

RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:

City of San Mateo
330 W. 20th Avenue
San Mateo, CA 94403
Attention: Community Development Department

NO FEE FOR RECORDING PURSUANT
TO GOVERNMENT CODE SECTION 27383

AGREEMENT CONTAINING COVENANTS AFFECTING REAL PROPERTY
(Child Care Loan Program)

This Agreement Containing Covenants Affecting Real Property (this "Agreement") is made and entered into as of _____, 20__ (the "Effective Date"), by and between the City of San Mateo, a California municipal corporation (the "City"), and _____, a _____, and its successors or assigns (collectively, the "Owner"), with reference to the following facts, purposes, and understandings.

RECITALS

A. The Owner owns certain real property located in the City of San Mateo, County of San Mateo, State of California, as more particularly described in Exhibit A (the "Property").

B. The Owner and the City are parties to that certain Loan Agreement dated as of _____, 20__ (the "Loan Agreement"). Pursuant to the Loan Agreement, the City has made a loan to the Owner in the amount of _____ Dollars (\$_____) (the "Loan") for the development of an approximately _____ (_____) square foot childcare facility providing child care services for up to _____ (_____) participants (the "Improvements" or the "Child Care Facility").

C. In addition to this Agreement, the Loan is evidenced by certain loan documents, as more particularly set forth in the Loan Agreement (collectively, the "Loan Documents"), including, but not limited to a deed of trust executed by the Owner, as trustor, in favor of the City, as beneficiary, recorded against the Property (the "Deed of Trust") in the official records of the County of San Mateo (the "Official Records"). The City and the Owner desire to enter into this Agreement to set forth their mutual understandings regarding the use of a portion of the Property for the Child Care Facility.

THEREFORE, for good and valuable consideration, the receipt of which is hereby acknowledged, the City and the Owner (each a "Party", and, collectively, the "Parties") hereby agree as follows.

Section 1. Use Restriction. The Child Care Facility shall be used as a licensed child care facility providing child care services for up to _____ (_____) participants, including _____ (_____) spaces for participants whose income does not exceed _____ percent (_____%) of area median income for the County, in accordance with the Loan Documents (the "Permitted Use"). No other use of the Improvements that is inconsistent with the Permitted Use is permitted by this Agreement. The Owner acknowledges that the City made to the Loan to Borrower, pursuant to the Loan Documents, in consideration for, and in reliance on, the Owner's obligation to restrict the Child Care Facility for the Permitted Use, in accordance with this Agreement, and that the City would not have agreed to make the Loan without the Owner's execution of, and obligation to comply with, this Agreement.

Section 2. Term of Agreement. The term of this Agreement shall commence as of the Effective Date and shall expire on the expiration of the term of the Loan, as set forth on in the Loan Agreement (the "Term"). This Agreement shall automatically terminate (without further action of the Parties) upon the expiration of the Term, as evidenced by the reconveyance of the Deed of Trust; provided, however, upon the written request of the Owner, following the expiration of the Term, the City shall promptly execute a release, termination or similar document necessary to cause the release of this Agreement as encumbrance from the Property. The Owner shall be solely liable and responsible for all costs and expenses related to the removal of this Agreement as an encumbrance against the Property following the expiration of the Term. Any damage to, or destruction of, the Improvements shall have no impact on the Term.

Section 3. Violations by Owner. The use of the Improvements for any use other than the Permitted Use, in accordance with the requirements of this Agreement, shall be a violation of this Agreement. The failure of the Owner to cure any default in the Owner's obligations under the terms of this Agreement within thirty (30) days after the delivery of a written notice of default from the City (or such longer period of time up to an additional sixty (60) days as may be necessary to remedy such default, provided that the Owner has commenced action during the thirty (30) days necessary to remedy such default, and the Owner is proceeding with reasonable diligence to remedy such default) will constitute a default under this Agreement.

Section 4. Remedies. Subject to the applicable notice and cure period set forth above, the City may exercise any and all remedies available to it under the Loan Documents, or otherwise available at law or equity, with respect to the Owner's failure to satisfy the terms of this Agreement. Owner acknowledges that any breach in Owner's performance of Owner's obligations under this Agreement would frustrate the public policy objectives desired by the City pursuant to the Loan Documents, and shall cause irreparable harm to the City. Therefore, Owner agrees that the City is entitled to equitable relief in the form of specific performance, and that an award of damages may not be adequate to compensate the City for Owner's failure to perform according to the terms of this Agreement. The City, in its sole and absolute discretion, may elect the appropriate remedy for Owner's default under this Agreement.

