

~~Attachment~~ 4

Draft Conservation and Maintenance Easement

Recorded at the request
of and when recorded
return to:

City of Albany
1000 San Pablo Avenue
Albany, CA 94706
Attn: Planning Manager

with a conformed copy to:

TMG Albany Associates, LP
100 Bush Street, 26th Floor
San Francisco, CA 94104
Attn: Denise Pinkston

DRAFT

SAMPLE
ONLY

GRANT OF CONSERVATION EASEMENT

THIS GRANT OF CONSERVATION EASEMENT is made this ____ day of _____, 2001, by TMG ALBANY ASSOCIATES, LP, a California limited partnership ("Grantor") to THE CITY OF ALBANY ("Grantee"), a California municipal corporation.

WITNESSETH:

WHEREAS, Grantor owns in fee simple, property located at 1055 Eastshore Road, previously occupied by aluminum smelting facilities, automobile repair businesses, and construction equipment storage facilities consisting of a total of approximately 10.12 acres, as further described on Exhibit A (the "Property"), which includes two drainages that traverse the site east to west, Village Creek to the north and Codornices Creek to the south, as further described in Exhibit B, the Creek Management Plan for Village and Codornices Creeks (the "Creek Management Plan") attached hereto and incorporated herein by reference; and

WHEREAS, Grantee is a California municipal corporation, and is a "qualified organization" within the provisions of Section 815.3 of the California Civil Code and Section 170(h) of the United States Internal Revenue Code, qualified to acquire and hold conservation easements; and

WHEREAS, Grantor and Grantee desire to establish this Conservation Easement, as required by Condition G-2 of the Conditions of Approval for the redevelopment of the Property as approved by the City of Albany Planning Commission on December 12, 2000 by Resolution No. 00-01 (the "Project"), on a portion of the Property as shown on Exhibit

C, (the "Conservation Easement Area") attached hereto and incorporated herein by reference; and

WHEREAS, Grantor and Grantee desire to establish this Conservation Easement on the Conservation Easement Area for water quality, habitat, recreation, conservation, open space, creek enhancement, and flood control purposes, as described in the Creek Management Plan, attached as Exhibit B; and

WHEREAS, although the City is surrounded on all sides by urban development, the Conservation Easement Area possesses potential jurisdictional waters of the United States and potential habitat values for the Western pond turtle (*Clemmys marmorata*), a California species of concern and Steelhead trout (*Oncorhynchus mykiss*), a federally listed endangered species, as well as other natural, scenic, wildlife, open space, and other conservation values (collectively "Conservation Values"); and

WHEREAS, protection and preservation of the Conservation Easement Area will assure that this area and its existing features will continue to be available for its natural habitat values and will provide a significant public benefit by preserving open space against development pressure and provide recreational opportunities and protection for wildlife and scenic qualities unique to the area; and

WHEREAS, in order to establish the present condition of the Conservation Easement Area, Grantee has examined the Conservation Easement Area and prepared a report as part of the Creek Management Plan (which functions as the "Easement Documentation Report") which contains an inventory of the relevant features and conditions, its improvements and its natural resources (the "Baseline Data"), and a map (the "Baseline Documentation Map"). A copy of the Easement Documentation Report has been provided to Grantor as part of the Creek Management Plan, and another shall be placed with and remain on file with Grantee. The Easement Documentation Report has been signed by Grantor and Grantee; and thus acknowledged to accurately represent the condition of the Mitigation Property at the date of the conveyance of this Easement, in accordance with Treasury regulation Section 1.170A-14(g)(5)(i). The parties intend that the Baseline Data and Baseline Documentation Map shall be used by Grantee to monitor Grantee and Grantor's future uses of the Conservation Easement Area and practices thereon. The parties further agree that, in the event a controversy arises with respect to the condition of the Conservation Easement Area or a particular resource thereof, the parties shall not be foreclosed from utilizing any other relevant document, survey, or report to assist in resolution of the controversy; and

WHEREAS, the parties desire that the Conservation Easement Area be used and managed in a manner compatible with the Conservation Values; and

WHEREAS, to accomplish all of the aforementioned purposes, Grantor hereby intends to convey to the Grantee and the Grantee intends to obtain a Conservation Easement restricting the use which may be made of the Conservation Easement Area, to manage the Conservation Values of the Property in accordance with the Creek Management Plan.

