

RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:

Omni Financial, LLC
1260 41st Avenue, Suite O
Capitola, CA 95010

(Space above for Recorder's use)

**DECLARATION OF LICENSES, COVENANTS AND RESTRICTIONS
(GRANITE PARK RECREATION DEVELOPMENT)**

THIS DECLARATION OF LICENSES, COVENANTS AND RESTRICTIONS (GRANITEGRANITE PARK RECREATION DEVELOPMENT) (**Declaration**) is made as of this ____ day of _____, 2020, by and among OMNI FINANCIAL, LLC, a California limited partnership (**Omni**), having as its principal place of business, 1260 41st Avenue, Suite O, Capitola, CA 95010, and the CITY OF FRESNO, a municipal corporation of the State of California (**Recreation Development Owner or CITY**).

RECITALS

- A. Omni is the owner of real property located in the City of Fresno, County of Fresno, State of California and more particularly described in and shown on **Exhibit "A"** (also referred to herein as the **Site Plan**). Developer, as defined below, may add or subtract land within or adjacent to the Parking Tract to the Parking Tract at any time or from to time, consistent with legal and regulatory requirements, in its sole and absolute discretion by recording in the Official Records a notice of change in the Parking Tract.
- B. Recreation Development Owner is the owner of real property located adjacent to the Parking Tract in the City of Fresno, County of Fresno, State of California, referred to herein as the "**Recreation Development**" and more particularly described on **Exhibit "A"** attached hereto.
- C. The "**Development**" consists of the Parking Tract, and Tracts A through P, all as shown on the Site Plan, incorporated herein, and is more particularly described on **Exhibit "A"** attached hereto.
- D. The "**Development Declaration**" consists of that certain Declaration of Easements, Covenants and Restrictions recorded as Instrument No. _____ in the Official Records of Fresno County, California, incorporated herein.
- E. The parties hereto intend to establish hereby certain licenses and to impose covenants running with the land affecting the Parking Tract and the Recreation Development.

- F. Recreation Development Owner has determined under the CEQA Guidelines, that Omni's granting of the Parking License, as hereinafter defined, and the agreements contained in this Declaration with respect thereto fits within the definition stipulated under "**Existing Facilities**" in Section 15301, Class 1 (c) as Categorically Exempt from further CEQA review. This project involves no negligible alteration of existing facilities involving negligible or no expansion of use beyond that existing at the time of the determination that the Categorical Exemption will apply. Furthermore, this project will not adversely impact air quality or any other environmental area as it will provide for facility and parking joint use synergies. Finally, staff has determined that none of the exceptions to the Categorical Exemptions set forth in CEQA Guidelines, Section 15300.2, apply. As such, staff has concluded that this Categorical Exemption applies to this project.
- G. On _____, 2020, the City Council of the City of Fresno approved this Declaration.

AGREEMENT

NOW, THEREFORE, for and in consideration of the sum of \$10.00 and the covenants herein contained and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Developer and the Recreation Development Owner hereby agree as follows:

1. ARTICLE I – DEFINITIONS

- 1.1. "**City**" shall refer to the City of Fresno, State of California.
- 1.2. "**County**" is the County of Fresno, State of California.
- 1.3. "**Developer**" initially shall be Omni or other entity controlled by, controlling or under common control with Omni (**Omni Entities**), so long as an Omni Entity owns any portion of the Development or until an Omni Entity elects to resign from its position as the Developer and is not replaced with another Omni Entity. After an Omni Entity shall no longer be the Developer, the Developer shall be the Owner of Tract 11. The parties acknowledge that the Owner of Tract 11 may in the future be an association comprised of one or more of the Owners of the Development, in which event the association by-laws shall designate the Developer for purposes of this Declaration (and if such by-laws fail to do so, then the Developer shall be the Owners controlling a majority of the ownership interests of such association). The licenses, covenants, conditions and restrictions of this Declaration to be kept, performed, observed and enforced by Developer shall be binding upon and enforceable against such Person only during, and with respect to obligations accruing while, such Person is the "**Developer**" hereunder.
- 1.4. "**Improvements**" shall mean and include structures and construction of any kind, whether above or below the land surface, including, but not limited to, buildings, outbuildings, walls, water lines, sewers, electrical and gas distribution facilities, parking facilities, driveways, loading areas, walkways, fences, hedges, mass plantings, poles, signs, balconies, screens, awnings, canopies and any other structures of any type or kind.

