

**CAPITAL IMPROVEMENT LOAN AGREEMENT  
BETWEEN THE CITY OF SAN LEANDRO AND  
SAN LEANDRO BOYS AND GIRLS CLUB, INC.**

This Capital Improvement Loan Agreement (this “**Agreement**”) is entered into as of \_\_\_\_\_, 2019 (“**Effective Date**”) by and between the City of San Leandro, a California charter city (“**City**”), and San Leandro Boys And Girls Club, Inc., a California nonprofit corporation (“**Borrower**”). City and Borrower are hereinafter collectively referred to as the “**Parties**.”

**RECITALS**

- A. Borrower is a local nonprofit organization that provides services to the community.
- B. Borrower has a right granted by City to occupy and operate its programs and services upon that certain real property located at 401 Marina Boulevard, San Leandro, California, legally described in Exhibit A (the “**Property**”).
- C. Borrower’s goal is to construct capital improvements related to the Property, as described under the scope of work, attached hereto as Exhibit B and incorporated herein, including modernizing locker rooms and meeting spaces, as well as other infrastructure upgrades, and seeks City’s assistance to accomplish this goal (the “**Improvements**”).
- D. City provides loans to qualified local nonprofit organizations like Borrower in order to assist such organizations with capital improvement projects that serve the public welfare.
- E. As a qualified local nonprofit organization, Borrower is eligible to receive a loan from the City’s General Fund to construct the Improvements (the “**Loan**”), and that providing the Loan to Borrower is in the public interest because Borrower provides public benefits.
- F. Concurrently herewith Borrower shall execute a promissory note (the “**City Note**”) in the amount of the City Loan. This Agreement and the City Note are collectively hereinafter referred to as the “**Loan Documents**.”
- H. The California Environmental Quality Act (Public Resources Code Sections 21000 et seq.) (“**CEQA**”) imposes no conditions on the City’s consideration and approval of this Agreement because the Improvements are exempt from CEQA requirements under the categorical exemption set forth in 14 California Code of Regulations Section 15303(b).

**NOW, THEREFORE**, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereto agree as follows:

**ARTICLE I  
LOAN TERMS; USE AND DISBURSEMENT OF PROCEEDS**

1.1 LOAN. City agrees to loan to Borrower, and Borrower agrees to borrow from City a sum of up to Three Hundred Thousand Dollars (\$300,000.00) (the “**City Loan**”) upon the terms and conditions and

for the purposes set forth in this Agreement for construction of Improvements approved by the City. The City Loan shall be evidenced by a City Note, which shall be dated as of the Effective Date.

## 1.2 REPAYMENT; INTEREST RATE; FORGIVENESS.

1.2.1 LOAN TERM AND REPAYMENT. The Term of this Agreement shall be ten (10) years. Provided that Borrower is not in default under the Loan Documents, the City shall forgive one tenth (1/10<sup>th</sup>) of the principal of the City Loan, which is equal to Thirty Thousand Dollars (\$30,000.00), annually on the anniversary of the Effective Date of the Agreement. On the tenth (10<sup>th</sup>) anniversary of the Effective Date, provided that no default or breach by Borrower has occurred pursuant to Article IV, the entire outstanding principal and interest accrued on the City Loan shall be forgiven. If Borrower sells or transfers the Property or changes the use of the Property without written approval from the City, the City Loan shall become due and payable upon sale.

1.2.2 TIMELINE TO SPEND THE LOAN. Borrower shall expend the entire City Loan within twenty-four (24) months of the effective date of this Agreement.

1.2.3 INTEREST. Interest shall accrue on the principal balance of the City Loan at a rate of three percent (3%) simple interest per annum.

1.3 PREPAYMENT. Borrower may, without premium or penalty, at any time and from time to time, prepay all or any portion of the outstanding principal balance due under the City Note. Any prepayment of principal must be accompanied by interest accrued but unpaid to the date of receipt of prepayment. Prepayments shall be applied first to any unpaid late charges and other costs and fees then due, then to accrued but unpaid interest and then to principal.

1.4 USE OF PROCEEDS. Borrower shall use the proceeds of the City Loan (the "**City Loan Proceeds**") solely and exclusively to pay for the construction of the Improvements described in Exhibit B and in accordance with the budget and timeline specified in Exhibit B.

