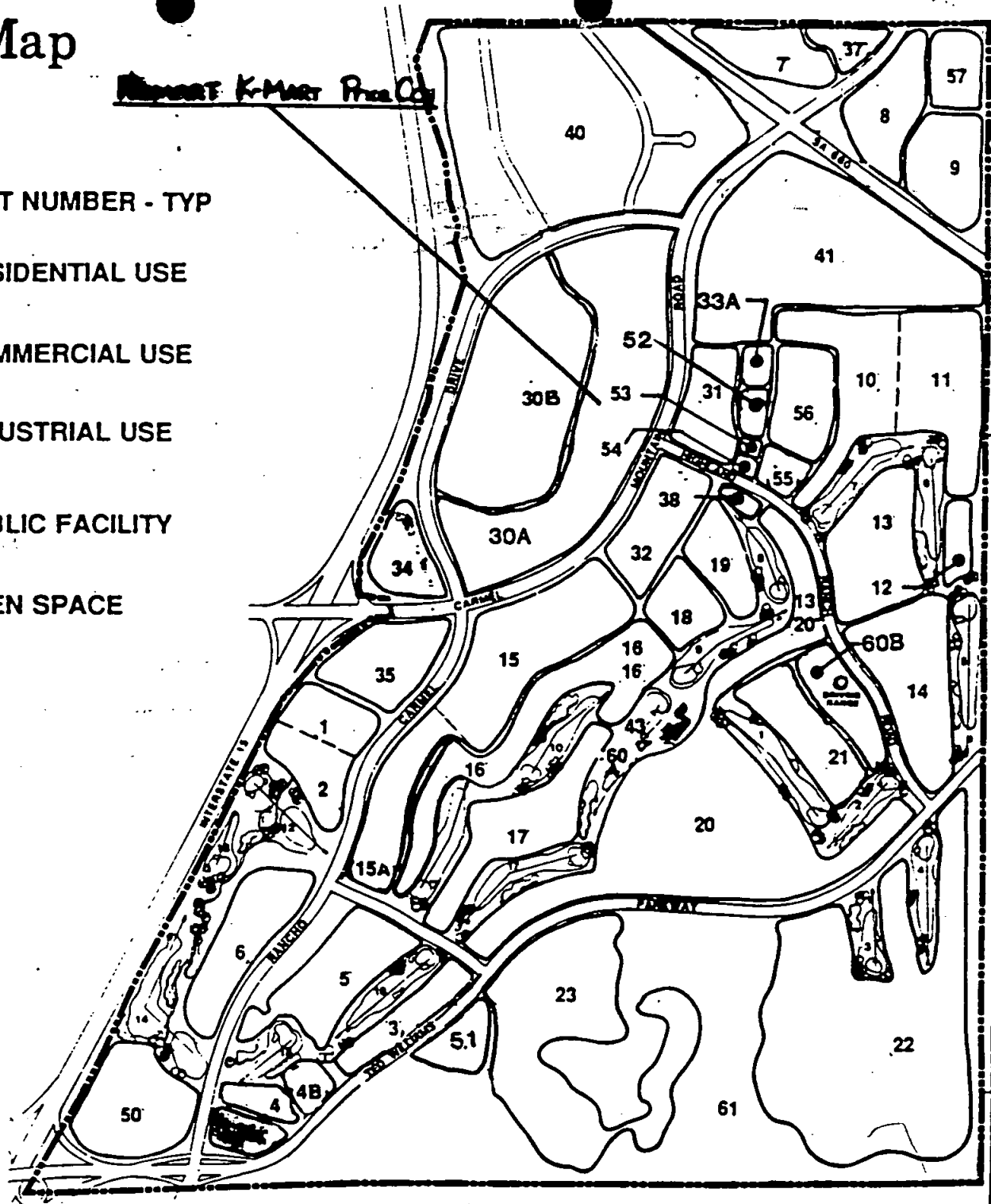
INDUSTRIAL USE

50-57

PUBLIC FACILITY

60-61

OPEN SPACE



Carmel Mountain Ranch