- 1.5. "**Interest Rate**" shall mean the lesser of 3% in excess of the current prime lending rate of Bank of America, N.A., or the maximum interest rate permitted by law.
- 1.6. "**Mortgage**" shall mean and refer to any duly recorded mortgage or deed of trust encumbering all or a portion of a Tract.
- 1.7. "**Mortgagee**" shall mean and refer to the mortgagee or beneficiary under any Mortgage.
- 1.8. "**Owner**" shall mean one or more persons or entities who alone or collectively are the record owner(s) of fee simple title to a portion of the Recreation Development or the Parking Tract, or the vendee under an installment land sales contract, but excludes those having any such interest merely as security for the performance of an obligation. In the event that the ownership of any Improvement and any portion of the Recreation Development or the Parking Tract shall be severed from the land, whether by lease or by deed, the owner(s) of the fee interest in the land and not the Improvements shall be deemed the Owner thereof. If any portion of the Recreation Development or the Parking Tract is leased, the Owner of the fee title and not the lessee of that portion of the Recreation Development or the Parking Tract, as applicable, shall be deemed the Owner regardless of the term of the lease.

In the event of the assignment, transfer or conveyance of the whole of the interest of any Owner in and to the Tract in which such Owner has an interest, without retaining any beneficial interest other than as beneficiary under the terms of a Mortgage or without simultaneously acquiring a new interest by way of leasehold, life estate or other possessory interest, then the rights conferred upon such Owner shall be deemed assigned, transferred or conveyed and the duties assumed by the assignee, transferee or purchaser of such interest. Each Owner hereby covenants and agrees to provide to the other Owners the name and address of each party to whom the transferring Owner conveys all or a portion of its Tract.

In the event an Owner shall transfer its present interest in its Tract or a portion of such interest in such manner as to vest its interest in its Tract in more than one Person, then not less than 51% in interest of such transferees shall designate (to the Developer and other Owners) one of their number to act on behalf of all of such transferees in the exercise of the powers granted to such Owner under this Declaration. So long as such designation remains in effect, such designee shall be an Owner hereunder and shall have the power to bind such Tract and such transferees, and such transferees shall not be deemed to be Owners. Any such designation must be in writing and served upon the other Owners hereto by registered or certified mail, and must be recorded in the Official Records of the County. In the absence of such written and recorded designation with respect to the exercise of the powers vested by this instrument, the acts of the Persons

constituting Owner whose interest is so divided shall be binding upon all Persons having an interest in such Tract until such time as written notice of such designation is given and recorded in the Official Records of the County.

- 1.9. **"Permittee"** is any officer, director, employee, agent, contractor, customer, vendor, supplier, visitor, invitee, licensee, lessee, or concessionaire of an Owner or its occupants insofar as such Person's activities relate to the intended use of a Tract.
- 1.10. **"Person"** is any individual, partnership, joint venture, firm, association, corporation, trust or any other form of entity.
- 1.11. **"Tract"** shall mean the portion of the Parking Tract or the Recreation Development owned by an Owner.