NOW, THEREFORE, in consideration of the above and the mutual covenants, terms, conditions, and restrictions contained herein, and pursuant to the laws of California and in particular, inter alia, Sections 815 *et. seq.* of the California Civil Code, Grantor hereby grants to Grantee, its successors and assigns, a Conservation Easement (the "Easement") as follows:

1. Purpose.
 - (a) This Easement is to assure that the Conservation Easement Area will be retained in perpetuity to protect the Conservation Values in accordance with the Creek Management Plan and to prevent any use of the Conservation Easement Area that will significantly impair or interfere with its Conservation Values. Accordingly, this Easement restricts the use of the Conservation Easement Area to activities involving flood control, recreation, nature study, enjoyment of views, open space, natural habitat and environmental protection, and related uses which are consistent with this Easement, as detailed in the Creek Management Plan.
 - (b) Grantor and Grantee acknowledge that this Easement satisfies the Condition G-2 of the Conditions of Approval for the redevelopment of 1055 Eastshore Road as approved by the City of Albany Planning Commission on December 12, 2000 by Resolution No. 00-01.
 - (c) Grantor agrees that it shall consider and negotiate in good faith any change in use of the Conservation Easement Area if requested by Grantee provided that the Conservation Values are not degraded and the change in use is not inconsistent with the Conservation Values. Grantee further agrees that Grantor shall not be obligated to pay for any such change in use (including any cost related to any remediation of soil or groundwater contamination which would be required by the use or change in use proposed by the Grantor) if the change would result in an additional cost to Grantor (and Grantor promptly notifies Grantee that the change will result in an additional cost), unless the change in use is caused by a violation of one or more of the terms of this Easement by the Grantor.
2. Rights of Grantee. To accomplish the purposes of this Easement, Grantor conveys to Grantee the right:
 - (a) To identify, preserve and protect the Conservation Values of the Conservation Easement Area, without any obligation of Grantor to pay any cost (unless the action is caused by Grantor's violation of this Conservation Easement or otherwise provided in the Creek Management Plan or otherwise set forth herein); and
 - (b) To fulfill the objectives of the Creek Management Plan; and

- (c) Pursuant to Section 7 hereof (“Disputes and Remedies”), to prevent any activity on or use of the Conservation Easement Area which is inconsistent with the purposes of this Easement and to require the restoration of such areas or features of the Conservation Easement Area that may be damaged by any inconsistent activity or use.
3. Prohibited Uses. Any activity on or use of the Conservation Easement Area which is inconsistent with the purposes of this Easement or the Creek Management Plan is prohibited.

Without limiting the generality of the foregoing, the following activities and uses are expressly prohibited on the Conservation Easement Area:

- (a) Commercial or Industrial Use. Any commercial, agricultural or industrial development, use of, or activity on the Conservation Easement Area.
- (b) Tree/Shrub Cutting. Removing, destroying, or cutting of live trees, shrubs or other vegetation, except as required for (1) fire breaks consistent with all applicable laws and regulations, (2) maintenance of existing foot trails or emergency access roads, (3) prevention or treatment of disease, or (4) other purposes with the permission of the Grantee.
- (c) Dumping. The dumping or other disposal of wastes, refuse, or debris into creek channels, water bodies or anywhere else on the Conservation Easement Area.
- (d) Signs and Billboards. The placement of any signs or billboards on the Conservation Easement Area, except those signs that serve the purpose of identifying or protecting the Conservation Easement Area, including but not limited to signs displayed to state the name and address of the Conservation Easement Area, to provide public education, or to control unauthorized entry or use.
- (e) Sale or Transfer of Water Rights. Sale or transfer of any water rights belonging to the Conservation Easement Area to any other property, or use of any water rights appurtenant to the Conservation Easement Area. This Easement shall not sever or impair any riparian water rights appurtenant to the Property.
- (f) Off Road Vehicles. Use of off-road or all-terrain vehicles or motorcycles is prohibited, except with the written permission of the Grantee.
- (g) Hunting or Shooting. No commercial hunting, trapping or shooting is permitted.

- (h) Archeological Resources. The excavation, removal, destruction, or sale of any archeological artifacts or remains which may be found on the property, except as part of any future archeological investigation approved by Grantee. All excavation plans shall be reviewed by an archaeologist prior to the start of, and during, the excavation.
- (i) Junk Yards or Storage of Materials. Storage or disassembly of inoperable automobiles, trucks or appliances, or other storage of materials.