1.5 DISBURSEMENT OF PROCEEDS. Borrower shall submit separate written requests for each disbursement of City Loan funds with supporting evidence for all amounts requested (each a "**Requisition**"). Borrower shall submit each Requisition to the Community Development Director, or her/his designee, stating the requisition or invoice number (e.g., Invoice #1) and purpose and amount of the requested disbursement. Borrower shall attach copies of any documents supporting the Requisition, including estimates, bids, receipts, invoices, contracts, payment schedules, or evidence of Borrower's payment of preconstruction and rehabilitation expenses required to fund the Improvements. The supporting documents shall state the time period in which work was performed, and the expenses to be funded with the City Loan Proceeds.

1.6 RESERVED.

1.7 CONDITIONS PRECEDENT TO DISBURSEMENT OF PROCEEDS. City's obligation to disburse the City Loan Proceeds is conditioned upon the satisfaction of all of the following conditions:

(a) Borrower's delivery to City of fully executed Loan Documents;

(b) Borrower's delivery to City of evidence reasonably satisfactory to City that Borrower obtained all necessary permits (including without limitation, building permits), licenses, and approvals required to undertake the Improvements, or that the receipt of such permits is subject only to such conditions as City shall reasonably approve;

(c) City shall have received and approved the final plans and specifications for the Improvements;

(d) City shall have received copies of labor and materials bonds and performance bonds for the construction of the Improvements in an amount equal to one hundred percent (100%) of the scheduled cost of the Improvements.

(e) Borrower's delivery to the City of evidence of insurance coverage in accordance with the requirements set forth in this Agreement;

(f) Borrower's delivery to City of such documentation as City shall reasonably require regarding Borrower's organizational status and authority to execute and perform Borrower's obligations under the Loan Documents;

(g) Borrower's delivery to City of all of the following: (i) Improvements budget; (ii) construction contract; (iii) other assurance of completion reasonably acceptable to City; and (iv) copies of such other documents related to the development and financing of the Improvements as City may reasonably request; and

(h) No material adverse change as determined by City in its reasonable judgment shall have occurred in the condition of the Property or the Improvements or in the financial or other condition of Borrower since the date of this Agreement.

1.8 NO OBLIGATION TO DISBURSE PROCEEDS UPON DEFAULT. Notwithstanding any other provisions of this Agreement, the City shall have no obligation to disburse any portion of the City Loan Proceeds if there is an occurrence of an Event of Default (defined below) under the Loan Documents.

## **ARTICLE II CONSTRUCTION OF THE IMPROVEMENTS**

2.1 CONSTRUCTION SCHEDULE. Borrower shall adhere to the schedule attached hereto under the Scope of Work as Exhibit B. Borrower must obtain written approval from the City for any changes to the construction schedule.

## **ARTICLE III AFFIRMATIVE COVENANTS**

3.1 USE OF FUNDS. Borrower covenants that it shall use the City Loan Proceeds solely for the purpose of financing the construction of the Improvements in accordance with Section 1.4.

3.2 COMPLIANCE WITH LAWS. Borrower covenants to comply with all federal, state and local laws, regulations, ordinances and rules applicable to the Property and the Improvements, including without

limitation, all applicable requirements of state and local building codes and regulations, and all applicable statutes and regulations relating to accessibility for the disabled.

3.3 INSURANCE. Borrower shall procure and maintain for the duration of the Agreement, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work hereunder by Borrower, its agents, representatives, employees, contractors or subcontractors. Consistent with the following provisions, Borrower shall provide proof satisfactory to City of such insurance that meets the requirements of this section and under forms of insurance satisfactory in all respects, and that such insurance is in effect prior to beginning work. Borrower shall maintain the insurance policies required by this section throughout the term of this Agreement. Borrower shall not allow any contractor to commence work until Borrower has obtained all insurance required herein for the contractor and provided evidence to the City that such insurance is in effect. Verification of the required insurance shall be submitted and made part of this Agreement prior to execution. Borrower shall maintain all required insurance listed herein for the duration of this Agreement.

