

24150870

Regina Alcomendras

Santa Clara County - Clerk-Recorder

04/05/2019 02:32 PM

Titles: 2 Pages: 15

Fees: \$242.00

Tax: \$0.00

Total: \$242.00

RECORDING REQUESTED BY:
Vista Montana Park Apartments Holdings, LLC
c/o Equity Residential
Two N. Riverside Plaza, Suite 400
Chicago, IL 60606

WHEN RECORDED, MAIL TO:
Department of Toxic Substances Control
700 Heinz Avenue
Berkeley, California 94710-2721
Attention: Mark Piros, Unit Chief
Site Mitigation and 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: 097-52-013
Vista Montana Park – Parcel A (Domain)
(Department Site Code 201657)**

This Land Use Covenant and Agreement ("Covenant") is made by and between Vista Montana Park Apartments Holdings, LLC (the "Covenantor"), the current owner of property located at 4145 North First Street and 55 Vista Montana, 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.

ARTICLE I

STATEMENT OF FACTS

1.1. Property Location. The Property that is subject to this Covenant, totaling approximately 6.971 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 to the east, Renaissance Drive to the south, North First Street to the north, and residences to the west. The Property is also identified as County of Santa Clara, Assessor Parcel Number 097-52-013.

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 (RAW), and a RAW Addendum, in accordance with Health and Safety Code, division 20, chapter 6.8. The remediation activities conducted at the Property included demolition and removal of on-site structures, soil evaluation, limited soil excavations, import of clean fill and installation of a cap consisting of: (a) a minimum of two feet of clean fill beneath landscaped areas, and (b) a minimum of six and a half (6.5) inches of concrete, asphalt, and or recycled aggregate base in the roadway, sidewalk, and foundation areas (the "Site Cap"). Hazardous substances, including: arsenic up to 84 parts per million (ppm); lead up to 310 ppm; and dichlorodiphenyltrichloroethane (DDT) up to 5.49 ppm, remain at the Property beneath the Site Cap above levels acceptable 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) Residential development for human habitation shall not be permitted on the Property, except for the development of townhouses and multifamily residences, and hotels. Any townhouse or multifamily residence

developments shall be constructed so that areas for human habitation shall not have ground level outdoor play areas except for areas that are located on top of or above the Site Cap.

- (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 Site 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., Site Cap) 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 June 1st 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 Apartments Holdings, LLC
c/o Equity Residential

Two N. Riverside Plaza, Suite 400
Chicago, Illinois 60606
Attn: Rebecca Becker – Assistant Vice President, Environmental

With a Copy to:

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

And

To Department:

Mark Piros, Unit Chief
Site Mitigation and Restoration Program
DTSC Berkeley Regional Office
700 Heinz Avenue, Suite 200
Berkeley, California 94710-2721

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 APARTMENTS HOLDINGS, LLC, a Delaware limited liability company qualified to do business in California.

By: EQR-Vista Member, LLC, a Delaware limited liability company, its managing member

By: EQR-Acquisitions, LP, a Delaware limited partnership, its sole member

By: EQR-Acquisitions, GP, LLC, a Delaware limited liability company, its general partner

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

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

By: _____
Name: BRADLEY KANABEK
Title: SUP DEVELOPMENT
Date: 4/1/19

Department of Toxic Substances Control:

By: _____
DANIEL MURPHY
Branch Chief
Site Mitigation and Restoration Program
Department of Toxic Substances Control
Date: 4/4/2019

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~~ WASHINGTON
County of King

On April 1 2019 before me,

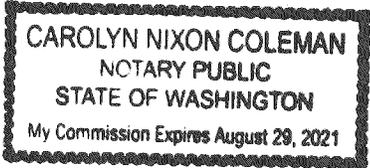
Carolyn Nixon Coleman
(space above this line is for name and title of the officer/notary),

personally appeared Brodley Karssek, 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,

Carolyn Nixon Coleman (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 April 4, 2019 before me,

Kathy Kimura-Barnes, Notary Public
(space above this line is for name and title of the officer/notary),

personally appeared Daniel Murphy, 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,