4. Development Rights.

- (a) Except as expressly permitted by terms of this Conservation Easement, including specifically the inclusion of the Conservation Easement Area in the calculation of the Floor Area Ratio for the Project (and any future development) on the Property, all remaining rights in any present or future development rights associated with the Conservation Easement Area are hereby conveyed by Grantor to Grantee and shall not be applied to or utilized by Grantee for development or for any other purpose on the Conservation Easement Area. No development rights shall be transferred by Grantor to the Conservation Easement Area from any other property. Grantee covenants that it will not use, sell or transfer these development rights to any other property.

5. Reserved Rights. Grantor reserves unto itself and to its successors and assigns all rights accruing from its ownership of the Conservation Easement Area which are not transferred, conveyed, or granted to Grantee, or which are not prohibited herein and are not inconsistent with the purposes of this Easement. Grantor expressly reserves the right to engage in or permit or invite others to engage in all uses of the Conservation Easement Area which are not transferred, conveyed, or granted to Grantee, nor expressly prohibited herein and which are not inconsistent with the purposes of this Easement.

Without limiting the generality of the foregoing, the following rights relating to the Conservation Easement Area are expressly reserved by Grantor and its successors in interest:

- (a) Project To construct, maintain, and repair any and all elements and features of the Project, as approved by the City of Albany Planning Commission on December 12, 2000 by Resolution No. 00-01 together with any and all amendments approved by Grantee.
- (b) Recreational Uses. To engage in and permit guests and invitees to engage in recreational uses of the Conservation Easement which do not result in degradation of Conservation Values.

- (c) Roads. To install any necessary emergency vehicle access required by the City of Albany, provided that grading is minimized and that adequate drainage is provided to prevent erosion. Grantor may relocate the emergency access if damage from a natural cause makes a road impassable in its existing right-of-way.
 - (d) Fencing. To repair, and maintain fencing and gates, as necessary, along within the Conservation Easement Area. However, the materials, style and location of new fencing and gates to be constructed are subject to the approval of Grantee. Said approval shall not be unreasonably withheld. Grantor will pay all costs of new fencing it requests; however Grantor shall not pay for fencing requested by Grantee.
 - (e) General Maintenance. Grantor may maintain the Conservation Easement Area in accordance with the terms of the Creek Management Plan.
6. Notification or Approval. Where Grantee approval is required in accordance with this instrument, Grantor shall seek approval in the manner described in Section 6(a) and 6(b).
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- (a) Notice of Certain Permitted Actions. Other than the notice provisions for access, as set forth in Section 8(a), whenever notice is required, Grantor shall notify Grantee in writing not less than thirty (30) days prior to the date Grantor intends to undertake the activity in question. The notice shall describe the nature, scope, design, location, timetable, and any other material aspects of the proposed activity in sufficient detail to permit Grantee (or the Resource Agencies, if appropriate) to make an informed judgment of the activity as to its consistency with the purposes of this Easement.
- (b) Grantee's Approval. Whenever Grantee approval is required in accordance with this instrument, the authorized representative of the Grantee shall grant or withhold its approval in writing within forty-five (45) days after receipt of Grantor's written request therefor. Notification of Grantee shall be as provided in Section 15. The request shall describe the nature, scope, design, location, timetable, and other material aspects of the proposed activity in sufficient detail to permit Grantee to make an informed judgment as to its consistency with the purposes of this Easement.

Approval may be withheld only upon a reasonable determination by Grantee that the action as proposed would be inconsistent with the purposes of this Easement. If Grantee fails to respond in writing within forty-five (45) days, the request shall automatically be deemed to be granted.

- (c) Grantor's Notification and Approval. Unless otherwise specified herein, where Grantor's approval is required in accordance with this instrument, Grantee shall notify Grantor in writing not less than forty-five (45) days prior to the date Grantee intends to undertake the activity in question. The request shall describe the nature, scope, design, location, timetable, and other material aspects of the proposed activity in sufficient detail to permit Grantor to make an informed judgment. Whenever Grantor's approval is required in accordance with this instrument, Grantor shall grant or withhold its approval in writing within forty-five (45) days after receipt of Grantee's written request therefor. Grantor shall not unreasonably withhold approval of activities consistent with the purposes of this Easement.

7. Disputes and Remedies. If Grantee determines that Grantor or Grantor's successors in interest or any occupant of the Conservation Easement Area is conducting or allowing a use, activity, or condition on the Conservation Easement Area which is prohibited by the terms of this Easement or that a violation is threatened, Grantee shall give written notice to Grantor of such violation and demand corrective action sufficient to cure the violation. Grantee shall also notify any appropriate federal or state regulatory agency with jurisdiction over the resource at issue. Where the violation involves injury to the Conservation Easement Area resulting from any use or activity inconsistent with the purposes of this Easement, Grantee shall demand corrective action sufficient to restore the portion of the Conservation Easement Area so injured.

