

DOCUMENT: 23072686

Pages: 15



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Fees . . .	67.00
Taxes . . .	.00
Copies . .	.00
<b>AMT PAID</b>	<b>67.00</b>

RECORDING REQUESTED BY:  
 Vista Montana Park Homes, LLC  
 c/o Equity Residential  
 2 North Riverside Plaza, STE 400  
 Chicago, IL 60606

REGINA ALCOMENDRAS  
 SANTA CLARA COUNTY RECORDER  
 Recorded at the request of  
 First Amer Titl Ins Co NCO SIM

RDE # 003  
 9/03/2015  
 02:05 PM

WHEN RECORDED, MAIL TO:

Department of Toxic Substances Control  
 700 Heinz  
 Berkeley, California 94710  
 Attention: Mark Piros Unit Chief  
 Brownfields and Environmental  
 Restoration Program

SPACE ABOVE THIS LINE RESERVED FOR RECORDER'S USE

LAND USE COVENANT AND AGREEMENT

ENVIRONMENTAL RESTRICTIONS

County of Santa Clara, Assessor Parcel Number(s): 097-53-015  
 Vista Montana Park-Parcel C  
 (Department Site Code 202049)

This Land Use Covenant and Agreement ("Covenant") is made by and between Vista Montana Park Homes, LLC (the "Covenantor"), the current owner of property located at 4041 North First Street, San Jose in the County of Santa Clara State of California (the "Property"), and the Department of Toxic Substances Control (the "Department"). Pursuant to Civil Code section 1471, the Department has determined that this Covenant is reasonably necessary to protect present or future human health or safety or the environment as a result of the presence on the land of hazardous materials as defined in Health and Safety Code section 25260. The Covenantor and the Department hereby agree that, pursuant to Civil Code section 1471 and Health and Safety Code section 25355.5 the use of the Property be restricted as set forth in this Covenant and that the Covenant shall conform with the requirements of California Code of Regulations, title 22, section 67391.1.

NCS-649062

ARTICLE I  
STATEMENT OF FACTS

1.1. Property Location. The Property that is subject to this Covenant, totaling approximately 5 acres, is more particularly described in the attached Exhibit A, "Legal Description", and depicted in Exhibit B, "Santa Clara County Assessor's Parcel Map". The Property is located in the area now generally bounded by Vista Montana on the west, North First Street on the north, and commercial properties on the east and south. The Property is also identified as County of Santa Clara Assessor Parcel Number 097-53-015.

1.2. Remediation of Property. This Property has been investigated and/or remediated under the Department's oversight. The Department approved a Removal Action Workplan in accordance with Health and Safety Code, division 20, chapter 6.8. Work was completed and summarized in the Removal Action Completion Report approved by DTSC on March 24, 2015. The remediation activities conducted at the Property include soil evaluation, soil excavation, import of clean fill and installation of a Cap over remaining contaminated soil. The Property has been developed as a park and different materials comprise the Cap in the different areas of the park. The installed Cap consists of: (a) a minimum of two feet of clean fill in landscaped areas; (b) 16.5 to 17 inches of clean fill, a synthetic liner, six inches of class 2 permeable rock, and a 2.25 inch thick artificial turf layer at the playing field; (c) 20 to 24 inches of clean fill beneath 4 inches of degraded granite in the bocce area; or (d) at least six inches of recycled aggregate base material beneath all installed asphalt and concrete surfaces (collectively referred to as, the "Cap") Hazardous substances including arsenic in soil below the Cap at levels from 2 to 84 parts per million (ppm) remain at the Property above levels accepted for unrestricted land use.

1.3. Basis for Environmental Restrictions. As a result of the presence of hazardous substances which are also hazardous materials as defined in Health and Safety Code section 25260, at the Property, the Department has concluded that it is reasonably necessary to restrict the use of the Property in order to protect present or future human health or safety or the environment, and that this Covenant is required as part of the Department-approved remedy for the Property. The Department has also

concluded that the Property, as remediated and when used in compliance with the Environmental Restrictions of this Covenant, does not present an unacceptable risk to present and future human health or safety or the environment.