2. **ARTICLE II - GRANT OF LICENSE**

- 2.1. **Parking License.** The Parking Tract Owner, on behalf of itself and its successors and assigns, grants to the Recreation Development Owner a nonexclusive license to use the Parking Tract for the parking and passage of motor vehicles and pedestrians by such Owner and its Permittees (the **Parking License**). The Parking Tract Owner may reconfigure the parking areas on the Parking Tract so long as (i) the number of complete parking spaces available for the Development does not fall below the minimum requirements of all applicable building and zoning ordinances plus 142 parking spaces and (ii) the Parking Tract contains at least 142 parking spaces.
- 2.2. **Recreation Development Owner's Parking Obligations.**
 - 2.2.1 **Common Area Rules and Regulations.** The Developer or the Manager, with the input of Recreational Development Owner, may create and impose reasonable rules and regulations for the use and operation of the Common Areas. Should Recreation Development Owner disagree with any rule or regulation proposed by Developer or the Manager, the parties shall attempt in good faith to resolve such disagreement, up to and including mediation as agreed upon by the parties. Such rules and regulations shall be in writing and provided to Recreational Development Owner and all parties to whom they pertain at least thirty (30) days prior to implementation. Recreation Development Owner shall comply with such rules. Recreation Development Owner shall take steps reasonably necessary to prevent a breach of the obligations provided herein. Such steps may include, if warranted and agreed to by Recreational Development Owner, providing security personnel to monitor the parking area. In the event that a breach and then failed to cure for at least three breaches of this Section in any calendar year, then for the fourth and subsequent breaches of this Section, the Developer and/or the

Parking Tract Owner may pursue the remedies set forth in Section 7.2 of this Declaration.

- 2.3 Parking Tract Owner's Parking Obligations. So long as the license set forth in Section 2.1 above continues in full force and effect, the Parking Tract Owner shall not erect barriers to eliminate access to the Parking Tract from the Recreation Development. So long as the license set forth in Section 2.1 above shall continue in full force and effect, at least 142 surface level parking spaces within the Parking Tract shall be available at all times to the Recreation Development Owner and its Permittees on a nonexclusive, unreserved basis.

3. **ARTICLE III - MAINTENANCE AND REPAIR**

- 3.1 Maintenance and Repair. The Recreation Development Owner shall be responsible for keeping the Improvements on the Recreation Development in good order, condition, and repair.

- 3.2 Common Areas. Generally, "**Common Area**" and "**Manager**" shall have the meaning given it in the Development Declaration.

- 3.2.1 CAM Share. The Recreation Development Owner will pay its "**CAM Share**", as defined hereinafter, of the Common Area Operating Costs, as defined in the Development Declaration (**Recreation Development CAM Contribution**). The Recreation Development Owner also shall pay to the Manager a management fee not to exceed 15% of the Recreation Development CAM Contribution. The Owner of the Recreation Development shall pay its estimated Recreation Development CAM Contribution and management fee based on its Recreation Development CAM Contribution and management fee for the previous year (or based on the Manager's reasonable estimate, for the first year); however, the Manager shall be entitled to adjust the Recreation Development CAM Contribution and management fee at any time during the year based on its reasonable estimate of the Common Area Operating Costs for such year; any increase to the Recreation Development CAM Contribution and management fee of 2.5% or greater shall require prior written consent by a majority of the Owners. Such estimated share shall be paid in equal monthly installments, with each payment due on the first day of the calendar month, without notice, demand or offset. Within one hundred twenty (120) days after the end of each calendar year, the Manager shall bill the Recreation Development Owner for its actual Recreation Development CAM Contribution and management fee. If the actual Recreation Development CAM Contribution and management fee is greater than the estimated payments, the Owner shall pay the difference to the Manager within thirty (30) days after receipt of the invoice. If the actual Recreation Development CAM Contribution and management fee is less than

the estimated payments, then the overpayment shall be applied against the next monthly installment(s). For purposes of determining the Recreation Development CAM Contribution and management fee, the Common Area Operating Costs shall exclude the Shared Parking Contribution as defined in the Development Declaration.