- (a) Consultations Regarding Interpretation and Enforcement of Easement. When any disagreement, conflict, need for interpretation, or need for enforcement arises between the parties to this Easement, each party shall first consult with the other party in good faith about the issue and attempt to resolve the issue without resorting to arbitration or legal action.
- (b) Grantee's Other Remedies. If Grantor fails to cure the violation within thirty (30) days after receipt of notice thereof from Grantee, or under circumstances where the violation cannot be cured within the thirty (30) day period, Grantor fails to continue diligently to cure such violation until finally cured, Grantee may bring an action at law or in equity in court of competent jurisdiction to enforce the terms of this Easement, to enjoin the violation, ex parte as necessary, by temporary or permanent injunction, to recover any damages to which it may be entitled for violation of the terms of this Easement, including damages for the loss of scenic, aesthetic, or environmental values, and to require the restoration of the Conservation Easement Area to the condition that existed prior to injury.

Without limiting Grantor's liability therefor, Grantee, in its sole discretion, may apply any damages recovered to the cost of undertaking any corrective action on the Conservation Easement Area. If Grantee, in its

sole and reasonable discretion, determines that circumstances require immediate action to prevent or mitigate significant damage to the Conservation Values of the Conservation Easement Area, Grantee may pursue its remedies under this section without waiting for the period provided for cure to expire, however, Grantee shall notify Grantor in the manner set forth in Section 8(a). Grantee's rights under this section apply equally in the event of either actual or threatened violations of the terms of this Easement, and Grantor agrees that Grantee's remedies at law for any violation of the terms of this Easement are inadequate and that Grantee shall be entitled to the injunctive relief described in this section, both prohibitive and mandatory, in addition to such other relief to which Grantee may be entitled, including specific performance of the terms of this Easement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. Grantee's remedies described in this section shall be cumulative and shall be in addition to all remedies now or hereinafter existing at law or in equity.

- (c) Costs of Enforcement. In the event any action or proceeding is brought by either Grantor or Grantee to enforce or to interpret the terms of this Easement, the prevailing party in such action or proceeding shall be entitled to recover its attorneys fees and costs of suit.
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- (d) Grantee's Discretion. Enforcement of the terms of this Easement shall be at the discretion of Grantee, and any forbearance by Grantee to exercise its rights under this Easement in the event of any breach of any term of this Easement by Grantor shall not be deemed or construed to be a waiver by Grantee of such term or of any subsequent breach of the same or any other term of this Easement or of any of Grantee's rights under this Easement. No delay or omission by Grantee in the exercise of any right or remedy upon any breach by Grantor shall impair such right or remedy or be construed as a waiver.
- (e) Waiver of Certain Defenses. Grantor agrees that no statute of limitations shall start to run and no estoppel or similar defense shall arise against any action brought by Grantee to enforce or interpret this Easement, unless and until Grantee is actually aware of a violation or is aware of a dispute regarding the interpretation of the provisions of the Easement. Grantee waives any right to assert any defense contrary to the provisions of this section.
- (f) Acts Beyond Grantor's Control. Nothing contained in this Easement shall be construed to entitle Grantee to bring any action against Grantor for any injury to or change in the Conservation Easement Area resulting from causes beyond Grantor's control, including without limitation, fire, flood, storm, and earth movement, or from any prudent action taken by Grantor under emergency conditions to prevent, abate, or mitigate significant

injury to the Conservation Easement Area or to human life or other real or personal property resulting from such causes.

- (g) State of California and Resource Agency Right of Enforcement. In the event that Grantee or any successor holder of this Easement fails to enforce the terms of this Easement, the State of California and each regulatory agency with jurisdiction over some or all of the Conservation Easement Area shall have the rights to enforce the easement as agent of Grantee or such successor holder.