## ARTICLE II

### DEFINITIONS

2.1. Department. "Department" means the California Department of Toxic Substances Control and includes its successor agencies, if any.

2.2. Environmental Restrictions. "Environmental Restrictions" means all protective provisions, covenants, restrictions, requirements, prohibitions, and terms and conditions as set forth in this Covenant.

2.3. Improvements. "Improvements" includes, but is not limited to buildings, structures, roads, driveways, improved parking areas, wells, pipelines, or other utilities.

2.4. Lease. "Lease" means lease, rental agreement, or any other document that creates a right to use or occupy any portion of the Property.

2.5. Occupant. "Occupant" or "Occupants" means Owner and any person or entity entitled by ownership, leasehold, or other legal relationship to the right to occupy any portion of the Property.

2.6. Owner. "Owner" or "Owners" means the Covenantor, and any successor in interest including any heir and assignee, who at any time holds title to all or any portion of the Property.

## ARTICLE III

### GENERAL PROVISIONS

3.1. Runs with the Land. This Covenant sets forth Environmental Restrictions that apply to and encumber the Property and every portion thereof no matter how it is improved, held, used, occupied, leased, sold, hypothecated, encumbered, or conveyed. This Covenant: (a) runs with the land pursuant to Civil Code section 1471 and Health and Safety Code section 25355.5 (b) inures to the benefit of and passes with each and every portion of the Property; (c) is for the benefit of, and is enforceable by the Department; and (d) is imposed upon the entire Property unless expressly stated as applicable only to a specific portion thereof.

3.2. Binding upon Owners/Occupants. This Covenant: (a) binds all Owners of

the Property, their heirs, successors, and assignees; and (b) the agents, employees, and lessees of the Owners and the Owners' heirs, successors, and assignees. Pursuant to Civil Code section 1471, all successive Owners of the Property are expressly bound hereby for the benefit of the Department; this Covenant, however, is binding on all Owners and Occupants, and their respective successors and assignees, only during their respective periods of ownership or occupancy except that such Owners or Occupants shall continue to be liable for any violations of, or non-compliance with, the Environmental Restrictions of this Covenant or any of their acts or omissions during their ownership or occupancy.

3.3. Incorporation into Deeds and Leases. This Covenant shall be incorporated by reference in each and every deed and Lease for any portion of the Property.

3.4. Conveyance of Property. The Owner and new Owner shall provide Notice to the Department not later than 30 calendar days after any conveyance or receipt of any ownership interest in the Property (excluding Leases, and mortgages, liens, and other non-possessory encumbrances). The Notice shall include the name and mailing address of the new Owner of the Property and shall reference the site name and site code as listed on page one of this Covenant. The notice shall also include the Assessor's Parcel Number(s) noted on page one. If the new Owner's property has been assigned a different Assessor Parcel Number, each such Assessor Parcel Number that covers the Property must be provided. The Department shall not, by reason of this Covenant, have authority to approve, disapprove, or otherwise affect proposed conveyance, except as otherwise provided by law or by administrative order.

3.5. Costs of Administering the Covenant to Be Paid by Owner. The Department has already incurred and will in the future incur costs associated with this Covenant. Therefore, the Covenantor hereby covenants for the Covenantor and for all subsequent Owners that, pursuant to California Code of Regulations, title 22, section 67391.1(h), the Owner agrees to pay the Department's costs in administering, implementing and enforcing this Covenant.

## ARTICLE IV

### RESTRICTIONS AND REQUIREMENTS

4.1. Prohibited Uses. The Property shall not be used for any of the following purposes without prior written approval by the Department:

- (a) A residence, including any mobile home or factory built housing, constructed or installed for use as residential human habitation.
- (b) A hospital for humans.
- (c) A public or private school for persons under 18 years of age.
- (d) A day care center for children.

