

**ARDENWOOD REGIONAL PRESERVE  
MANAGEMENT AGREEMENT**

by and between

**EAST BAY REGIONAL PARK DISTRICT  
and  
CITY OF FREMONT**

THIS AGREEMENT ("Agreement") dated as of \_\_\_\_\_, 2010, is entered into by and between the East Bay Regional Park District, a California special district formed pursuant to section 5500 *et seq.* of the California Public Resources Code ("DISTRICT") and the City of Fremont, a municipal corporation organized and existing under and by virtue of the laws of the State of California ("CITY").

**RECITALS**

WHEREAS, CITY is the fee owner of certain real property located in the City of Fremont, County of Alameda, State of California, which is described in Exhibits A and B;

WHEREAS, CITY acquired title to the property described in Exhibits A and B in order to preserve prime agricultural land and historic resources, provide an opportunity to demonstrate historical and agricultural practices, provide a sense of open space and visual farm activity along the Dumbarton and Nimitz Freeways, and offer educational opportunities for historical heritage and farming and horticultural practices;

WHEREAS, CITY has determined, in the exercise of its judgment and discretion, that it is in the best public interest for DISTRICT to assume development, management, and operational responsibilities for such property as a regional preserve facility; and

WHEREAS, CITY and DISTRICT have completed a long term, successful agreement for these premises which was initially executed in 1982, and which the parties desire to extend.

NOW, THEREFORE, DISTRICT is willing to continue its development, management, and operational responsibilities for the regional preserve facility which are more fully set forth in this Agreement.

**AGREEMENT**

**1. FACILITY DESCRIPTION.**

For the better promotion of historical heritage and farming and horticultural practice, and for and in consideration of the faithful performance by DISTRICT of this Agreement, CITY leases to DISTRICT, and DISTRICT does lease, hire, and take from CITY those certain parcels of land (collectively referred to as the "regional preserve facility") situated in the City of Fremont, County of Alameda, State of California, more particularly described as follows:

- a. Real property owned by CITY and located in the City of Fremont, County of Alameda, State of California, commonly known as the Ardenwood Historic Farm Regional Preserve ("Park") and more particularly described, shown, and delineated in Exhibits A and B.
- b. All existing improvements on the above real properties which are set forth in Exhibit C.

## **2. EFFECTIVE DATE; TERM; OPTION TO EXTEND TERM.**

- a. This Agreement shall become effective upon its approval by the governing bodies of DISTRICT and CITY.
- b. The initial term of this Agreement shall be fifty (50) years commencing upon the effective date, as defined above.
- c. DISTRICT is hereby granted and shall have an option to extend the initial fifty (50) year term of this Agreement, upon all of the same terms and conditions herein contained, for an additional period of forty-nine (49) years ("extended term") commencing upon the expiration of the initial term. Such option shall be exercised, if at all, by DISTRICT by delivering to CITY at least six (6) months prior to the expiration of the initial term a written notice of its intention to extend the initial term of this Agreement. The word "term" as used in this Agreement shall include both the initial term and the extended term. As used herein, the word "lease year" shall mean a year commencing on the first day of the term hereof and each anniversary of said date.

## **3. CITY DISPOSITION OF PARKLAND.**

CITY acknowledges that approximately one hundred and twenty-one (121) acres of a total of two hundred and five (205) acres of the regional preserve facility were purchased with the proceeds of bonds from an issue authorized for the purpose of acquiring the land for park purposes, and that the entire regional preserve facility covered by this Agreement has been placed into use as a park. Accordingly, CITY agrees that in the event it desires to discontinue the use of all or any portion of the regional preserve facility as a park and sell or convey the land, it shall follow the procedures set forth in either California Government Code section 38502 or California Government Code section 38440 *et seq.*, as appropriate, to conduct an election regarding the disposition of the land.

In the future, should CITY acquire additional Caltrans lands for park purposes as part of the regional preserve facility, the provisions of this paragraph shall apply to those lands.

## **4. LAND USE DEVELOPMENT PLAN.**

DISTRICT completed and CITY approved an initial Land Use Development Plan for the regional preserve facility in 1982. DISTRICT completed and CITY approved an Amendment to the Land Use Development Plan dated August 1, 2006 (the "Land Use Plan Amendment"). The Land Use Development Plan as amended by the Land Use Plan Amendment (collectively the "Development Plan") shall guide DISTRICT'S use and operation of the regional preserve facility. The Development Plan may be amended from time to time. As provided in the Development Plan, DISTRICT shall develop the amendments, including any applicable environmental review document, and the Board of Directors of DISTRICT and the City Council of CITY shall approve any amendment following review by appropriate advisory bodies. Minor corrections to the

Development Plan and minor park development projects (collectively “minor changes”) that are consistent with and implement the Development Plan, which do not require further environmental review, may be approved by letter agreement between the City Manager of CITY and General Manager of DISTRICT. DISTRICT may also propose projects that are not minor changes and not included in the Development Plan. Such projects shall be proposed and considered for approval in accordance with Section B.2 of the 2004 Memorandum of Understanding between DISTRICT and CITY for a Liaison Committee, a copy of which is attached as Exhibit D.