- 3.2.2 Current CAM Share. The CAM Share payable by Recreational Development Owner shall represent a percentage of the Base CAM Value (defined below). The CAM Share shall be 11.42%.
- 3.2.3 Additional Security. To the extent that it is determined by the mutual agreement of the Parties that Recreational Development Owner's use of the Recreational Development gives rise to the need for additional security, Recreational Development Owner shall be responsible for said security.
- 3.2.4 Property Tax. The Recreation Development Owner, if subject to property tax, will also pay its CAM Share of the Common Area Real Estate Taxes, as defined in the Declaration ("**Recreation Development Tax Contribution**"). If applicable, the Recreation Development Owner shall also pay to the Manager a management fee not to exceed 15% of the Recreation Development Tax Contribution; such fee shall be paid in arrears no later than thirty (30) days after receipt of the bill for the Recreation Development Tax Contribution and management fee. Manager will bill the Recreation Development Owner no less frequently than annually and no more frequently than monthly.
- 3.2.5 CAM Share Recordkeeping. In accordance with good bookkeeping practices, Manager will maintain a complete record of all items of cost or expense incurred for the operation and maintenance of the Common Area. Manager will make these records available during normal business hours for inspection, preliminary accounting review, or audit by the Recreation Development Owner or its designated representatives. Manager will keep and maintain all required records and books for a period of two years from the end of the calendar quarter to which they apply.
- 3.2.6 Base CAM Value. The Base CAM Value shall be the total Common Area Operating Costs for Fiscal Year 2018-19. The Base CAM Value may not increase annually by more than 2.5 percent or the twelve-month percentage change in the U.S Bureau of Labor Statistics Consumer Price Index (CPI) (Urban Wage Earners and Clerical Workers for the San Francisco-Oakland-San Jose Area), for the most current month that data is available – whichever is less. Any adjustment of the Base CAM Value must be justified and noticed in writing to Recreational Development Owner.

4. ARTICLE IV - COVENANTS AND RESTRICTIONS

- 4.1 Permitted Uses. The Recreation Development shall be used in accordance with applicable zoning and land use ordinances. On the date of this Declaration, zoned CRC/AE/cz (**Current Zoning**).
- 4.1.1 Termination for Non-Conforming Use. In the event of a use in violation of Current Zoning, the Parking Tract Owner may terminate the Parking License by giving written notice of such termination to the Recreation Development Owner. Unless and until the Parking License is terminated, the Recreation Development Owner shall continue to pay the Recreation Development CAM Contribution and the Recreation Development Tax Contribution. The Recreation Development Owner shall not be obligated to pay any Recreation Development CAM Contribution or Recreation Development Tax Contribution accruing after the date of termination, including amounts owing pursuant to annual reconciliations which may occur after the date of termination (if the Recreation Development Owner is the City of Fresno, such obligation shall be subject to annually allocated and available funds). Upon termination, the Manager, the Developer, and the Parking Tract Owner may take reasonable steps to prevent the Recreation Development Owner and its Permittees from using the Parking Tract (including, without limitation, erecting barriers, posting signs, and towing vehicles at the vehicle owner's expense).
- 4.1.2 Termination. So long as the Recreation Development Owner is the City of Fresno, the Recreation Development Owner may terminate this Agreement (and the Parking License contained herein), at any time, in the public interest, by giving prior written notice to the Developer and/or Main Tract Owner, but such termination shall not relieve the Recreation Development Owner of any obligations which accrued under this Declaration prior to the date of termination.
- 4.2 Development Declaration. This Declaration shall be subject to the applicable terms and provisions of the Development Declaration.
5. **ARTICLE V - EMINENT DOMAIN**
 - 5.1 If any part of the Parking Tract shall be taken by eminent domain or under any other similar authority of law, the Recreation Development Owner shall not claim any portion of such award by virtue of any interests created by this Declaration or otherwise.
6. **ARTICLE VI – RIGHT TO MAKE CHANGES**
 - 6.1 Nothing in this Declaration shall prevent or limit the right of the Parking Tract Owners to make changes, alterations, additions or improvements to the Common Areas and Improvements on the Parking Tract and the consent of the Recreation Development Owner shall not be required. Recreation Development Owner hereby acknowledges it has no interest in the

Development Declaration and it is not a third party beneficiary thereof, or bound thereunder, except as provided by this Declaration.

7. ARTICLE VII - REMEDIES

7.1 Notice of Default. In the event the Recreation Development Owner defaults in the performance of any of its obligations or agreements set forth herein, Developer may deliver a Notice of Default to the Recreation Development Owner, specifying the nature of such default and the action(s) required to cure such default.