Section 5. Covenants to Run With the Land. The Parties hereby declare their express intent that the covenants and restrictions set forth in this Agreement shall run with the land, and shall bind all successors in title to the Property, provided, however, that on the expiration of the Term said covenants and restrictions shall expire. Throughout the Term, each and every

contract, deed or other instrument hereafter executed covering or conveying the Property or any portion thereof shall be held conclusively to have been executed, delivered and accepted subject to such covenants and restrictions, regardless of whether such covenants or restrictions are set forth in such contract, deed or other instrument, unless the City expressly releases such conveyed portion of the Property from the requirements of this Agreement. All of the provisions of this Agreement shall be enforceable as equitable servitudes and shall constitute covenants running with the land pursuant to applicable laws, including without limitation Section 1468 of the California Civil Code. Each covenant to do, or to refrain from doing, some act on the Property hereunder: (a) is for the benefit of the Property and is a burden on the Property, (b) runs with the Property, and (c) is binding upon each Party and each successive owner during its ownership of the Property or any portion thereof, and shall be a benefit to and a burden upon each Party and the Property hereunder and each other person or entity succeeding in an interest to the Property.

Section 6. Recording and Filing. The Parties shall cause this Agreement, and all amendments and supplements to it (if any), to be recorded against the Property in the Official Records.

Section 7. Amendments, Modifications, and Waivers. This Agreement may not be amended, modified or changed, nor shall any waiver of any provision hereof be effective, except by an instrument in writing and signed by the Parties.

Section 8. Waiver. In accordance with Section 7 above, the City may (but shall not be obligated to) waive any obligation imposed on the Owner pursuant to this Agreement; provided, however, the City's waiver of any term, covenant, or condition shall not be deemed to be a waiver of such term, covenant or condition of any subsequent breach of the same or any other term, covenant or condition. The City's failure to exercise any right, option or privilege hereunder shall not be deemed a waiver of such right, option or privilege nor shall it relieve the Owner from: (1) its obligation to perform each and every covenant and condition on its part to be performed, or (2) from any damages or other remedy for failure to perform the obligations of this Agreement.

Section 9. Entire Understanding of the Parties. This Agreement constitutes the entire understanding and agreement of the Parties with respect to the use of the Improvements on the Property. In the event of any conflict between the terms of this Agreement and the Loan Documents, the terms of this Agreement shall prevail. The Parties and their counsel have read and reviewed this Agreement and agree that any rule of construction to the effect that ambiguities are to be resolved against the drafting party (including, but not limited to Civil Code Section 1654, as may be amended from time to time) shall not apply to the interpretation of this Agreement.

Section 10. Severability. If any term, provision, covenant or condition of this Agreement is held in a final disposition by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions shall continue in full force and effect.

Section 11. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California, without reference to conflict of laws principles. In the event that suit shall be brought by either Party to this Agreement, the Parties

agree that venue shall be exclusively vested in the state courts of the County of San Mateo, and the Parties consent to the personal and exclusive jurisdiction and venue of such court.

Section 12. Time. In all matters under this Agreement, the Parties agree that time is of the essence. References in this Agreement to days shall be to calendar days, unless otherwise indicated. If the last day of any period to give or reply to a notice, meet a deadline or undertake any other action occurs on a day that is not a day of the week on which the City of San Mateo is open to the public for carrying on substantially all business functions (a "Business Day"), then the last day for giving or replying to such notice, meeting such deadline or undertaking any such other action shall be the next succeeding Business Day. In no event shall a Saturday or Sunday be considered a Business Day.

Section 13. Notice. All notices given or certificates delivered under this Agreement shall be in writing and be deemed received on the delivery, or refusal, date shown on the delivery receipt, if: (i) personally delivered, (ii) mailed by certified mail, return receipt requested, postage prepaid, addressed as shown below, or (iii) delivered by reputable overnight delivery service with a receipt showing date of delivery. Either of the Parties may, by notice given hereunder, designate any further or different addresses to which subsequent notices, certificates or communications shall be sent.