## **5. RENTAL FEE.**

DISTRICT shall pay as rent for each lease year of the term of this Agreement, in advance, without previous demand on or before the first day of each and every lease year during the term, in lawful money of the United States of America, the sum of One Dollar (\$1.00). At its discretion, DISTRICT may pay the entire rental fee for the initial term in a lump sum upon the commencement of this Agreement.

## **6. USE OF REGIONAL PRESERVE FACILITY.**

a. The regional preserve facility shall be used by DISTRICT to preserve agricultural land; to provide an opportunity to demonstrate historical and current agricultural practices; and to offer a broad range of historical and current educational, cultural, and recreational opportunities consistent with DISTRICT'S Regional Park purposes and as described in the Development Plan. It is understood and agreed that DISTRICT shall continuously use and operate the regional preserve facility for such use during the entire term of this Agreement; provided, however, it is agreed that DISTRICT'S obligation shall arise as to any portion of the regional preserve facility only when such portion has been substantially developed in accordance with the Development Plan. Until any such area(s) of the regional preserve facility is substantially developed in accordance with the Development Plan, DISTRICT may close off such area(s) to the public.

b. DISTRICT may enter into subleases and license and concession agreements (herein collectively referred to as “subleases”) during the term of this Agreement for the uses hereinabove mentioned provided that any subleases shall be subject to the provisions of this Agreement. Prior to execution of a sublease, a draft copy thereof shall be delivered to the City Manager or designee. The City Manager or designee shall respond to DISTRICT within five (5) calendar days of receipt of the proposed sublease with any comments or objections to the sublease. If the City Manager or designee fails to respond within the five (5) calendar day period, CITY shall be deemed to consent to the sublease. Subleases that have been in effect prior to the commencement of this Agreement are itemized in Exhibit E.

DISTRICT agrees it shall use the proceeds of any sublease for the sole benefit of the regional preserve facility in the following order of priority:

1. For the maintenance, management, and/or operation of the facility, and
2. For the construction of improvements at the facility pursuant to the Land Use Development Plan.

Upon CITY request, DISTRICT agrees to provide CITY with an annual audit report of

such sublease proceeds and DISTRICT expenditures at the regional preserve facility within a reasonable period of time following expiration of each calendar year during the term of this Agreement and within thirty (30) days following the termination of this Agreement.

c. DISTRICT may conduct special events at the regional preserve facility. A list of special events that DISTRICT has regularly held and intends to continue holding at the regional preserve facility is set forth in Exhibit F, attached to and made a part of this Agreement. By approval of this Agreement, CITY approves those special events listed in Exhibit F for the term of this Agreement. Should DISTRICT wish to hold other special events that are not set forth in Exhibit F, it will prior to November 15 of each year provide to the City Manager or designee a list of the proposed additional special events for the upcoming calendar year. The City Manager or designee shall review and approve that list within thirty (30) calendar days of receipt. Such review shall include consideration of impacts on CITY services and associated fees if CITY services are directly impacted by the proposed special event. CITY approval shall not be unreasonably withheld. If the City Manager or designee fails to respond within the thirty (30) day-time period, the list of additional special events shall be deemed approved. Once the special event is either approved or deemed approved, it shall be added to the list set forth in Exhibit F without amendment to this Agreement. Prior to December 31 of each year, DISTRICT shall provide CITY a calendar of special events showing the dates they will be held at the regional preserve facility during the forthcoming year.

d. DISTRICT shall not use or permit the regional preserve facility to be used in whole or in part during the term of this Agreement in violation of any present or future laws, ordinances, general rules or regulations of city, state, or regional authority having jurisdiction over the regional preserve facility.

e. DISTRICT and CITY will enter into and revise as needed a separate "Patterson House Special Use Agreement."

## **7. FEES AND CHARGES**

DISTRICT agrees that it will not levy an entrance fee or other charge against any individual person to come onto the regional preserve facility, where such person attends a function or event solely at the Patterson House and/or gardens immediately adjacent thereto. The foregoing shall not preclude DISTRICT from charging a single-use fee or normal vehicle parking fee to the person, organization, or group sponsoring such function or event at the Patterson House and/or gardens. DISTRICT further agrees it will not levy a parking fee, entrance fee, or other charge against CITY or any attendee of CITY for any program CITY desires to conduct at the regional preserve facility.

CITY will reimburse DISTRICT for costs or expenses incurred by DISTRICT as a direct result of programs sponsored by CITY, provided that such costs and expenses have been mutually agreed upon in advance and in writing by CITY'S Recreation Department Director or designee and DISTRICT'S Assistant General Manager for Operations or designee. Alternatively, by advance mutual written agreement of CITY'S Recreation Department Director or designee and DISTRICT'S Assistant General Manager for Operations or designee, CITY may establish program fees to be collected by DISTRICT to reimburse DISTRICT costs incurred during the program. In the event a CITY program results in DISTRICT costs, including but not limited to police or staff expenses, that could not reasonably have been foreseen at the time any agreement to reimburse DISTRICT costs or to establish program fees is made, CITY will

promptly reimburse DISTRICT for the undisputed reasonable costs incurred.