A. Workers' Compensation. Borrower shall, at its sole cost and expense, maintain Statutory Workers' Compensation Insurance and Employer's Liability Insurance for any and all persons employed directly or indirectly by Borrower. The Statutory Workers' Compensation Insurance and Employer's Liability Insurance shall be provided with limits of not less than \$1,000,000 per accident. In the alternative, Borrower may rely on a self-insurance program to meet those requirements, but only if the program of self-insurance complies fully with the provisions of the California Labor Code. Determination of whether a self-insurance program meets the standards of the Labor Code shall be solely in the discretion of the City. The insurer, if insurance is provided, or the Borrower, if a program of self-insurance is provided, shall waive all rights of subrogation against the City and its officers, officials, employees, and volunteers for loss arising from work performed under this Agreement.

B. Commercial General and Automobile Liability Insurance.

1) General requirements. Borrower, at its own cost and expense, shall maintain commercial general and automobile liability insurance for the term of this Agreement in an amount not less than \$2,000,000 per occurrence, combined single limit coverage for risks associated with the work contemplated by this Agreement. If a Commercial General Liability Insurance or an Automobile Liability form or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to the work to be performed under this Agreement or the general aggregate limit shall be at least twice the required occurrence limit. Such coverage shall include but shall not be limited to, protection against claims arising from bodily and personal injury, including death resulting therefrom, and damage to property resulting from activities contemplated under this Agreement, including the use of owned and non-owned automobiles.

2) Minimum scope of coverage. Commercial general coverage shall be at least as broad as Insurance Services Office Commercial General Liability occurrence form CG 0001 (most recent edition) covering comprehensive General Liability on an "occurrence" basis. Automobile coverage shall be at least as broad as Insurance Services Office Automobile Liability form CA 0001 (most recent edition), Code 1 (any auto). No endorsement shall be attached limiting the coverage.

- 3) Additional requirements. Each of the following shall be included in the insurance coverage or added as a certified endorsement to the policy:
  - a. The Insurance shall cover on an occurrence or an occurrence basis, and not on a claims-made basis.
  - b. City, its officers, officials, employees, and volunteers are to be covered as additional insureds as respects: liability arising out of work or operations performed by or on behalf of the Borrower; or automobiles owned, leased, hired, or borrowed by the Borrower.
  - c. For any claims related to this Agreement or the work hereunder, the Borrower's insurance coverage shall be primary insurance as respects the City, its officers, officials, employees, and volunteers. Any insurance or self-insurance maintained by the City, its officers, officials, employees, or volunteers shall be in excess of the Borrower's insurance and shall not contribute with it.
  - d. Each insurance policy required by this clause shall be endorsed to state that coverage shall not be canceled by either party, except after 30 days' prior written notice has been provided to the City.

C. All Policies Requirements.

- 1) Acceptability of insurers. All insurance required by this section is to be placed with insurers with a Bests' rating of no less than A:VII.
- 2) Verification of coverage. Prior to commencing or authorizing the commencement of any work under this Agreement, Borrower shall furnish City with complete copies of all policies delivered to Borrower by the insurer, including complete copies of all endorsements attached to those policies. All copies of policies and endorsements shall show the signature of a person authorized by that insurer to bind coverage on its behalf. If the City does not receive the required insurance documents prior to the Borrower beginning work, it shall not waive the Borrower's obligation to provide them.
- 3) Deductibles and Self-Insured Retentions. Borrower shall disclose to and obtain the written approval of City for the self-insured retentions and deductibles before beginning any of the services or work called for by any term of this Agreement. At the option of the City, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the City, its officers, officials, employees, and volunteers; or the Borrower shall provide a financial guarantee satisfactory to the City guaranteeing payment of losses and related investigations, claim administration and defense expenses.
- 4) Wasting Policies. No policy required by this Section shall include a "wasting" policy limit (i.e. limit that is eroded by the cost of defense).

- 5) Waiver of Subrogation. Borrower hereby agrees to waive subrogation which any insurer or contractor may require from vendor by virtue of the payment of any loss. Borrower agrees to obtain any endorsements that may be necessary to affect this waiver of subrogation. The Workers' Compensation policy shall be endorsed with a waiver of subrogation in favor of the entity for all work performed by the Borrower, its employees, agents, and subcontractors.
- D. Subcontractors. Borrower shall include, or require its general or prime contractor to include, all subcontractors as insureds under its policies or shall furnish separate certificates and endorsements for each subcontractor. All coverages for subcontractors shall be subject to all of the requirements stated herein.

The City Risk Manager may approve a variation in those insurance requirements upon a determination that the coverages, scope, limits and forms of such insurance are either not commercially available or that the City's interests are otherwise fully protected.