8. Access.

- (a) Grantor acknowledges and agrees that upon 24 hours phone or fax notification to Grantor (or less with the consent of Grantor), Grantee or its respective agents or contractors may enter the Conservation Easement Area as described by Creek Management Plan to take certain actions to protect and enhance the Conservation Values on the Conservation Easement Area consistent with the actions described in the Creek Management Plan attached hereto as Exhibit B. Where Grantee determines that immediate entry is required to prevent, terminate, or mitigate a violation of this Easement, Grantee may enter with at least concurrent phone or fax notification to Grantor.
- (b) Rights of access to the Conservation Easement Area shall include use of appurtenant easements and rights of way, if any, to enter upon the Conservation Easement Area and rights of access across the Property, including without limitation vehicular access at reasonable times in order to monitor Grantor's compliance with the terms of this Easement and to enforce such terms; provided, that access by Grantee its respective authorized designees shall not be more than is necessary to monitor this Easement and implement the Creek Management Plan and shall not unreasonably interfere with the use and quiet enjoyment of the Property or Conservation Easement Area by the Grantor or its successors in interest or by any tenants of Property.
- (c) Nothing herein is intended to set any monitoring standard for Grantee, nor to create any obligation that Grantee access the property more than Grantee deems necessary, in its sole judgment.
- (d) No right of access by the general public to any portion of the Conservation Easement Area is conveyed by this Easement; although access to the general public may be provided with the mutual consent of Grantee and Grantor if it is not inconsistent with the protection of the Conservation Values.

9. Costs and Responsibilities. Grantor retains the responsibility for ownership, operation, upkeep, and general maintenance of the Conservation Easement Area as provided in the Creek Management Plan, provided that Grantor shall not incur any costs for Conservation Values enhancement actions performed or requested by Grantee and their designees pursuant the Creek Management Plan, unless caused by a violation of this Conservation Easement. Grantor, Grantee, and their respective designees shall use all reasonable efforts to keep Grantee's interest in the property free of any liens arising out of any work performed for, materials furnished to, or obligations incurred by Grantor. Grantor acknowledges that Grantee is not responsible for any actions or omissions of Grantee or its agents or contractors, and Grantee acknowledges that Grantor is not responsible for any actions or omissions of the Grantee or its agents or contractors.

(a) Taxes. Grantor shall pay or cause to be paid before delinquency all taxes, assessments, fees, and charges of whatever description levied on or assessed against the Conservation Easement Area by competent authority (collectively "taxes"), including any such taxes imposed upon, or incurred as a result of, this Easement, and shall furnish Grantee with satisfactory evidence of payment upon request.

10. Extinguishment. It is the intention of the parties that the conservation purposes of this Conservation Easement shall be carried out forever. Liberal construction is expressly required for purposes of effectuating this Conservation Easement in perpetuity, notwithstanding economic hardship or changed conditions of any kind. Notwithstanding the foregoing, if circumstances arise in the future which render the purposes of this Easement impossible to accomplish, this Easement can only be terminated or extinguished, whether in whole or in part, by judicial proceedings in a court of competent jurisdiction. The amount of the proceeds to which Grantee shall be entitled, after satisfaction of claims prior in right to Grantee, from any sale, exchange, or involuntary conversion of all or any portion of the Conservation Easement Area subsequent to such termination or extinguishment, shall be determined, unless otherwise provided by California law at the time, in accordance with Section 10(a). Grantee shall use all such proceeds in a manner consistent with the conservation purposes of this Easement.

(a) Compensation or Proceeds. This Easement shall have a fair market value determined by multiplying (i) the fair market value of the Conservation Easement Area unencumbered by the Easement (minus any increase in value attributable to improvements made after the date of this easement) by (ii) the ratio of the value of the Easement at time of grant of the Easement to the value of the Conservation Easement Area unencumbered by the Easement, at the time of this grant. The values at the time of recording of this Easement are agreed by the parties to be _____ [need to establish the value and ratio] the values established by the Grantor's qualified appraisal. The ratio established by this section shall remain constant, and on a subsequent sale, exchange or involuntary conversion of

all or any portion of the Conservation Easement Area which extinguishes or terminates all or a portion of this Easement, Grantee shall be entitled to a portion of the proceeds equal to such proceeds (minus any portion attributable to improvements made after the date of this Easement) multiplied by the ratio established in this section. However, Grantor may retain all proceeds from a sale of its interest in the Property if this Easement remains in full force and effect.

(b) Condemnation. If the Conservation Easement Area is taken, in whole or in part, by exercise of the power of eminent domain, for purposes of a public park, open space, watershed or public trail or for any other reason, to the extent that the Conservation Easement shall be extinguished for those portions taken, compensation from the condemning agency or entity shall go to the Grantor and Grantee in the ratio established in section 10(a).