**8. CONDITION OF REGIONAL PRESERVE FACILITY.**

DISTRICT agrees to accept the regional preserve facility in its “AS-IS” present, existing condition. DISTRICT acknowledges that its representatives have visited the regional preserve facility and all appurtenant facilities and have otherwise become fully acquainted with conditions relevant to the regional preserve facility and their operation.

**9. DEVELOPMENT AND IMPROVEMENT OF REGIONAL PRESERVE FACILITY.**

DISTRICT covenants and agrees, and it is made an express condition of this Agreement, that it shall develop and improve the regional preserve facility for the uses and purposes described in Paragraph 6 above in accordance with the Development Plan. Landscaping of the Patterson House grounds by the DISTRICT is included as a part of the Development Plan. DISTRICT shall be responsible for all development costs including, but not limited to, design, demolition, and construction, unless otherwise provided herein or in the Development Plan. To the extent DISTRICT uses private contractors to perform construction work at the regional preserve facility, it shall comply with all state or federal bidding, prevailing wage, bonding, and other requirements applicable to DISTRICT.

The layout and design plans of all improvements to be constructed upon the regional preserve facility shall be subject to the written approval of the City Manager or designee prior to the commencement of construction thereof. In addition, landscape plans shall be subject to the prior written approval of the City Manager or designee if such plans specify the relocation or removal of any tree that qualifies for designation as a landmark tree under CITY’S Tree Preservation Ordinance (Fremont Municipal Code section 4-5112., as it may be amended from time to time) or if it is reasonably foreseeable that implementation of the landscape plans will result in damage to any such tree. CITY covenants not to unreasonably withhold or delay such approvals. DISTRICT acknowledges that these approvals are separate and distinct from CITY’S regulatory process of plan checking in connection with building permit issuance. In the event the DISTRICT determines that the condition of any tree that qualifies for designation as a landmark tree presents an imminent threat to public health or safety, the DISTRICT prior to taking any remedial action shall notify (by phone, e-mail or facsimile) the CITY’S Recreation Department Director or designee of the remedial actions it has determined are reasonably necessary to address the situation. If the CITY’S Recreation Department Director or designee does not respond or object to the DISTRICT’S proposal by 5:00 p.m. on the next business day, DISTRICT may take such actions as it deems reasonably necessary without the prior approval of the CITY and will provide a written report of such actions within seven (7) business days.

Notwithstanding the foregoing provision of this Paragraph 9 or any other provision of this Agreement, DISTRICT further covenants and agrees, at its own cost and expense, to be responsible for capping wells and drilling new wells when necessary; establishing potable water and irrigation systems for agricultural areas; maintaining grounds and improvements; providing driveways, parking lots, restrooms, a security residence, and security fencing; and maintaining trees and tree areas to standards suitable to the species.

DISTRICT shall be the lead agency for purposes of the California Environmental Quality Act and shall obtain at its expense (except as provided below) all necessary permits, approvals,

licenses, and certificates necessary for the development of the regional preserve facility and construction of improvements thereon and for the conduct of DISTRICT'S operations pursuant to this Agreement. During the first fiscal year of this Agreement (ending June 30, 2010), all CITY permit fees related to the DISTRICT'S construction of improvements at the regional preserve facility up to an aggregate amount of Twenty Thousand Dollars (\$20,000.00) shall be shared equally between CITY and DISTRICT. Accordingly, for the fiscal year ending June 30, 2010, CITY shall be responsible to pay fifty percent (50%) of all applicable permit fees in an amount not to exceed Ten Thousand Dollars (\$10,000.00) and DISTRICT shall be solely responsible to pay all permit fees that exceed an aggregate amount of Twenty Thousand Dollars (\$20,000.00). In each subsequent fiscal year, commencing July 1, 2010 and ending June 30, 2028, the aggregate amount of permit fees to be equally shared by CITY and DISTRICT shall be increased by the percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers for the San Francisco-Oakland-San Jose area published by the United States Department of Labor Statistics ("CPI"), which is published most immediately preceding the commencement of the applicable fiscal year. After June 30, 2028, representatives of CITY and DISTRICT shall meet to discuss whether to recommend the parties continue sharing permit fee costs according to the methodology set forth above or use another mutually agreed upon methodology.

#### **10. MAINTENANCE AND IMPROVEMENTS.**

a. Except as otherwise provided herein, DISTRICT covenants and agrees, at its own cost and expense, during the entire term of this Agreement to be responsible for maintaining the grounds (including landscaping), existing and future improvements to be constructed by DISTRICT, structural integrity of all existing buildings, and alarm systems. Notwithstanding the foregoing, CITY shall be responsible for performing all maintenance of the Patterson House and Cook's House, including any and all repairs, utilities, and alarm systems.

b. Notwithstanding anything contained in this Agreement to the contrary, DISTRICT shall be under no obligation to rebuild or restore the buildings, facilities, structures, and improvements existing in the regional preserve facility as of the effective date of the term hereof, either during the term hereof or upon the expiration or termination of this Agreement.