7.2 Cure and Termination. If the Recreation Development Owner fails to cure the default within thirty (30) days following written notice (or fails to commence the cure within said thirty (30) day period and thereafter diligently prosecute the same to completion), then the Manager, the Developer or the Main Tract Owner shall have the right, in addition to its rights and remedies at law or in equity, to (i) cause such violation to be remedied, and any costs and expenses of any such proceeding is to be paid by Recreation Development Owner or (ii) terminate the Parking License by giving written notice of such termination.

7.2.1 CAM Contribution and Tax Contribution. Until the Parking License is terminated Recreation Development Owner shall remain responsible for the Recreation Development CAM Contribution and Tax Contribution, including amounts owing pursuant to annual reconciliations which may occur after the date of termination but relate to a period prior to the date of termination).

7.2.2 Use of Parking Tract upon Termination. Upon termination, Recreational Development Owner shall have no rights to use the Parking Tract; the Developer, the Manager and/or Main Tract Owner may take reasonable actions to prevent the Recreation Development Owner and its Permittees from using the Parking Tract (including, without limitation, erecting barriers, posting signs, and towing vehicles at the vehicle owner's expense).

7.2.3 Non-Exclusive Remedies. The remedies set forth herein shall be cumulative and nonexclusive.

7.3 Late Payment Fees. If the Recreation Development Owner fails to pay any amount owed to the Manager or the Developer within thirty (30) days of receiving an invoice, the outstanding balance shall be immediately payable upon demand by the Manager or the Developer, as applicable along with a late fee equal to 5% of the unpaid principal amount. No interest shall accrue on any unpaid balance nor on the late fee incurred thereon.

8. ARTICLE VIII - NOTICES

8.1 Any notice, report or demand to be given to an Owner under the provisions of this Declaration shall be in writing and shall be delivered personally, sent by registered or certified mail, return receipt requested, or sent by overnight

courier (i.e., Federal Express or similar service) to the most recent address furnished by such Owner in writing to Developer for the purpose of giving notice, or if no such address shall have been furnished, then to the street address of such Owner's Tract. Any notice so deposited in the mail within the county in which the Development is located shall be deemed delivered upon receipt or refusal of receipt. In the case of co-Owners, any such notice may be delivered or sent to any one of the co-Owners on behalf of all co-Owners and shall be deemed delivered on all such co-Owners. Any notice to the parties first named above shall be delivered in the above manner to the address first listed above for such party, or to the most recent address furnished by such party in writing to the Owners for the purpose of giving notice.

9. ARTICLE IX – MISCELLANEOUS

- 9.1 Severability If any provision of this Declaration or portion hereof, or the application hereof to any person or circumstances, shall to any extent be held invalid, inoperative or unenforceable, the remainder of this Declaration, or the application of such provision or portion hereof to any other persons or circumstances, shall not be affected hereby; it shall not be deemed that any such invalid provision affects the consideration for this Declaration, and each provision of this Declaration shall be valid and enforceable to the fullest extent permitted by law.
- 9.2 Term. This Declaration and the licenses, rights, obligations and liabilities created hereby, as the same may be modified, amended, or terminated pursuant to the terms of this Declaration, shall have a term expiring on December 7, 2090, subject to earlier termination as provided herein.
- 9.3 Applicable Law. This Declaration shall be construed in accordance with the laws of the State of California.
- 9.4 Section Headings. The section headings in this Declaration are for convenience only, shall in no way define or limit the scope or content of this Declaration, and shall not be considered in any construction or interpretation of this Declaration or any part hereof.
- 9.5 Binding Effect. All of the limitations, covenants, conditions, licenses, and restrictions contained herein shall attach to and run with the Parking Tract and the Recreation Development and shall benefit or be binding upon the respective Owners and their successors in interest and assigns.
- 9.6 Breach Shall Not Permit Termination. No breach of this Declaration shall entitle any Owner to cancel, rescind, or otherwise terminate this Declaration, and such limitations shall not affect in any manner any of the rights or remedies which the Owners may have by reason of any breach of this Declaration (including, without limitation, termination of licenses as provided by this Declaration), except as expressly provided herein.
- 9.7 Breach - Effect on Mortgagee and Right to Cure. Breach of any of the