3.4 MAINTENANCE. Participant shall maintain the Improvements to the City's standards and repair Improvements at Participant's own expense for a period of not less than ten (10) years after completion thereof.

3.5 INDEMNIFICATION. Borrower shall indemnify, defend (with counsel reasonably acceptable to City), and hold harmless the City and its respective elected and appointed officials, officers, agents, and employees (collectively the **Indemnitees**"), from and against, and shall pay on demand, any and all losses, liabilities, damages, costs, claims, demands, penalties, fines, orders, judgments, injunctive or other relief, expenses and charges (including attorneys' fees and expenses of attorneys) (collectively "**Liabilities**") arising directly or indirectly in any manner in connection with or as a result of (a) any breach of Borrower's covenants under the Loan Documents, (b) any failure of Borrower's representations and warranties to be true and correct in all material respects when made, (c) injury or death to persons or damage to property or other loss occurring on the Property, whether caused by the negligence or any other act or omission of Borrower or any other person or by negligent, faulty, inadequate or defective design, building, construction or maintenance or any other condition or otherwise, or (d) any claim, demand or cause of action, or any action or other proceeding, whether meritorious or not, brought or asserted against any Indemnitee which relates to or arises out of the Property, the Improvements, the City Loan, the Loan Documents, or any transaction contemplated thereby, or any failure of Borrower to comply with all applicable state, federal and local laws and regulations, including without limitation, applicable provisions of the California Building Standards Code, the Prevailing Wage Laws, and the Americans with Disabilities Act in connection with the construction or operation of the Improvements, provided that no Indemnitee shall be entitled to indemnification under this Section for matters caused by such Indemnitee's gross negligence or willful misconduct. The obligations of Borrower under this Section shall survive the expiration or termination of this Agreement and the making and repayment of the City Loan.

3.6 OBLIGATION TO REFRAIN FROM DISCRIMINATION. Borrower shall not restrict the rental, sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the Property, or any portion thereof, on the basis of race, color, religion, creed, sex, sexual orientation, disability, marital status, ancestry, or national origin of any person. Borrower covenants for itself and all persons claiming under or through it, and this Agreement is made and accepted upon and subject to the condition that there shall be no

discrimination against or segregation of any person or group of persons on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the Property or part thereof, nor shall Borrower or any person claiming under or through Borrower establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees or vendees in, of, or for the Property or part thereof. Borrower shall include such provision in all deeds, leases, contracts and other instruments executed by Borrower, and shall enforce the same diligently and in good faith.

All deeds, leases or contracts made or entered into by Borrower, its successors or assigns, as to any portion of the Property or the Improvements shall contain the following language:

(a) In Deeds, the following language shall appear:

“Grantee herein covenants by and for itself, its successors and assigns, and all persons claiming under or through it, that there shall be no discrimination against or segregation of a person or of a group of persons on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the property herein conveyed nor shall the grantee or any person claiming under or through the grantee establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees or vendees in the property herein conveyed. The foregoing covenant shall run with the land.”

(b) In Leases, the following language shall appear:

“The lessee herein covenants by and for the lessee and lessee’s heirs, personal representatives and assigns, and all persons claiming under the lessee or through the lessee, that this lease is made subject to the condition that there shall be no discrimination against or segregation of any person or of a group of persons on account of race, color, creed, religion, sex, sexual orientation, marital status, national origin, ancestry or disability in the leasing, subleasing, transferring, use, occupancy, tenure or enjoyment of the property herein leased nor shall the lessee or any person claiming under or through the lessee establish or permit any such practice or practices of discrimination of segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, sublessees, subtenants, or vendees in the property herein leased.”

(c) In Contracts

“There shall be no discrimination against or segregation of any person or group of persons on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the property nor shall the transferee or any person claiming under or through the transferee establish or permit any such practice or practices of discrimination or segregation with reference to selection, location, number, use or occupancy of tenants, lessee, subtenants, sublessees or vendees of the land.”

3.7 USE OF PROPERTY: A Borrower may not change the use or planned use of any such property (including the beneficiaries of such use) from that for which the Improvements were made unless the Borrower provides the City with reasonable notice of, and opportunity to comment on, any proposed change.