CITY and DISTRICT acknowledge that four (4) vacant structures are located at the Regional Preserve Facility. These structures were not originally located at the Regional Preserve Facility, were placed at the facility subsequent to the initial 1982 Management Agreement, and have never been in use at the facility by the DISTRICT. The future disposition, relocation, or demolition of these structures is outside the scope of this Agreement, and will be determined by the CITY and the DISTRICT in the future as appropriate. CITY understands and agrees that these buildings are not insured, managed, or maintained by the DISTRICT and that the DISTRICT has no maintenance or other obligations with respect to them. These structures are itemized in Exhibit G.

c. If DISTRICT shall fail, neglect, or refuse to perform any of its obligations hereunder after thirty (30) days written notice from CITY, CITY, in addition to any other rights and remedies it may have, may perform such obligation, and DISTRICT shall reimburse CITY for the cost thereof. If CITY considers the failure to perform any such obligation to be of an emergency nature, CITY may shorten the thirty (30) days notice provisions as is reasonable under the circumstances.

d. CITY shall, at its own cost and expense, during the entire term of this Agreement, make all repairs to the premises and all improvements thereon resulting from the acts or omissions of CITY, its officers, employees, and agents.

#### **11. ADVISORY BOARD; LIAISON COMMITTEE.**

a. CITY has established the G.W Patterson House Advisory Board (“Advisory Board”) in accordance with provisions of the Fremont Municipal Code. The responsibilities of the Advisory Board are to oversee the general building maintenance, restoration, interpretative function, and management of the Patterson House and to procure funds for its restoration, maintenance, and management. The Advisory Board is accountable to CITY.

b. CITY and DISTRICT through the Liaison Committee Agreement (a copy of which is attached as Exhibit D) have established a Liaison Committee of the two agencies to discuss and confer on issues of mutual interest between the two agencies in the Fremont area and at the regional preserve facility. The Liaison Committee reports and advises the City Council of CITY and Board of Directors of DISTRICT on the operation, development, and management of regional parklands in the Fremont area.

#### **12. UTILITY EASEMENTS.**

DISTRICT is hereby granted the right to construct utility facilities necessary for DISTRICT to carry out its obligations and to recommend nonexclusive underground utility easements consistent with DISTRICT’S obligations hereunder to other parties. CITY agrees to execute whatever instruments are required to effect the foregoing. DISTRICT agrees that all utilities installed by DISTRICT or others will not disturb in any significant manner the improvements on the premises; will be located and installed so as to cause as little impairment of park uses, facilities, and qualities as may be reasonably possible; shall be in accordance with CITY adopted codes and regulations; and that all repair and/or replacement work made necessary by any damage done by virtue thereof shall become the responsibility of the party (including DISTRICT) performing such work.

CITY reserves the right to grant an additional extension to the width of an existing easement and to convert existing working strip easements to full easements to a total width of fifty (50) feet for each easement as held by Pacific Gas & Electric Company and as more particularly shown and delineated on Exhibits A and B. CITY agrees that any work done in such expanded easements will require compliance with DISTRICT’S encroachment permit process, which permit shall not be unreasonably denied by DISTRICT. Any payments from Pacific Gas & Electric Company for the extension of such easements shall be paid to CITY.

#### **13. TITLE TO IMPROVEMENTS.**

During the term of this Agreement, title to all improvements constructed on the regional preserve facility by DISTRICT shall vest in DISTRICT. Upon termination of this Agreement (whether by expiration of the term hereof, cancellation or otherwise), unless otherwise provided in this Agreement, title to all such improvements then remaining upon the regional preserve facility shall vest in CITY.

Title to all equipment, furnishings, and trade fixtures placed by DISTRICT in the regional

preserve facility shall remain in DISTRICT, and replacements, substitutions, and modifications thereof may be made by DISTRICT throughout the term of this Agreement.

**14. NO LIENS; FUTURE ALTERATIONS AND IMPROVEMENTS.**

DISTRICT agrees to pay for all labor performed and materials furnished for any construction, repairs, additions, alterations, or improvements made by it in the regional preserve facility and to keep its possessory interest therein free and clear of all liens. Upon and after completion of the construction contemplated under the Development Plan, no major alterations, additions, changes, or improvements to the structures or buildings or to the regional preserve facility shall be made without the prior written consent of the City Manger or designee.

**15. SECURITY AND UTILITY CHARGES.**

DISTRICT shall pay the cost of all necessary security, light, heat, water, garbage, or other utility services required in connection with the use of the regional preserve facility. To the extent CITY receives free or discounted utility services from utility service providers, CITY will provide DISTRICT the same financial benefit on such utilities at Ardenwood. DISTRICT will be exempt from any hook-up or installation fees for CITY provided utilities. DISTRICT shall also be responsible for paying to CITY the cost of any water and sewer services furnished by CITY to DISTRICT'S subtenants in the event that payment is not made to CITY by the subtenants. CITY will pay all utility fees and charges incurred at the Patterson House and the Cook House.