11. Amendment. If circumstances arise under which an amendment to or modification of this Easement would be appropriate, Grantor and Grantee may jointly amend this Easement provided that no amendment shall be allowed that will affect the qualification of this Easement or the status of Grantee under any applicable laws, including Sections 815 *et. seq.* of the California Civil Code, or Section 170(h) of the Internal Revenue Code, as amended, and any amendment shall be consistent with the purposes of this Easement. Any such amendment shall be in writing, shall refer to this Easement by reference to its recordation data, and shall be recorded in the Official Records of Alameda, California.
12. Conveyance. Grantee may not convey this Easement in whole or in part without the prior written approval of Grantor, which approval shall not be unreasonably withheld. After prior written approval from Grantor, Grantee may convey this easement, but only to an entity qualified at the time of transfer under Section 170(h) of the Internal Revenue Code, as amended, or California Civil Code Section 815.3 (or any successor provision then applicable) and the applicable regulations promulgated thereunder, authorized to acquire and hold conservation easements under Section 815.3 of the California Civil Code (or any successor provision then applicable), and demonstrated, to Grantee's reasonable satisfaction, to be an entity that has the experience and ability to manage a conservation easement. Grantee acknowledges that governmental agencies are qualified entities and may be transferees of Grantee's interest hereunder. As a condition of such transfer, Grantee shall require the transferee to expressly agree in writing to assume Grantee's obligations hereunder in order that the purposes of this Easement will continue to be carried out and shall obtain Grantor's prior consent, which shall not be unreasonably withheld. In the event of a conveyance of the Conservation Easement, upon accepting the assignment of this Easement, the entity receiving the assignment may be released from the Indemnification obligations set forth in Section 17(b), only if it has provided Grantor with a written release of Grantor's indemnification obligations under Section 17(a).

- (a) Executory Limitation. If a subsequent transferee (other than the State) of Grantee shall cease to exist or to be qualified to hold conservation easements under California Civil Code Section 815.3, then the Easement shall vest in the State of California upon the State's acceptance, or in a qualified entity then designated by the Grantee with prior written notice to Grantor, with due regard to the requirements of Section 12.
13. Subsequent Conveyance of the Conservation Easement Area. Grantor retains the right to sell the Conservation Easement Area. Each Grantor shall incorporate by reference hereto the terms of this Easement in any deed or other legal instrument by which any Grantor divests itself of any interest in the Property or the Conservation Easement Area, including, without limitation, a leasehold interest, and all obligations of Grantor under this Easement shall be assumed by any assignee or transferee of any Grantor. Grantor shall provide a complete copy of this Easement to its transferee prior to any such transfer. Grantor shall give written notice that the prospective transferee has received a copy of this Easement to Grantee at least 5 days prior to the date of any transfer or intended transfer of any interest in the Conservation Easement Area, except as provided below. Grantee shall have the right to prevent subsequent transfers in which prospective subsequent claimants or transferees are not given notice of the covenants, terms, conditions and restrictions of this Easement. The failure of Grantor to perform any act required by this section shall not impair the validity of this Easement or limit its enforceability in any way. Grantee approval shall not be necessary for Grantor to transfer any interest in the Property or the Conservation Easement Area. However, Grantor shall notify Grantee of such transfer no later than 20 days after the transfer is effective.
14. Estoppel Certificates. Upon request by Grantor, Grantee shall within 30 days after receipt of such request execute and deliver to Grantor any document, including an estoppel certificate, which certifies, to the best of Grantee's knowledge, Grantor's compliance with any obligation of Grantor contained in this Easement or otherwise evidences the status of this Easement as may be reasonably requested by Grantor. Such certification shall be limited to Grantee's most recent inspection. If Grantor requests more current documentation, Grantee shall conduct an inspection, at Grantor's expense, within 30 days of receipt of Grantor's written request therefore, provided that in no event shall Grantee be required to conduct an inspection for this purpose more than two (2) times per any calendar year.
15. Notices. Any notice, demand, request, consent, approval, or communication that either party desires or is required to give to the other shall be in writing and shall be deemed delivered upon receipt and either served personally or sent by first class mail - postage prepaid, certified mail, or overnight delivery by a reputable carrier, addressed as follows:

To Grantor: TMG Albany Associates, LP

100 Bush Street, 26th Floor
San Francisco, CA 94104
Attn: Denise Pinkston
(415) 772-5900 telephone
(415) 772-5911 fax

with a copy to (not to constitute notice):

Beveridge & Diamond, P.C
456 Montgomery Street, Suite 1800
San Francisco, CA 94104
Attn: Tamsen Plume
(415) 262-4012 telephone
(415) 262-4040 fax

To Grantee: City of Albany
1000 San Pablo Avenue
Albany, CA 94706
Attn: Planning Manager
(510) 528-5760 telephone
(510) 524-9359 fax

with a copy to (not to constitute notice):

Robert Zweben
City Attorney
City of Albany
1730 Solano Avenue
Berkeley, California 94707
(510) 524-9205 telephone
(510) 526-9190 fax

or to such other address as either party from time to time shall designate by written notice to the other.