3.8 TAXES AND OTHER LIABILITIES. Borrower shall pay and discharge when due any and all indebtedness, obligations, assessments, taxes, including federal and state payroll and income taxes which are the obligations of Borrower in relation to the Property or the Improvements except those that Borrower may in good faith contest or as to which a bona fide dispute may arise, provided provision is made to the satisfaction of City for eventual payment thereof in the event that it is found that the same is an obligation of Borrower.

3.9 HAZARDOUS MATERIALS.

3.9.1 Covenants. Borrower shall not cause or permit any Hazardous Materials (as defined below) to be brought upon, kept, stored or used in, on, or about the Property by Borrower, or the agents, employees, contractors or invitees of Borrower except for materials commonly used in construction activities similar to those related to the Improvements, or in the operation and maintenance of the Property and the Improvements, in each case in compliance with all applicable laws, and shall not cause any release of Hazardous Materials into, onto, under or through the Property. If any Hazardous Material is discharged, released, dumped, or spilled in, on, under, or about the Property and results in any contamination of the Property or adjacent property, or otherwise results in the release or discharge of Hazardous Materials in, on, under or from the Property, Borrower shall promptly take all actions at Borrower's sole expense as are necessary to comply with all Environmental Laws (as defined below).

**"Hazardous Materials"** means any substance, material or waste which is or becomes regulated by any federal, state or local governmental authority, and includes without limitation (i) petroleum or oil or gas or any direct or indirect product or by-product thereof; (ii) asbestos and any material containing asbestos; (iii) any substance, material or waste regulated by or listed (directly or by reference) as a "hazardous substance", "hazardous material", "hazardous waste", "toxic waste", "toxic pollutant", "toxic substance", "solid waste" or "pollutant or contaminant" in or pursuant to, or similarly identified as hazardous to human health or the environment in or pursuant to, the Toxic Substances Control Act [15 U.S.C. 2601, et seq.]; the Comprehensive Environmental Response, Compensation and Liability Act [42 U.S.C. Section 9601, et seq.], the Hazardous Materials Transportation Authorization Act [49 U.S.C. Section 5101, et seq.], the Resource Conservation and Recovery Act [42 U.S.C. 6901, et seq.], the Federal Water Pollution Control Act [33 U.S.C. Section 1251], the Clean Air Act [42 U.S.C. Section 7401, et seq.], the California Underground Storage of Hazardous Substances Act [California Health and Safety Code Section 25280, et seq.], the California Hazardous Substances Account Act [California Health and Safety Code Section 25300, et seq.], the California Hazardous Waste Act [California Health and Safety Code Section 25100, et seq.], the California Safe Drinking Water and Toxic Enforcement Act [California Health and Safety Code Section 25249.5, et seq.], and the Porter-Cologne Water Quality Control Act [California Water Code Section 13000, et seq.], as they now exist or are hereafter amended, together with any regulations promulgated thereunder; (iv) any substance, material or waste which is defined as such or regulated by any "Superfund" or "Superlien" law, or any Environmental Law; or (v) any other substance, material, chemical, waste or pollutant identified as hazardous or toxic and regulated under any other federal, state or local environmental law, including without limitation, asbestos, polychlorinated biphenyls, petroleum, natural gas and synthetic fuel products and by-products.

**"Environmental Law"** means all federal, state or local statutes, ordinances, rules, regulations, orders, decrees, judgments or common law doctrines, and provisions and conditions of permits, licenses and other operating authorizations regulating, or relating to, or imposing liability or standards of conduct

concerning (i) pollution or protection of the environment, including natural resources; (ii) exposure of persons, including employees and agents, to Hazardous Materials (as defined above) or other products, raw materials, chemicals or other substances; (iii) protection of the public health or welfare from the effects of by-products, wastes, emissions, discharges or releases of chemical substances from industrial or commercial activities; (iv) the manufacture, use or introduction into commerce of chemical substances, including without limitation, their manufacture, formulation, labeling, distribution, transportation, handling, storage and disposal; or (iv) the use, release or disposal of toxic or hazardous substances or Hazardous Materials or the remediation of air, surface waters, groundwaters or soil, as now or may at any later time be in effect, including but not limited to the Toxic Substances Control Act [15 U.S.C. 2601, et seq.]; the Comprehensive Environmental Response, Compensation and Liability Act [42 U.S.C. Section 9601, et seq.], the Hazardous Materials Transportation Authorization Act [49 U.S.C. Section 5101, et seq.], the Resource Conservation and Recovery Act [42 U.S.C. 6901, et seq.], the Federal Water Pollution Control Act [33 U.S.C. Section 1251], the Clean Air Act [42 U.S.C. Section 7401, et seq.], the California Underground Storage of Hazardous Substances Act [California Health and Safety Code Section 25280, et seq.], the California Hazardous Substances Account Act [California Health and Safety Code Section 25300, et seq.], the California Hazardous Waste Act [California Health and Safety Code Section 25100, et seq.], the California Safe Drinking Water and Toxic Enforcement Act [California Health and Safety Code Section 25249.5, et seq.], and the Porter-Cologne Water Quality Control Act [California Water Code Section 13000, et seq.], as they now exist or are hereafter amended, together with any regulations promulgated thereunder.