**16. TAXES AND ASSESSMENTS.**

DISTRICT agrees to pay all lawful taxes, which at any time may lawfully be levied by the state, county, or any tax levying body, upon any interest in this Agreement or any possessory right, which DISTRICT may have in or to the regional preserve facility covered hereby by reason of its use or occupancy thereof or otherwise, including all taxes, charges on goods, merchandise, fixtures, appliances, equipment, and property owned by it in or about the regional preserve facility, and any assessments for roadways, water, sewer, or storm drains.

**17. FORCE MAJEURE; EXTENSION OF TIME.**

In the event that DISTRICT or CITY is delayed, directly or indirectly, from the performance of any obligation required under this Agreement by acts of God, accidents, fire, floods, inclement weather, governmental action and restrictions of any and all kinds, strikes or labor difficulties of any and all kinds, shortages of or delay in the delivery of materials, acts of war, riot and civil commotion, or by any other cause beyond the reasonable control of DISTRICT or CITY, as the case may be, such failure shall not be deemed to be a breach of this Agreement, and the time within which DISTRICT or CITY must perform any such obligations, so affected by such causes, shall be extended by a period of time equal to the period of delay arising from any of such causes.

**18. SIGNS.**

Subject to the provisions of this Section 18, DISTRICT shall have the right to erect and maintain all signs typically employed by DISTRICT in connection with the operation of the regional preserve facility. The DISTRICT signs currently in use are the East Field, Produce

Stand and Special Event signs and banners. Any changes proposed to the structure or physical appearance of the existing signs and all new signs proposed by the DISTRICT will be subject to the applicable CITY sign ordinance, with the understanding by the parties that the nature of the signs will be generally consistent with a rural, farming theme which the regional preserve facility represents.

## **19. INDEMNIFICATION.**

Each party hereby agrees to indemnify the other against claims, causes of action, penalties, losses, expenses (including reasonable attorneys' fees), and any other liability arising out of the willful or negligent act or omission of any contractor, agent, employee, or official of the indemnitor on account of the death of or injury to any person, including the officials, employees, agents, and contractors of the parties or for loss of or damage to property, including the property of such persons and of the parties. Such indemnification shall extend to the elected officials, officers, and employees of the indemnitee.

## **20. INSURANCE.**

DISTRICT shall maintain in force during the term of this Agreement public liability, property damage, products liability insurance, including owned and non-owned automobile coverage for the full limits in existing policies, but in no event for less than the sum of One Million Dollars (\$1,000,000.00) combined single limit. Upon the receipt of advice from CITY'S Risk Manager, CITY may reasonably require, by one (1) year advance written notice from the City Manager or designee, DISTRICT to increase the policy limits for all such insurance. DISTRICT agrees that CITY shall be named as an additional insured under such liability insurance policy or policies.

All such policies shall be endorsed with a severability of interest or cross-liability endorsement reading generally as follows:

Cross-Liability: In the event of one of the assureds incurring liability to any other of the assureds, this policy shall cover the assured against whom claim is or may be made in the same manner as if separate policies had been issued to each assured. Nothing contained herein shall operate to increase underwriter's limited of liability.

A certificate(s) evidencing such insurance coverage shall be delivered to CITY prior to the effective date of the term of this Agreement and such certificate(s) shall provide that such insurance coverage will not be cancelled or reduced without at least thirty (30) days prior written notice. At least thirty (30) days prior to the expiration of any such policy, a certificate showing that such insurance coverage has been renewed or extended shall be delivered to CITY. If such coverage is cancelled or reduced, DISTRICT shall, within fifteen (15) days after receipt of written notice from CITY of such cancellation or reduction of coverage, deliver to CITY a certificate showing that the required insurance has been reinstated or provided through another insurance company or companies. Upon failure to so file such certificate, CITY, without further notice, at the expense of DISTRICT, shall have the right to obtain and maintain such insurance until such time as DISTRICT obtains same and DISTRICT shall pay CITY the costs thereof.

Notwithstanding the foregoing provisions of this Paragraph 20, in the event the DISTRICT shall determine to self-insure against any or all of the liabilities set forth in this

Paragraph 20, then in that event, DISTRICT may so self-insure, and DISTRICT agrees to afford CITY the same protection as if the insurance set forth in this Paragraph 20 had been carried.

## **21. FIRE INSURANCE.**

DISTRICT shall maintain at its own costs and expense, during the entire term of this Agreement, a policy or policies of insurance against loss or damage by fire with extended coverage and vandalism and malicious mischief endorsements covering all buildings (specifically excepting the Patterson House and nearby Cook's House for which the CITY will acquire insurance as it deems appropriate), facilities, and improvements existing at the time of execution of this Agreement, or placed or erected in the regional preserve facility by DISTRICT during the term hereof (in an amount equal to one hundred twenty percent (120%)) of the actual cash value of all such buildings, facilities, and improvements. The proceeds of any such insurance shall be used for rebuilding or repairing or replacing the damaged or destroyed buildings, facilities, or improvements, unless DISTRICT, with CITY'S concurrence, elects not to so repair, rebuild, or replace the same. DISTRICT, with CITY'S concurrence, may optionally use the proceeds of any such insurance for developing other capital improvements in the regional preserve facility. If such proceeds are not so used, the buildings or improvements so damaged or destroyed shall be removed by DISTRICT and the portion or portions of the regional preserve facility occupied by the buildings or improvements so removed shall be restored to substantially the same condition in which they existed immediately prior to construction of the buildings or improvements. In the event the proceeds are not used to rebuild, repair, replace the improvements or buildings, or to construct other improvements, such proceeds shall first be used to restore the underlying land as described above. The parties agree to use the balance for the improvement and enhancement of the regional preserve facility.