16. Recordation. Grantor shall cause this instrument to be recorded in the Official Records of the County of Contra Costa, California. Grantee may re-record this Easement whenever re-recording is required to preserve Grantee's rights in this Easement.
- (a) Notice of Recordation. Within ten (10) business days of recording the Conservation Easement, Grantor shall send Grantee written notice of the recording date, addressed as follows:

TMG Albany Associates, LP

100 Bush Street, 26th Floor
San Francisco, CA 94104
Attn: Denise Pinkston

With a copy to (not to constitute notice)

Beveridge & Diamond, P.C
456 Montgomery Street, Suite 1800
San Francisco, CA 94104-1251
Attn: Tamsen Plume

17. Indemnification

- (a) Indemnification by Grantor. Notwithstanding any other provision herein to the contrary, but subject to Section 19(g), Grantor hereby agrees to indemnify, defend, and hold harmless Grantee and its successors and assigns, employees, agents, and contractors (the "Indemnified Parties") from and against any costs, liabilities, penalties, damages, claims or expenses (including reasonable attorneys' fees) which the Indemnified Parties may suffer or incur as a result of or arising out of the activities of Grantor on the Property or any breach of this Conservation Easement by Grantor or its guests or invitees. Section 12 further discusses the indemnification obligations of the parties upon assignment of this Easement. Without limiting the foregoing, Grantor shall indemnify, defend, and hold harmless the Indemnified Parties for all of the following:
- (i) Approvals. Approvals requested by Grantor or given or withheld by the Grantee hereunder, or on account of any claim, liability, damage, or expense suffered or incurred by or threatened against Grantor or any other person or entity, except as such claim, liability, damage, or expense is the result of the Grantee's gross negligence or intentional misconduct or that of its successors, assigns, agents, representatives, or invitees.
 - (ii) Taxes. Any real property taxes, insurance, utilities or assessments that are levied against the Property (other than to the extent directly resulting from the actions or omissions of Grantee), including those for which exemption cannot be obtained, or any other costs of maintaining the Property.
 - (iii) Hazardous Materials. Any Hazardous Material, as that term is defined in Section 18, which is present, alleged to be present, or otherwise connected in any way to the Property, whether by or after the date of this Conservation Easement, unless put there by Grantee or its successors, assigns, agents, employees, representatives, guests, or invitees or are related to a use or change

in use by the Grantee which would necessitate a higher level or standard of clean up for any existing Hazardous Materials than would otherwise be required by Environmental Laws.

- (b) Indemnification by Grantee. Grantee shall indemnify, defend, and hold harmless Grantor, its successors and assigns, from any costs, liabilities, penalties, damages, claims or expenses (including reasonable attorneys' fees) which Grantor (and its successors and assigns) and its employees, agents, and contractors may suffer or incur as a result of or arising out of the respective activities of the Grantee and its successors, assigns, employees, agents, representatives, guests and invitees of any type on the Conservation Easement Area and any breach of this Conservation Easement by Grantee, except damages caused solely by the gross negligence or willful misconduct or any breach of this Conservation Easement by Grantor or its employees, agents, contractors, guests, or invitees. Section 12 further discusses the indemnification obligations of the parties upon assignment of this Easement.
18. Hazardous Materials Liability. Notwithstanding any other provision herein to the contrary, the parties do not intend this Conservation Easement to be construed such that it creates in or gives to the Grantee:
- (a) the obligations or liabilities of an "owner" or "operator" as those words are defined and used in environmental laws, as defined below, including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (42 USC Section 9601 et seq. and hereinafter "CERCLA"); the obligations or liabilities of a person described in 42 USC Section 9607(a)(3), except as to Hazardous Materials put on the Conservation Easement Area by Grantee or its successors, assigns, agents, employees, representatives, guests, or invitees or liability for a higher level or standard of clean up for any existing Hazardous Materials than would otherwise be required by Environmental Laws related to Grantee related to or necessitated by a use or change in use by the Grantee;
 - (b) the obligations of a responsible person under any applicable Environmental Laws, as defined below, unless the Grantee is applying for authorization pursuant to an Environmental Law to achieve the purposes of the Creek Management Plan or is using or changing the use of the Conservation Easement Area so as to necessitate a higher level or standard of clean up for any existing Hazardous Materials than would otherwise be required by Environmental Laws;
 - (c) the right to investigate and remediate any Hazardous Materials, as defined below, associated with the Property without prior approval of Grantor; or

- (d) control Grantor's ability to investigate, remove, remediate or otherwise clean up any Hazardous Materials associated with the Property.