3.10 PREVAILING WAGES. Borrower shall pay and shall cause Borrower's contractor and subcontractors to pay prevailing wages in the construction of the Improvements as those wages are determined pursuant to Labor Code Section 1720 *et seq.* and the regulations adopted pursuant thereto ("**Prevailing Wage Laws**") and shall comply or shall cause the contractor and subcontractors to comply with all other applicable provisions of the Prevailing Wage Laws. Borrower shall maintain or shall cause the contractor and subcontractors to maintain such records as are necessary to determine if prevailing wages have been paid as required pursuant to the Prevailing Wage Laws during the construction of the Project. Borrower shall cause the contractor to post at the Property the applicable prevailing rates of per diem wages. Borrower shall indemnify, defend (with counsel approved by City) and hold the Indemnitees harmless from and against all Liabilities which directly or indirectly, in whole or in part, are caused by, arise in connection with, result from, relate to, or are alleged to be caused by, arise in connection with, or relate to, the payment or requirement of payment of prevailing wages (including without limitation, all claims that may be made by contractors, subcontractors or other third party claimants pursuant to Labor Code sections 1726 and 1781), the failure to comply with all applicable state and federal labor laws, regulations and standards in connection with the construction of the Project, including but not limited to the Prevailing Wage Laws, or any act or omission of Borrower or Borrower's contractors and subcontractors with respect to the payment or requirement of payment of prevailing wages, whether or not any insurance policies shall have been determined to be applicable to any such Claims. It is further agreed that City does not, and shall not, waive any rights against Borrower which it may have by reason of this indemnity and hold harmless agreement because of the acceptance by City, or the deposit with City, of any of the insurance policies described in this Agreement. The provisions of this Section shall survive the expiration or termination of this Agreement and the making and repayment of the City Loan.

#### ARTICLE IV NEGATIVE COVENANTS

Borrower covenants and agrees that for the life of this Agreement, Borrower will not, without prior written consent of the City:

4.1 USE OF FUNDS. Use any of the proceeds of the City Loan except for the purpose(s) stated in Section 1.4 of this Agreement.

4.2 ENCUMBER THE PROPERTY. Create nor suffer to exist any mortgage, lien, charge, or encumbrance, including liens arising from judgments on the Property. This includes Workers' Compensation, unemployment, Internal Revenue Service, state, local, mechanic, and any other liens of any type; provided however, that Borrower shall have thirty (30) days to discharge or provide adequate security for any involuntary lien upon the Property except that which may be in the ordinary course of business to obtain a line of credit or letters of credit.

4.3 MERGER, CONSOLIDATION, SALE OF ASSETS. Merge into or consolidate with any corporation or other entity, or acquire all or substantially all of the assets of any other corporation or entity; or sell, lease, assign, transfer or otherwise dispose of all or substantially all Borrower's assets.

4.4 LOANS, ADVANCES, INVESTMENTS. Make any loan or advances to or investments in, any person or entity except those usually made in the ordinary course of business.

## **ARTICLE V DEFAULT AND REMEDIES**

5.1 EVENTS OF DEFAULT. The occurrence of any one or more of the following events shall constitute an event of default hereunder ("**Event of Default**"):

(a) Participant removes the Improvements from the Property, or fails to maintain the Improvements and the Property according to the City's standards, or fails to promptly make repairs in violation of Section 3.4.

(b) Any representation or warranty contained in this Agreement or any certificate furnished in connection with the foregoing or in connection with any request for disbursement of City Loan Proceeds proves to have been false or misleading in any respect when made.