The obligations of DISTRICT under this Paragraph 21 shall be deemed to be satisfied if a sublessee, concessionaire, or licensee of any building or improvement is required to carry and in fact does carry insurance on such building and improvement in the amount and upon the terms set forth in this Paragraph 21.

## **22. CANCELLATION AND TERMINATION OF AGREEMENT.**

Notwithstanding anything in this Agreement to the contrary, DISTRICT shall have the right to terminate this Agreement at any time upon not less than two (2) years prior written notice if the Board of Directors of DISTRICT, in their sole discretion to be exercised in a reasonable manner, determines that it cannot economically continue to perform its obligations under this Agreement.

## **23. FORFEITURES.**

Subject to the provisions of Paragraph 17, it is mutually covenanted and agreed and this Agreement is made upon the condition that if the rents or other sums, which DISTRICT herein agrees to pay, or any part thereof, shall be unpaid on the date on which the same shall become due, or if default be made in any of the terms, agreements, conditions, or covenants herein contained on the part of DISTRICT or should DISTRICT abandon and cease to use the regional preserve facility for a period of ninety (90) days at any one time then and in such event, at the option of CITY as evidenced by resolution of its City Council, this Agreement shall become

forfeited, and CITY may exercise all rights of entry and re-entry upon the regional preserve facility. DISTRICT shall not be considered in default as to any provisions of this Agreement where such default is the result of, or pursuant to, any process, order or decree, or any court or regulatory body.

DISTRICT shall not be considered to be in default until the expiration of forty-five (45) days (in the case of a failure in the payment of rent or other sums herein provided to be made by DISTRICT) or sixty (60) days (in all other instances except abandonment) after written notice by CITY to DISTRICT and if, during such forty-five (45) or sixty (60) days period, as the case may be, such failure or condition in violation of the provisions of this Agreement shall have been cured or obviated by DISTRICT, then upon payment, performance, or satisfaction of such term, covenant, or condition any right of CITY to terminate this Agreement or re-enter upon the regional preserve facility by reason of such failure shall cease.

If any condition, which would entitle CITY to declare a default, is of such nature that it cannot be remedied within sixty (60) days, such declaration of default, termination, and right of re-entry, or other rights of CITY shall be postponed as long as DISTRICT shall have commenced the elimination of such condition within such sixty (60) days and shall then be continuously and diligently proceeding in good faith to cure the same.

#### **24. SURRENDER OF REGIONAL PRESERVE FACILITY.**

DISTRICT covenants and agrees that at the expiration of this Agreement, or upon its earlier termination, it will quit and surrender the regional preserve facility as set forth in this Agreement.

#### **25. INSPECTION OF REGIONAL PRESERVE FACILITY.**

CITY or its duly authorized representatives or agents and other persons for it may enter upon the regional preserve facility at any and all reasonable times during the term of this Agreement for the purpose of determining whether or not DISTRICT is complying with the terms and conditions hereof or for any other purpose incidental to rights of CITY. CITY agents entering the regional preserve facility for official purposes shall be exempt from entry fees and other charges.

#### **26. HOLDING OVER.**

Should DISTRICT hold over the use of the regional preserve facility after this Agreement has terminated in any manner, such holding over shall be deemed merely a tenancy from month-to-month on the same terms and conditions as herein provided.

#### **27. HAZARDOUS SUBSTANCE.**

No goods, merchandise, or material shall be kept, stored, or sold in the regional preserve facility which are in any way explosive or hazardous, and no offensive or dangerous trade, business, or occupation shall be carried on therein or thereon, and nothing shall be done in the regional preserve facility other than as is provided for in Paragraph 6 of this Agreement, which will suspend the insurance on the regional preserve facility; and no machinery or apparatus shall be used or operated in the regional preserve facility which will in any way

damage the regional preserve facility or adjacent buildings; provided, however, that nothing in this paragraph contained shall preclude DISTRICT from bringing, keeping, or using on or about the regional preserve facility such materials, supplies, equipment, and machinery as are appropriate or customary in carrying on its operations directly related to the regional preserve facility or from carrying on its operation in the regional preserve facility in all respects as is generally usual. DISTRICT shall be responsible for proper handling and disposal of any hazardous materials brought by DISTRICT, its employees, agents, or sublees onto the regional preserve facility.

