

Attachment 5

Public Access Easement

DRAFT

RECORDING REQUESTED BY, AND
WHEN RECORDED RETURN TO:

Attention: _____

THIS SPACE ABOVE FOR RECORDER'S USE

THIS EASEMENT AGREEMENT IS RECORDED AT THE REQUEST OF THE CITY OF BERKELEY, A CALIFORNIA MUNICIPAL CORPORATION, AND IS EXEMPT FROM RECORDING FEE PURSUANT TO GOVERNMENT CODE § 6103 AND § 27383 AND FROM THE PAYMENT OF A DOCUMENTARY TRANSFER TAX PURSUANT TO REVENUE AND TAXATION CODE § 11922.

EASEMENT AGREEMENT

This Easement Agreement ("Agreement"), is made and entered into as of _____, 2004, by and between _____ ("Grantor") and the CITY OF BERKELEY, a California municipal corporation ("City").

RECITALS

A. _____ is the owner of the real property described on Exhibit A hereto (the "Grantor's Property").

B. In connection with City's development of a bicycle and pedestrian path along Codornices Creek, commonly known as the "Codornices Creek Trail" and subject to the terms and conditions contained herein, Grantor has agreed to grant to City certain easements and related rights in the land described on Exhibit B hereto ("Easement Area").

AGREEMENT

In consideration of the foregoing, and for other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

1. **Grant of Easements.**

1.1 Right-of-Way. Subject to the terms and conditions of this Agreement, Grantor grants to City a non-exclusive easement over and across the Easement Area for public use as a section of the Codornices Creek Trail. ("Right of Way").

1.2 Utility Easement. Grantor grants to City a non-exclusive easement ("Utility Easement") on, across and under the Easement Area, for the installation, use,

maintenance, repair, restoration, relocation and removal of (i) storm sewers, (ii) electricity, and (iii) and water mains or conduits (collectively the "Utilities"). The Utilities must serve only the Path Improvements (as defined below). All improvements, fixtures and equipment relating to the Utilities must be located underground with the exception of customary above-ground fixtures and equipment incidental to such underground utilities.

2. **Installation of Path Improvements and Maintenance Obligations.**

2.1 City, at its sole cost and expense, may install, within the Easement Area, the improvements listed on Exhibit C hereto (collectively, the "Path Improvements") and related Utilities. City shall carry out such installation so as to cause as little disturbance as possible to Grantor and Grantor's use of the Grantor's Property and the improvements now or hereafter located thereon. Thereafter, City shall, at all times, and at its sole cost and expense, (i) keep and maintain the Right of Way in good condition and repair, and (ii) be responsible for the maintenance, repair of the Path Improvements.

2.2 **Standards of Installation and Maintenance.** Upon City's construction, maintenance or of the Path Improvements, as the case may be, City shall, at its sole cost and expense, and in a timely manner, remove any scars to the surface and restore all disturbed areas of the Grantor's Property and any improvements thereon utilizing industry standard workmanship and materials, including without limitation re-seeding, re-sodding or repaving where necessary. Trenches shall be backfilled and compacted to density equal to that of the adjacent undisturbed soil. In addition, such repair and maintenance includes, but is not limited to: (a) providing for the maintenance of paved surfaces in a smooth and evenly covered condition with the type of surfacing material originally installed or a substitute equal or superior in quality, use and durability to such original material; (b) providing for the maintenance of the Right of Way in clean and orderly condition; (c) providing for the repair, repainting or replacement of any necessary or appropriate signs, markers and lines; (d) providing for the operation, maintenance, repair and replacement of lighting facilities; (e) providing for the pruning, cultivation, watering, fertilization, fumigation and other maintenance of all landscaped areas and the repair of sprinkler systems and water lines; (f) providing for the replacement of plants and other landscaping as necessary or appropriate; and (g) providing for the construction, repair and maintenance of any subsequent upgrades that may be required by any governmental entity.

3. **Use of Right of Way.** City shall use reasonable efforts to ensure that the Right of Way is only used as a _____ ("Intended Use"), including, without limitation, (i) posting signage in the Easement Area stating the Intended Use and (ii) the removal of persons who engage in activities that are outside the scope of the Intended Use.

4. **Nonexclusive.** Grantor retains the right to use and grant to others the nonexclusive right to use the real property encumbered by the Right of Way and the Utility Easement for any lawful purpose to the extent that such uses do not unreasonably

interfere with the use of the Right of Way or the Utility Easement by City. Notwithstanding anything contained herein to the contrary, in the event that any governmental or quasi-governmental entity or public or private utility company requests a specific non-exclusive easement over the Right of Way for such entity or utility by separate recordable document, and upon Grantor's written request, City shall execute such easement agreement (on such entity's standard form for such easements, with any adjustments reasonably required by City). Such entity shall pay all applicable City fees and expenses associated with granting easements and shall obtain pay all required permits as may be required by local ordinance and pay all City fees for permits including all fees needed for engineering review of proposed improvements.