4.2. Soil Management. Soil management activities at the Property are subject to the following requirements in addition to any other applicable Environmental Restrictions:

- (a) No activities that will disturb the soil *below the Cap* (e.g., excavation, grading, removal, trenching, filling, earth movement, mining, or drilling) shall be allowed at the Property without a Soil Management Plan pre-approved by the Department in writing.
- (b) Any soil brought to the surface by grading, excavation, trenching or backfilling shall be managed in accordance with all applicable provisions of state and federal law.

4.3. Prohibited Activities. The following activities shall not be conducted at the Property:

- (a) Drilling for any water, oil, or gas without prior written approval by the Department.
- (b) Extraction or removal of groundwater without a Groundwater Management Plan pre-approved by the Department in writing.
- (c) Activity that may alter, interfere with, or otherwise affect the integrity or effectiveness of, or the access to, any investigative, remedial, monitoring, operation or maintenance system (e.g., *Cap, vapor extraction system, monitoring system, groundwater extraction system*) or activity required for the Property without prior written approval of the Department.

4.4. Access for Department. The Department shall have reasonable right of

entry and access to the Property for inspection, investigation, remediation, monitoring, and other activities as deemed necessary by the Department in order to protect human health or safety or the environment.

4.5. Access for Implementing Operation and Maintenance. The entity or person responsible for implementing the operation and maintenance activities, if any, shall have reasonable right of entry and access to the Property for the purpose of implementing such operation and maintenance activities until the Department determines that no further operation and maintenance activity is required.

4.6. Inspection and Reporting Requirements. The Owner shall conduct an annual inspection of the Property verifying compliance with this Covenant and shall submit an annual inspection report to the Department for its approval by January 15<sup>th</sup> of each year. The annual inspection report must include the dates, times, and names of those who conducted the inspection and reviewed the annual inspection report. It also shall describe how the observations that were the basis for the statements and conclusions in the annual inspection report were performed (e.g., drive by, fly over, walk in, etc.). If any violation is noted, the annual inspection report must detail the steps taken to correct the violation and return to compliance. If the Owner identifies any violations of this Covenant during the annual inspection or at any other time, the Owner must within 10 calendar days of identifying the violation: (a) determine the identity of the party in violation; (b) send a letter advising the party of the violation of the Covenant; and (c) demand that the violation cease immediately. Additionally, a copy of any correspondence related to the violation of this Covenant shall be sent to the Department within 10 calendar days of its original transmission.

#### ARTICLE V

#### ENFORCEMENT

5.1. Enforcement. Failure of the Owner or Occupant to comply with this Covenant shall be grounds for the Department to require modification or removal of any Improvements constructed or placed upon any portion of the Property in violation of this Covenant. Violation of this Covenant, such as failure to submit (including submission of any false statement) record or report to the Department, shall be grounds for the Department to pursue administrative, civil, or criminal actions, as provided by law.

## ARTICLE VI

### VARIANCE, REMOVAL AND TERM

6.1. Variance from Environmental Restrictions. Any person may apply to the Department for a written variance from any of the Environmental Restrictions imposed by this Covenant. Such application shall be made in accordance with Health and Safety Code section 25223.

6.2. Removal of Environmental Restrictions. Any person may apply to the Department to remove any of the Environmental Restrictions imposed by this Covenant or terminate the Covenant in its entirety. Such application shall be made in accordance with Health and Safety Code section 25224.

6.3. Term. Unless ended in accordance with paragraph 6.2, by law, or by the Department in the exercise of its discretion, this Covenant shall continue in effect in perpetuity.

## ARTICLE VII

### MISCELLANEOUS

7.1. No Dedication Intended. Nothing set forth in this Covenant shall be construed to be a gift or dedication, or offer of a gift or dedication, of the Property, or any portion thereof, to the general public or anyone else for any purpose whatsoever.

7.2. Recordation. The Covenantor shall record this Covenant, with all referenced Exhibits, in the County of Santa Clara within 10 calendar days of the Covenantor's receipt of a fully executed original.