## **28. WAIVERS.**

No waiver by either party, at any time, of any of the terms, conditions, covenants, or agreements of this Agreement shall be deemed or taken as a waiver at any time thereafter of the same or any other term, condition, covenant, or agreement herein contained, nor of the strict and prompt performance thereof. No delay, failure, or omission of CITY to exercise any right, power, privilege, or option arising from any default shall be construed to be a waiver of any such default. No option, right, power, remedy, or privilege of CITY shall be construed as being exhausted or discharged by the exercise thereof in one or more instances. It is agreed that each and all of the options, rights, powers, or remedies given to CITY by this Agreement are cumulative and no one of them shall be exclusive of the other or exclusive of any remedies provided by law, and that the exercise of one option, right, power, or remedy by CITY shall not impair its rights to any other option, right, power, or remedy.

## **29. CONDEMNATION.**

a. As used herein the term “condemnation” means the condemnation or taking for a higher public or quasi-public use by right of eminent domain, with or without litigation, or transferred by agreement in connection with such higher public or quasi-public use. If any part of the regional preserve facility shall be condemned, this Agreement, as to the part so taken, shall terminate as of the date title shall vest in the condemnor; provided, however, that in the event, in the sole judgment of DISTRICT to be exercised in a reasonable manner, the portion of the regional preserve facility remaining is either insufficient or unsuitable for the conduct of an operation of the nature contemplated hereunder, then DISTRICT shall have the option of terminating this Agreement upon thirty (30) days written notice.

b. DISTRICT shall be entitled to that portion of the award (which word includes compensation payable as a result of transfer under threat of condemnation) attributable to the improvements made in the regional preserve facility by DISTRICT or persons acting under or through DISTRICT (regardless of whether title thereto shall be in DISTRICT) and any award for relocation, and CITY shall be entitled to the balance of the award.

c. DISTRICT agrees that in the event of condemnation and this Agreement is not terminated pursuant to the terms hereof, all condemnation proceeds (other than for relocation) received by DISTRICT shall be used by DISTRICT for the management, operation, control of, and additional improvements to the remainder of the regional preserve facility and for pro rata costs of administration, legal fees, and other expenses incurred as a result of such condemnation.

### **30. EXTENSIONS OF TIME.**

CITY shall have the right to grant reasonable extensions of time to DISTRICT for any purpose or for the performance of any obligation of DISTRICT hereunder. Such extension shall be provided in writing to DISTRICT.

### **31. RESOLUTION OF DISPUTES.**

In the event disputes should arise under this Agreement, the Parties agree to the following procedures:

a. First Level. At least one individual from each of the Parties will meet, in person, and attempt to resolve the dispute. If a third party is involved in the dispute, the Parties will make diligent good faith efforts to include that third party in the dispute resolution process set forth in this Section 31. For the CITY, the first level person shall be the Recreation Department Director or designee. For the DISTRICT, the first level person shall be the Chief for Interpretative and Recreation Services or designee.

b. Second Level. Each Party will designate individuals to whom matters not resolved at the first level shall be referred. For the CITY, the second level person shall be the City Manager or Deputy City Manager. For the DISTRICT, the second level person shall be the General Manager or Assistant General Manager for Operations.

c. Urgent and Non-Urgent Matters. For any matter designated by the initiating Party as "urgent," the other Party shall make its first response within twenty-four (24) hours, or within such other period as the first level persons may agree. Unless a matter is designated "urgent" by the initiating Party, the other Party shall respond within five (5) working days, or within such other period as the first level persons may agree.

d. Mediation. If the meeting(s) at the second level do not resolve the dispute, the Parties agree to mediate the matter with a mutually selected mediator, with the mediator's fees to be split equally between or among the Parties to the dispute (unless the mediator finds one or more Parties acted in bad faith and otherwise allocates the fees among the Parties).

e. Remedies Under Law. If neither the meetings nor the mediation results in a resolution to the dispute, the Parties will have the right to exercise any of its remedies available under law.

### **32. TERMS BINDING ON SUCCESSORS.**

All the terms, covenants, and conditions of this Agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto.

### **33. TIME OF ESSENCE.**

Time is of the essence in each provision of this Agreement.

**34. CONSENT OF CITY.**

Whenever approval of CITY is required under any provision of this Agreement, CITY agrees to notify DISTRICT in writing within thirty (30) days after delivery of the request for approval whether CITY approves or disapproves and, if the latter, the reasons therefore. Should CITY not notify DISTRICT within said thirty (30) days, it shall be conclusively deemed that CITY has approved such request.

**35. NOTICES.**

All notices to be given hereunder shall be in writing and shall be deemed given when deposited in the United States mail, postage prepaid, certified return receipt requested, or registered, addressed as follows, or to such other address as from time to time may be designated by a party by written notice to the other party:

CITY: City of Fremont  
Attn: City Manager  
City Hall Building B  
3300 Capitol Avenue  
Fremont, California 94537-5006

DISTRICT: East Bay Regional Park District  
Attn: General Manager  
2950 Peralta Oaks Court  
Oakland, California 94605-0381

**36. EQUAL OPPORTUNITY; NON-DISCRIMINATION.**

In furtherance of CITY'S and DISTRICT'S long-standing policy to insure that equal employment opportunity is achieved and non-discrimination is guaranteed in all CITY and DISTRICT related activities, it is expressly understood and agreed with respect to the DISTRICT'S activities upon the premises:

a. DISTRICT will not discriminate against any employee or applicant for employment because of race, color, religious creed, national origin, physical disability, mental disability, medical condition, marital status, sexual orientation, or gender, and shall post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this paragraph.