(c) Borrower defaults in the performance of any term, provision, covenant or agreement (other than an obligation enumerated in this Article V) contained in this Agreement or unless a shorter cure period for such default is specified herein, the default continues for ten (10) days in the event of a monetary default or thirty (30) days in the event of a nonmonetary default after the date upon which City shall have given written notice of the default to Borrower (or such longer time as City may agree upon in writing), provided that in each case Borrower commences to cure the default within thirty (30) days and thereafter prosecutes the curing of such default with due diligence and in good faith.

(d) Borrower becomes insolvent or shall cease to pay its debts as they mature or voluntarily files a petition seeking reorganization of, or the appointment of a receiver, trustee, or liquidation for it or a substantial portion of its assets, or to effect a plan or other arrangement with creditors, or shall be adjudicated bankrupt, or shall make voluntary assignment for the benefit of creditors.

(e) An insolvency petition is filed against Borrower under any bankruptcy, insolvency, or similar law or seeking the reorganization of or the appointment of a receiver, trustee, or liquidator for Recipient, or of a substantial part of the property of the Recipient's, or a writ or warrant of attachment or similar process shall be issued against a substantial part of the property of Recipient, and such petition shall not be dismissed, or such writ or warrant of attachment or similar process shall not be released or bonded, within sixty (60) days of filing of levy.

5.2 REMEDIES AND RIGHTS UPON DEFAULT. Upon the occurrence of an Event of Default, City shall have all remedies available to it under law or equity, including, but not limited to the following, and City may, at its election, without notice to or demand upon Borrower, except for notices or demands required by law or expressly required pursuant to this Agreement, exercise one or more of the following remedies:

- a) Seek specific performance to enforce the terms of this Agreement;
- b) Accelerate and declare the balance of the City Note and interest accrued thereon immediately due and payable;
- c) Pursue any and all other remedies available under any other Loan Document;
- d) Terminate Borrower's right to use or occupy the Property. Borrower understands that the Property is owned by the City, and expressly acknowledges and agrees that an Event of Default shall give the City the right to terminate Borrower's right to use or occupy the Property, notwithstanding Borrower's rights under any other agreement regarding use of the Property.
- e) Pursue any and all other remedies available under law to enforce the terms of this Agreement and City's rights hereunder.

5.3 REMEDIES CUMULATIVE. Each of the remedies provided herein is cumulative and not exclusive of, and shall not prejudice any other remedy provided herein. The City may exercise from time to time any rights and remedies available to it under applicable law, in addition to, and not in lieu of, any rights and remedies expressly granted in this Agreement or in any other instrument or notice, demand or legal process of any kind.

## **ARTICLE VI RESERVED**

## **ARTICLE VII MISCELLANEOUS**

7.1 NOTICES. All notices to be sent pursuant to this Agreement shall be made in writing, and sent to the Parties at their respective addresses specified below or to such other address as a Party may designate by written notice delivered to the other Party in accordance with this Section. All such notices sent by personal delivery shall be deemed delivered upon receipt and all notices sent first class, postage prepaid, return receipt requested shall be deemed delivered five (5) business days after deposit in the United States mail.

**City:** City of San Leandro

835 E. 14th Street  
San Leandro, CA 94577  
Attn: Community Development Director

**Borrower:** San Leandro Boys And Girls Club, Inc.  
401 Marina Blvd.  
San Leandro, CA 94577  
Attn: Executive Director

7.2 COUNTERPARTS. This Agreement may be executed in multiple counterparts each of which shall be an original and all of which taken together shall constitute one and the same instrument.

7.3 SEVERABILITY. If any term, provision, covenant or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the provisions shall continue in full force and effect unless the rights and obligations of the Parties are materially altered or abridged by such invalidation, voiding or unenforceability.

7.4 LEGAL ACTIONS; ATTORNEYS' FEES. In the event any legal action is commenced to interpret or to enforce the terms of this Agreement or to collect damages as a result of any breach thereof, the Party prevailing in any such action shall be entitled to recover against the other Party all reasonable attorneys' fees and costs incurred in such action.

7.5 CAPTIONS; INTERPRETATION. The captions of the Sections and Articles of this Agreement are for convenience only and are not intended to affect the interpretation or construction of the provisions herein contained. The language of this Agreement shall be construed as a whole according to its fair meaning and not strictly for or against any Party. Time is of the essence in the performance of this Agreement.