City: City of San Mateo
330 W. 20th Avenue
San Mateo, CA 94403
Attention: Community Development Department

Owner: **[TO BE INSERTED]**

Section 14. Indemnity. The Owner shall indemnify, defend (with counsel reasonably selected by the City), and hold harmless the City and its officers, officials, agents, and employees against any and all liability, claims, actions, causes of action or demands whatsoever against any of them, including any injury or death of any person or damage to property or other liability of any nature, arising out of the Owner's performance of its obligations hereunder, except where the cause of such is solely due to the gross negligence or willful misconduct of City. The indemnification obligations set forth in this Section shall survive any termination of this Agreement.

Section 15. Discretion Retained by City. The Owner acknowledges and agrees that nothing in this Agreement shall waive, limit, or otherwise impair any municipal power or authority of any office or department of the City acting in its capacity as a governmental regulatory authority with jurisdiction over the development, use, or operation of the Property.

Section 16. City Approval. The City has authorized the City Manager, or his or her designee, to execute this Agreement and deliver such approvals or consents as are required by this Agreement, and to execute estoppel certificates concerning the status of the Loan and the existence of Borrower defaults under the Loan Documents.

Section 17. No Third Party Beneficiaries. This Agreement is not intended to create, nor shall it be in any way interpreted or construed to create, any third party beneficiary rights in any person not a party hereto.

Section 18. No Partnership. This Agreement shall not be construed to constitute any form of partnership or joint venture between the Parties.

Section 19. Interpretation. The use in this Agreement of the words "including", "such as" or words of similar import when used with reference to any general term, statement or matter shall not be construed to limit such statement, term or matter to the specific statements, terms or matters, unless language of limitation, such as "and limited to" or words of similar import are used with reference thereto. The headings of this Agreement are for convenience only and do not in any way limit or amplify the terms or provisions hereof. All pronouns and variations thereof shall be deemed to refer to the masculine, feminine, or neuter, and to the singular or plural, as the identity of the party or parties may require.

Section 20. Estoppel Certificate. Upon the Owner's request, the City will execute and deliver to the Owner no more than fifteen (15) business days after the Owner's written request an estoppel certificate, stating that, to the best of the City's knowledge:

- (a) This Agreement is unmodified and in full force and effect, or, if the Agreement is modified;
- (b) There is no outstanding default under the Agreement, or identifying any default which exists; and
- (c) Such other matters as may be reasonably requested by the Owner.

If the Owner requests an estoppel certificate, and the City does not respond within fifteen (15) business days, the City shall be deemed to have delivered a certificate containing the requested statements.

Section 21. Owner Acknowledgement. The Owner agrees and acknowledges that adequate, and good and valuable, consideration has been obtained by the Owner, pursuant to this Agreement and the Loan Documents. The Owner further acknowledges that due to the limitations on the use of the Property, as set forth in this Agreement, the Owner may suffer economic loss or other consequences, including, but not limited to, economic loss or other consequences due to the Owner's inability to operate, or to permit the operation of, any particular form of business at the Property that does not constitute the Permitted Use. The Owner, on behalf of itself and anyone claiming by, through or under the Owner specifically releases and waives any claim against the City for such loss or economic consequences in connection with the limitations imposed pursuant to this Agreement, including but not limited any claim for inverse condemnation or similar claims. By its execution of this Agreement, the Owner, on behalf of itself and anyone claiming by, through or under the Owner, hereby assumes the above-mentioned risks and hereby expressly waives any right the Owner and anyone claiming by, through or under the Owner, may have under Section 1542 of the California Civil Code, which reads as follows:

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

Section 22. Multiple Originals; Counterparts. This Agreement may be executed in multiple originals, each of which is deemed to be an original, and may be signed in counterparts.

Remainder of Page Left Intentionally Blank

IN WITNESS WHEREOF, the Parties have executed this Agreement by duly authorized representatives, all as of the Effective Date.

CITY:

CITY OF SAN MATEO, a California
municipal corporation

By: _____

Name: _____

Its: _____

OWNER:

**[OWNER SIGNATURE BLOCK TO BE
INSERTED]**

By: _____

Name: _____

Its: _____

EXHIBIT A

LEGAL DESCRIPTION OF PROPERTY

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA)
)
COUNTY OF _____)

On _____, before me, _____, Notary Public, personally appeared _____, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify UNDER PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Name: _____
Notary Public

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA)
)
COUNTY OF _____)

On _____, before me, _____, Notary Public, personally appeared _____, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify UNDER PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Name: _____
Notary Public