b. DISTRICT will, in all solicitations or advertisements for employees placed by or on behalf of DISTRICT, state that all qualified applicants will receive consideration for employment without regard to race, color, religious creed, national origin, physical disability, mental disability, medical condition, marital status, sexual orientation, or gender.

c. DISTRICT will not discriminate by segregation or otherwise against any person or persons because of race, color, religious creed, national origin, physical disability, mental disability, medical condition, marital status, sexual orientation, or gender in furnishings, or by refusing to furnish, to such person or persons the use of any public facility in the regional

preserve facility including any and all services, privileges, accommodations, and activities provided thereby.

d. DISTRICT'S noncompliance with the provisions of this paragraph shall constitute a material breach of this Agreement.

### **37. PUBLIC SAFETY.**

DISTRICT and CITY each agree that public safety services within the regional preserve facility shall be conducted in the manner set forth herein. CITY shall have primary policing responsibility for the Patterson House and the Cook House, and DISTRICT shall have primary policing responsibility for the remaining area of the regional preserve facility. The police officers of each agency shall have concurrent jurisdiction throughout the regional preserve facility to be exercised in accordance with the following policies:

The agency first receiving notification of a probable crime in progress will provide emergency response to the best of its ability. Such responding agency will request additional assistance from the other agency as necessary to provide more rapid response or backup. When either agency provides first response in connection with a crime or occurrence originating in the portion of the regional preserve facility under the jurisdiction of the other agency, the responding agency will provide full advice to the public safety department of the other who shall then be responsible for any subsequent investigation and follow-up.

Each agency will respond to and be responsible for those non-emergency incidents or crimes occurring within its designated area. However, either DISTRICT or CITY may respond and take preliminary information which shall be turned over to the proper agency for necessary investigation and follow-up.

Each agency will handle its own non-crime public service calls as time and resources are available. However, each agency may also on its own initiative provide assistance to the other when it is appropriate to do so.

DISTRICT and CITY each agree to provide the same level of public safety services to all portions of the regional preserve facility that it provides throughout the rest of its jurisdiction, subject to the policies set forth above.

### **38. AMENDMENT.**

This Agreement may be amended by mutual written agreement of the parties evidenced by proper action of the governing bodies of each of the parties hereto.

### **39. HEADINGS.**

The paragraph headings in this Agreement are inserted only as a matter of convenience and for reference and in no way define, limit, or describe the scope or intent of this Agreement or any provision thereof or in any way affect this Agreement.

**40. ENTIRE AGREEMENT.**

This Agreement, including all documents incorporated herein by reference, comprises the entire integrated understanding between the parties concerning the matters described herein. This Agreement supersedes all prior negotiations, agreements, and understandings regarding this matter, whether written or oral.

**41. EXHIBITS.**

All of the exhibits attached hereto are hereby incorporated into this Agreement at the place(s) each such exhibit is referred to in the next as though set out in full at such place(s).

**42. COVENANTS AND CONDITIONS.**

It is hereby agreed between the parties hereto that all of the agreements herein contained, whether technically covenants or conditions, shall be deemed conditions for the purpose hereof.

**43. ATTORNEYS' FEES.**

If legal action or arbitration shall be brought by either of the parties hereto because of the breach of any term, covenant, or condition hereof, the party prevailing in such action or arbitration (DISTRICT or CITY, as the case may be) shall be entitled to recover from the party prevailing costs of suit and reasonable attorneys' fee which shall be fixed by the Judge of the Court or the arbitrator.

**44. CITY AND DISTRICT AUTHORITY.**

The parties agree that this Agreement shall not become effective for any purpose whatsoever until duly executed by CITY and DISTRICT officials, in quadruplicate, with a certified copy of the resolutions of City Council of CITY and Board of Directors of DISTRICT authorizing such execution. No agent or representative of either CITY or DISTRICT has any authority to vary the terms of this Agreement, or to extend the rights and privileges, as herein set forth, or to make any statements, or representations concerning this Agreement, in the rights and privileges herein set forth, except as may be evidenced by resolution of such City Council and Board of Directors and a duly executed amendment thereto.

IN WITNESS WHEREOF, this Agreement is entered into by the parties hereto and is effective on the date and year first hereinabove written.

[Signature Page Follows]

EAST BAY REGIONAL PARK DISTRICT

CITY OF FREMONT

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

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

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

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

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

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

APPROVED AS TO FORM:

APPROVED AS TO FORM:

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

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

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

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

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

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

## LIST OF EXHIBITS

- Exhibit A: Property Description
- Exhibit B: Property Description
- Exhibit C: Existing Improvements on Property
- Exhibit D: Memorandum of Understanding between the DISTRICT and the CITY for a Liaison Committee
- Exhibit E: List of Subleases
- Exhibit F: List of Special Events
- Exhibit G: Structures Not Used as Part of Facility