The term "Hazardous Materials" includes, without limitation, (a) material that is flammable, explosive, or radioactive; (b) petroleum products; and (c) hazardous materials, hazardous wastes, hazardous or toxic substances, or related materials defined in the CERCLA (42 USC Section 9601 *et seq.*), the Hazardous Materials Transportation Act (49 USC Section 6901 *et seq.*), the Hazardous Waste Control Law (Cal. Health & Safety Code Section 25100 *et seq.*), the Hazardous Substance Account Act (Cal. Health & Safety Code Section 25300 *et seq.*), and in the regulations adopted and publications promulgated pursuant to them, or any other applicable federal, state, or local laws, ordinances, rules, or regulations now in effect or enacted after this date.

The term "Environmental Laws" includes, without limitation, any federal, state, local or administrative agency statute, regulation, rule, ordinance, order or requirement relating to pollution, protection of human health, the environment or Hazardous Materials.

19. General Provisions.

- (a) Controlling Law. The interpretation and performance of this Easement shall be governed by the laws of the State of California.
- (b) Liberal Construction. Any general rule of construction to the contrary notwithstanding, this Easement shall be liberally construed in favor of Grantee to effect the purposes of this Easement and the policy and purpose of Section 815 *et seq.* of the California Civil Code. If any provision in this instrument is found to be ambiguous, an interpretation consistent with the purposes of this Easement that would render the provision valid shall be favored over any interpretation that would render it invalid. This instrument shall be construed in accordance with its fair meaning and it shall not be construed against either party on the basis that that party prepared this instrument.
- (c) Severability. If any provision of this Easement, or the application thereof, is found to be invalid to any person or circumstance, the remainder of the provisions of this Easement, or the application of such provision to persons or circumstances other than those as to which it is found to be invalid, as the case may be, shall not be affected thereby so long as the purposes of this Easement can still be carried out.
- (d) Third Party Rights. This instrument is made and entered into for the sole benefit and protection of Grantor and Grantee and their respective successors and assigns. No person or entity other than the parties hereto shall have any right of action under this Easement or the Creek.

Management Plan, or any right to enforce the terms and provisions thereof, except as provided in Section 8(g).

- (e) No Forfeiture. Nothing contained herein is intended to result in a forfeiture or reversion of Grantor's fee title in any respect. Grantor specifically reserves the right at any time, to convey fee title to the Conservation Easement Area subject to the terms of this Easement.
- (f) Successors. The covenants, terms, conditions, and restrictions of this Easement shall be binding upon, and inure to the benefit of, the parties hereto and their respective successors and assigns, and shall continue as a servitude running in perpetuity with the Conservation Easement Area.
- (g) Termination of Rights and Obligations. Except as expressly provided otherwise in this instrument, a party's rights and obligations under this Easement shall terminate upon the transfer of the party's interest in this Easement or the fee title to the Conservation Easement Area, as the case may be, except that rights, obligations, and liability relating to acts or omissions occurring prior to transfer shall survive transfer.
- (h) Captions. The captions in this instrument have been inserted solely for convenience of reference and are not a part of this instrument and shall have no effect upon construction or interpretation.
- (i) Counterparts. Grantor may execute this instrument in two or more counterparts. Each counterpart shall be deemed an original instrument. In the event of any disparity between the counterparts produced, the recorded counterpart shall be controlling.

TO HAVE AND TO HOLD unto Grantee, its successors and assigns forever.

IN WITNESS WHEREOF, Grantor has set its hand on the day and year first written above.

GRANTOR
TMG ALBANY ASSOCIATES, LP.

Date: _____

By: _____

Name: _____

Title: _____

GRANTEE
CITY OF ALBANY

Date: _____

Approved as to Form

By: _____

Name: _____

Title: City Attorney

Date: _____

By: _____

Name: _____

Title: _____

EXHIBIT A

PROPERTY

MAP

EXHIBIT C

LEGAL DESCRIPTION AND
MAP OF CONSERVATION EASEMENT AREA