covenants or restrictions contained in this Declaration shall not defeat or render invalid the lien of any Mortgage made in good faith, but all of the foregoing provisions, restrictions, and covenants shall be binding and effective against any Owner who acquires title by foreclosure or trustee's sale or by deed in lieu of foreclosure or trustee's sale; provided, however, that any such Owner who acquires title by foreclosure or trustee's sale or by deed in lieu of foreclosure or trustee's sale shall take title free of any liens created or provided for hereunder, though otherwise subject to the provisions hereof. Notwithstanding any other provision in this Declaration for notices of default, the Mortgagee of any defaulting Owner shall be entitled to notice of the defaulting Owner's default, given in the same manner that other notices are required to be given under this Declaration; provided, however, that said Mortgagee shall have, prior to the occurrence of the default, notified the other Owners of the Mortgagee's interest and mailing address. If any notice shall be given of the default to an Owner and such defaulting Owner shall have failed to cure or commence to cure such default as provided in this Declaration, then the Owner desiring to pursue its remedies against the defaulting Owner shall give such Mortgagee (which has previously given the above-stated notice to such Owner) under any Mortgage affecting the Tract of the defaulting Owner an additional notice given in the manner provided above, that the defaulting Owner has failed to cure such default and that such Mortgagee shall have thirty (30) days after said additional notice to commence to cure and thereafter diligently prosecute to completion such cure of any such default. Giving or failing to give any notice of default to any Mortgagee shall in no event create any liability on the part of the Owner desiring to pursue its remedies.

- 9.8 Effect on Third Parties. Except for the benefits to Mortgagees under Section 9.7 above, the rights, privileges, or immunities conferred hereunder are for the benefit of the Owners and not for that of any third party.
- 9.9 No Partnership. Neither this Declaration nor any acts of the Owners shall be deemed or construed by any of the parties hereto or by any third person to create any relationship of principal and agent, partnership, joint venture, or other form of association between any of the Owners.
- 9.10 Terminology. All personal pronouns used in this Declaration, whether used in the masculine, feminine, or neuter gender, shall include all other genders; the singular shall include the plural and vice versa.
- 9.11 Consent. In any instance in which any Owner shall be requested to consent to, or approve of, any matter with respect to which such consent or approval is required or allowed by any of the provisions of this Declaration, such consent, approval or disapproval shall be given in writing, by an authorized agent of said Owner.
- 9.12 Estoppel Certificate. Within thirty (30) days after receipt of the written request of any Owner, each Owner shall issue to such other Owner, or to

any prospective Mortgagee or purchaser of such Owner's Tract, an estoppel certificate stating: (a) whether the Owner to whom the request has been directed knows of any default under this Declaration and, if there are known defaults, specifying the nature thereof; (b) whether to its knowledge this Declaration has been assigned, modified or amended in any way and, if it has, then stating the nature thereof; and (c) whether, to the Owner's knowledge, this Declaration as of that date is in full force and effect.