7.3. Notices. Whenever any person gives or serves any Notice ("Notice" as used herein includes any demand or other communication with respect to this Covenant), each such Notice shall be in writing and shall be deemed effective: (a) when delivered, if personally delivered to the person being served or to an officer of a corporate party being served; or (b) five calendar days after deposit in the mail, if mailed by United States mail, postage paid, certified, return receipt requested:

To Owner:

Vista Montana Park Homes, LLC  
c/o Equity Residential  
Two N. Riverside Plaza, Suite 400  
Chicago, IL 60606

Attn: Rebecca Becker – Environmental Director

With a Copy to:  
Equity Residential  
Two North Riverside Plaza, Suite 400  
Chicago, Illinois 60606  
Attn: General Counsel

And

To Department:  
Unit Chief  
Department of Toxic Substances Control  
700 Heinz Avenue  
Berkeley, CA 94710

Any party may change its address or the individual to whose attention a Notice is to be sent by giving advance written Notice in compliance with this paragraph.

7.4. Partial Invalidity. If this Covenant or any of its terms are determined by a court of competent jurisdiction to be invalid for any reason, the surviving portions of this Covenant shall remain in full force and effect as if such portion found invalid had not been included herein.

7.5. Statutory References. All statutory or regulatory references include successor provisions.

7.6. Incorporation of Exhibits. All exhibits and attachments to this Covenant are incorporated herein by reference.

IN WITNESS WHEREOF, the Covenantor and the Department hereby execute this Covenant.

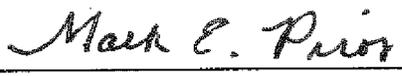
Covenantor: VISTA MONTANA PARK HOMES, LLC, a Delaware limited liability company qualified to do business in California.

By: ERP Operating Limited Partnership, an Illinois limited partnership, its managing member

By: Equity Residential, a Maryland real estate investment trust, its  
general partner

By:   
Name: MARK TENNISON  
Title: EXECUTIVE VICE PRESIDENT

Department of Toxic Substances Control:

By: 

Mark E. Piros, P.E.  
Brownfields and Environmental Restoration Program  
Department of Toxic Substances Control Date:

Date: 8/27/2015

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~~ Illinois  
County of Cook

On August 20, 2015 before me,

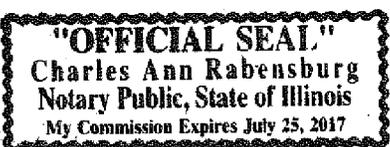
Charles Ann Rabensburg, Legal Assistant  
*(space above this line is for name and title of the officer/notary),*

personally appeared Mark Tannison, 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,

Charles Ann Rabensburg (seal)  
Signature of 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 Alameda

On August 27, 2015 before me,

Nicole Thuemmler Notary Public  
(space above this line is for name and title of the officer/notary),

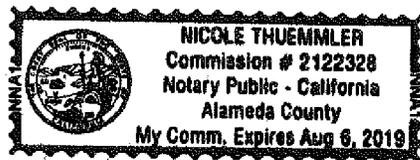
personally appeared Mark E. Piro, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) 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,

Nicole Thuemmler (seal)