7.6 PARTIES NOT CO-VENTURERS. At all times during the term of this Agreement, Borrower shall be an independent contractor and shall not be an employee of City. City shall have the right to control Borrower only insofar as the results of Borrower's services rendered pursuant to this Agreement; however, City shall not have the right to control the means by which Borrower accomplishes services rendered pursuant to this Agreement. Nothing in this Agreement is intended to or shall establish the Parties as partners, co-venturers, or principal and agent with one another.

7.7 GOVERNING LAW; VENUE. This Agreement shall in all respects be construed and enforced in accordance with laws of the State of California without regard to principles of conflicts of laws. Any action to enforce or interpret this Agreement must be filed in Alameda County, State of California, or the Northern District of California.

7.8 WAIVER; MODIFICATION AND AMENDMENT. No failure or delay on the part of the City in exercising any right, power, or remedy hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any such right, power, or remedy preclude any other or further exercise thereof or the exercise of any other right, power, or remedy hereunder. No modification or waiver of any provision of this Agreement, nor any consent to any departure by Borrower therefrom, shall in any event be effective unless the same shall be in writing, and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given. No notice to or demand on the Borrower in any case shall entitle

the Borrower to any other or further notice or demand in similar or other circumstances. No amendment to or modification of this Agreement shall be effective unless and until such amendment or modification is in writing, properly approved in accordance with applicable procedures, and executed by the Parties.

7.9 ASSIGNMENT PROHIBITED. Borrower shall not assign any right or obligation pursuant to this Agreement. Any attempted or purported assignment of any right or obligation pursuant to this Agreement shall be void and of no effect.

7.10 NO THIRD PARTY BENEFICIARIES. There shall be no third party beneficiaries to this Agreement.

7.11 ENTIRE AGREEMENT; EXHIBITS. This Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof and supersedes any and all prior or contemporaneous oral or written agreements and negotiations between the Parties with respect thereto. Exhibits A through G attached hereto are incorporated herein by reference as though fully set forth herein. Notwithstanding any other agreement to the contrary, the Parties hereto acknowledge and agree that the City owns the underlying land, identified as the Property, and Participant owns and operates the Improvements that are upon the Property. The City may, upon a breach or default of this Agreement, terminate Participant's right to be upon the Property.

7.12 SURVIVAL. All representations made by Borrower herein and the provisions of Section 3.5 hereof shall survive the expiration or earlier termination of this Agreement and the making of the City Loan. The representations of Borrower made herein have been or will be relied upon by the City, notwithstanding any investigation made by the City or on its behalf.

7.13 ACTION BY THE CITY. Except as may be otherwise specifically provided herein, whenever any approval, notice, direction, or consent by the City is required or permitted under this Agreement, such action shall be in writing, and such action may be given, made or taken by the City Manager or by any person who shall have been designated by the City Manager, without further approval by the City Council. City shall use reasonable best efforts to respond to requests for any such approval, notice, direction, or consent in a timely manner.

7.14 NON-LIABILITY OF CITY OFFICIALS, EMPLOYEES AND AGENTS. No member, official, employee or agent of the City shall be personally liable to Borrower or any successor in interest to any of the foregoing in the event of any default or breach by the City, or for any amount of money which may become due to Borrower or Borrower's successor in interest or for any obligation of City under this Agreement.

7.15 BINDING UPON SUCCESSORS. Borrower hereby subjects its interest in the Property and the Improvements to the covenants and restrictions set forth in this Agreement.

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

**PARTICIPANT:**

San Leandro Boys And Girls Club, Inc.

By: \_\_\_\_\_  
Executive Director

Date: \_\_\_\_\_

**CITY:**

**CITY OF SAN LEANDRO**

By: \_\_\_\_\_  
Jeff Kay, City Manager

ATTEST:

\_\_\_\_\_  
Leticia Miguel, City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
Richard D.Pio Roda, City Attorney

APPROVED AS TO BUDGET:

\_\_\_\_\_  
David Baum , Finance Director

Account Number:

**EXHIBIT A**

**LEGAL DESCRIPTION OF PROPERTY**

**EXHIBIT B**

**SCOPE OF WORK, SCHEDULE & BUDGET**

3239132.3