Kathy Kimura-Barnes (seal)
Signature of Notary Public

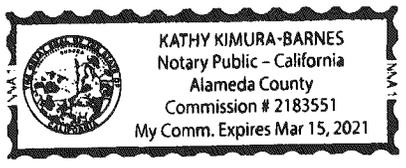


Exhibit A

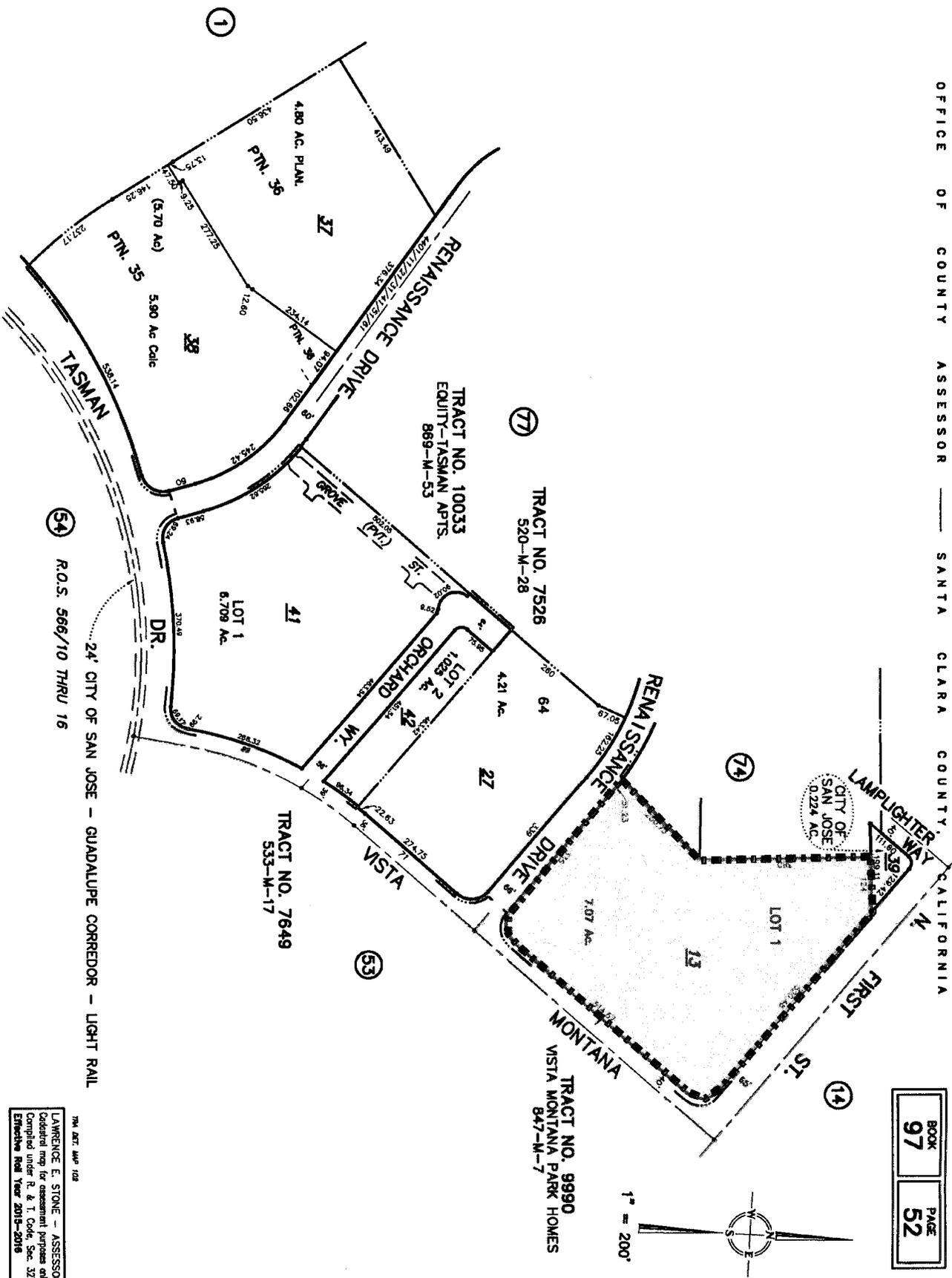
EXHIBIT A

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

ALL OF LOT 1, 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: 097-52-013

Exhibit B



THE DET. MAP 108
 LAWRENCE E. STONE - ASSESSOR
 Created map for assessment purposes only.
 Compiled under R. & T. Code, Sec. 327.
 Effective Roll Year 2015-2016