Signature of Notary Public



# Exhibit A

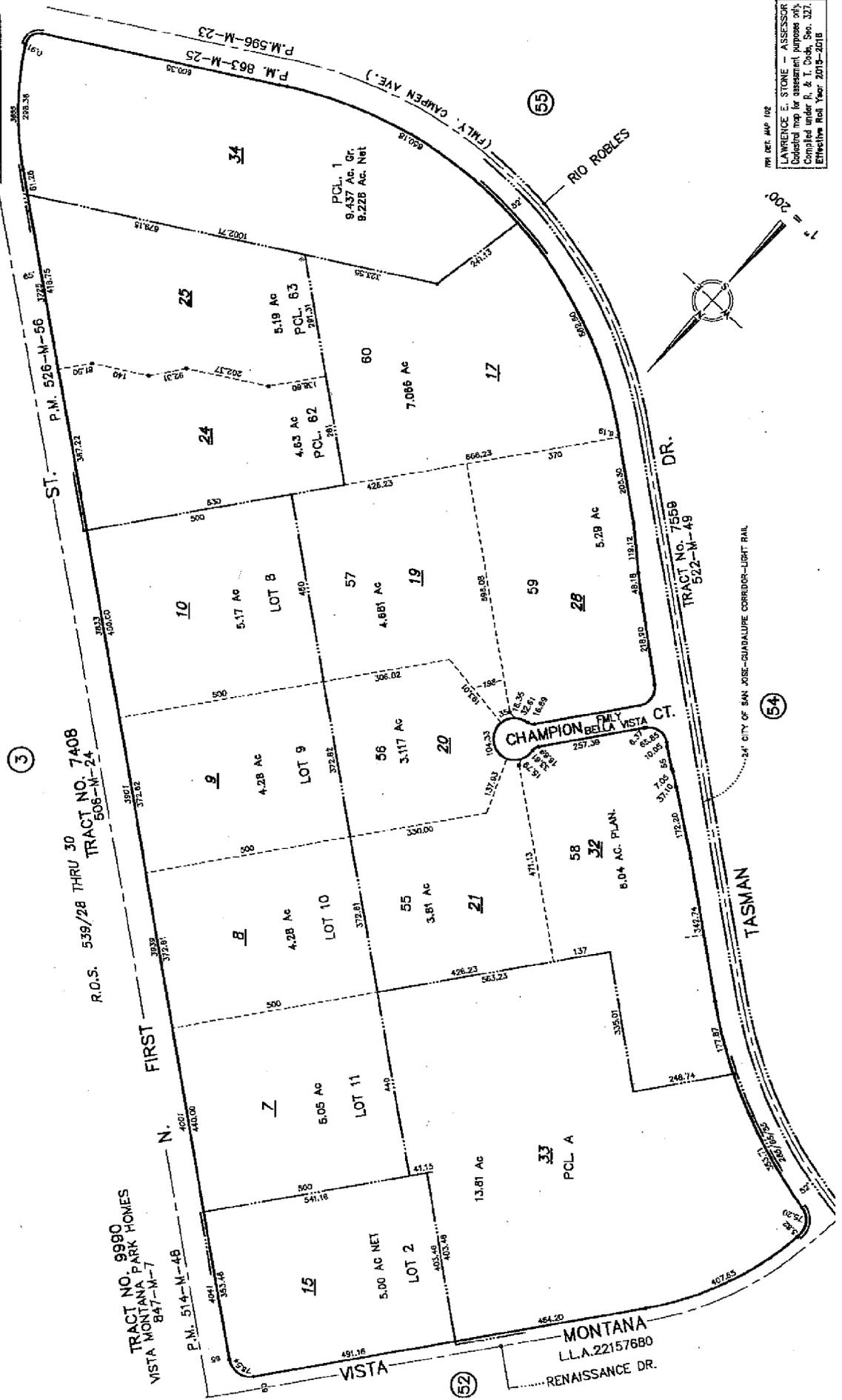
**EXHIBIT A**

Real property in the City of San Jose, County of Santa Clara, State of California, described as follows:

ALL OF LOT 2, AS SHOWN ON THAT CERTAIN MAP ENTITLED TRACT NO. 9990, WHICH MAP WAS FILED FOR RECORD IN THE OFFICE OF THE RECORDER OF THE COUNTY OF SANTA CLARA, STATE OF CALIFORNIA ON SEPTEMBER 20, 2011 IN BOOK 847 OF MAPS, PAGES 7-11.

APN: 097-53-015

# Exhibit B



TRA. REF. MAP 102  
LAWRENCE E. STONE - ASSESSOR  
[Detailed map for assessment purposes only]  
Compiled under R. & T. Code, Sec. 327.  
Effective Roll Year 2019-2018

MONTANA  
L.L.A. 22157680  
RENAISSANCE DR.