5. **Continuing Effect.** Except as otherwise set forth herein, this Agreement shall bind, and inure to the benefit of, the successors and assigns of City and Grantor, and the rights and easements granted hereunder shall run with the land and continue in perpetuity except to the extent any are terminated pursuant to the terms of this Agreement; provided however that, if any rule of law or equitable principle would prevent any covenant or other right or interest set forth herein from existing in perpetuity, then the same shall continue for 99 years from the date this Agreement is recorded.

6. **Compliance with Laws.** With respect to (i) City's installation and maintenance obligations set forth in Section 2 above, and (ii) City's use and enjoyment of any of the Right of Way, Utility Easement and/or the related rights granted herein, City shall comply in all respects with all statutes, ordinances, rules and regulations of the United States, the State of California, the City of Berkeley and all political subdivisions of any thereof with jurisdiction or claiming jurisdiction over any of the Right of way or the Utility Easement.

7. **Nature of Available Remedies.** In the event of any breach or attempted or threatened breach of this Agreement by City or Grantor, each shall be entitled to full and adequate relief by injunction and/or any other available legal or equitable remedy with respect to such breach.

8. **Modification, Amendment and Termination.** This Agreement may be amended, modified, terminated or canceled, in whole or in part, only by the agreement of City and Grantor (each a "Party" and, collectively, the "Parties"). No such amendment, modification, termination or cancellation is effective until a written instrument setting forth its terms has been executed, acknowledged and recorded by the Parties in the Official Records of Alameda County, California. No such amendment, modification, termination or cancellation affects the rights of any mortgagee under a mortgage or any trustee or beneficiary under a deed of trust constituting a lien on the Grantor's Property, or any portion thereof, and recorded in the Official Records of Alameda County, California, at the time of such amendment, modification, termination or cancellation unless such mortgagee, trustee or beneficiary consents thereto. No person other than a Party and any such mortgagee, trustee or beneficiary, is required to join in the execution of or consent to any such amendment, modification, termination or cancellation.

9. **Mortgagee Protection.** Breach of any restriction or other provision of this Agreement does not defeat or render invalid the lien of any mortgage or deed of trust made in good faith and for value, but all of the restrictions and other provisions of this Agreement are binding and effective against any owner of the Grantor's Property whose title is acquired by foreclosure, trustee's sale or otherwise.

10. **Indemnification.** City shall indemnify, defend and hold Grantor, and its officers, directors, shareholders, employees and agents (hereinafter collectively called "Indemnified Parties") harmless from all liabilities, penalties, costs, damages, expenses, causes of action, claims or judgments (including without limitation reasonable attorneys fees) (collectively, "Indemnified Claims"), resulting from injury or the death of any person (including without limitation any Indemnified Party) or physical damage to property, real or personal, of any kind wherever located and by whomever owned (including, without limitation, property owned by an Indemnified Party), which injury, death or physical damage arises out of or is connected with City's (or its officers', employees', agents', contractors', licensees', or invitees') use or occupancy of any of the easements created herein.

11. **Notice.** Any notice, request, demand, instruction or other communication to be given to any party under this Agreement must be in writing and sent by registered or certified mail as follows:

CITY

Director, Parks, Recreation &
Waterfront Department
2180 Milvia Street, Third Floor
Berkeley, CA 94704
Telephone: (510) 981-6700
Facsimile: (510) 981-6710

Berkeley, CA
Telephone:
Facsimile:

Notice is deemed to be given upon receipt. The addresses and addressees for the purpose of this Section may be changed by giving written notice of such change in a manner provided herein for giving notice. However, until such written notice is actually received, the last address and addressee for such addressee continues in effect for all purposes hereunder.

12. **Miscellaneous.** This Agreement, including all exhibits, represents the entire agreement between the parties with respect to the subject matter hereof, and to the extent inconsistent herewith, supersedes all prior agreements, representations and convents, oral or written. This Agreement may be executed in counterparts with the same

force and effect as if the parties had executed one instrument, and each such counterpart shall constitute an original hereof. No provision of this Agreement that is held to be inoperative, unenforceable or invalid shall affect the remaining provisions, and to this end all provisions hereof are hereby declared to be severable. Time is of the essence of this Agreement. This Agreement shall be governed by the laws of the State of California (without regard to any choice of law provisions thereof).

[Remainder of Page Intentionally Left Blank; Signatures on Following Page]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date first written above.

_____:

By: _____
Name: _____
Title: _____

CITY:
CITY OF BERKELEY,
a California municipal corporation

By: Phil Kamlarz
City Manager

Approved as to form and legality:

By: _____
Name: _____
Title: _____

EXHIBIT A

(Grantor's Property)

All that certain real property, together with all appurtenances thereto and all improvements now or hereafter located thereon, situated in the City of Berkeley, County of Alameda, State of California, and described as follows:

[Insert Legal]

EXHIBIT B

(Easement Area)

[Insert Description]

EXHIBIT C

(Path Improvements)

[Describe landscaping and lighting]