- 9.13 Not a Public Dedication. Nothing herein contained shall be deemed to be a gift or dedication of any portion of the Development to the general public or for the general public or for any public purpose whatsoever, it being the intention of Developer that this Declaration shall be strictly limited to and for the purposes herein expressed.
- 9.14 Release. If an Owner shall sell, transfer, convey or assign its entire Tract or its interest therein (other than a transfer or conveyance after which the Owner remains the owner as provided in Section 1.9 above), such Owner shall be released from its unaccrued obligations hereunder from and after the date of such sale, transfer or assignment. Such transferor Owner shall give notice to the other Owners of any such sale, transfer, conveyance or assignment, which notice shall disclose the name and address of the transferee. Failure to deliver any such written statement shall not affect the running of any covenants herein with the land. Notwithstanding anything in this Section to the contrary, no such sale, transfer, conveyance or assignment or written acknowledgment by the transferee of its duties hereunder shall effectuate a release of the transferor Owner with respect to duties that accrued hereunder prior to the subject transfer.
- 9.15 Indemnification and Insurance. To the furthest extent allowed by law, Omni shall indemnify, hold harmless and defend CITY and each of its officers, officials, employees, agents and volunteers from any and all loss, liability, fines, penalties, forfeitures, costs and damages (whether in contract, tort or strict liability, including but not limited to personal injury, death at any time and property damage) incurred by CITY, Omni or any other person, and from any and all claims, demands and actions in law or equity (including attorney's fees and litigation expenses), arising or alleged to have arisen directly or indirectly from the negligent or intentional acts or omissions, or willful conduct of Omni or any of its officers, officials, employee, agents, contractors or subcontractors or anyone employed directly or indirectly by any of them, or volunteers in performance of this Agreement. For purposes of this provision, as between Omni and the CITY, the parties expressly agree that Omni shall be responsible for all actions of Omni's contractors or subcontractors (including anyone employed directly or indirectly by any of them) and shall indemnify, hold harmless and defend the CITY from any action or alleged actions of said contractors or subcontractors.
- 9.16

To the furthest extent allowed by law, CITY shall indemnify, hold harmless and defend Omni and each of its officers, officials, employees, agents and volunteers from any and all loss, liability, fines, penalties, forfeitures, costs and damages (whether in contract, tort or strict liability, including but not limited to personal injury, death at any time and property damage) incurred by Omni, CITY or any other person, and from any and all claims, demands and actions in law or equity (including attorney's fees and litigation expenses), arising or alleged to have arisen directly or indirectly from the negligent or intentional acts or omissions, or willful misconduct of CITY or any of its officers, officials, employees, agents or volunteers in the performance of this Agreement; provided nothing herein shall constitute a waiver by CITY of governmental immunities including California Government Code section 810 et seq. Omni agrees that this Agreement shall in no way act to abrogate or waive any immunities available to CITY under the Tort Claims Act of the State of California.

This section shall survive termination or expiration of this Contract.

Throughout the life of this Agreement, the CITY and Omni shall pay for and maintain in full force and effect all insurance as required in Exhibit B, which is incorporated into and part of this Agreement. The required policies of insurance as stated in Exhibit B shall maintain limits of liability of not less than those amounts stated therein.

- 9.17 Time of Essence. Time is of the essence with respect to the performance of each of the covenants and duties contained in this Declaration.
- 9.18 Force Majeure. Developer and each Owner shall be excused from performing any obligation or duty provided in this Declaration, except any obligation to pay any sums of money under the applicable provisions hereof, in the event and so long as the performance of any such obligation is prevented or delayed, retarded or hindered by act of God, fire, earthquake, flood, explosion, war, invasion, insurrection, riot, mob violence, sabotage, inability to procure or general shortage of labor, equipment, facilities or materials supplied in the ordinary course on the open market, failure of normal transportation, strikes, lockouts, action of labor unions, condemnation, requisition, laws or other matters beyond such party's reasonable control. Additionally, and without limiting the foregoing, so long as the Recreation Development Owner is the City of Fresno, the obligations of Recreation Development Owner shall be subject to annually allocated and available funding (but if annually allocated and available funding is not available, Developer shall still have the right to terminate the Parking License due to nonpayment in the manner provided herein).
- 9.19 Waiver of Default. No waiver of any default by Developer or any Owner shall be implied from any omission by Developer or any other Owner to take any action in respect of such default if such default continues or is repeated.

No express written waiver of any default shall affect any default or cover any period of time other than the default and period of time specified in such express waiver. One or more written waivers of any default in the performance of any term, provision or covenant contained in this Declaration shall not be deemed to be a waiver of any subsequent default in the performance of the same term, provision or covenant or any other term, provision or covenant contained herein. The consent or approval by Developer or any Owner to or of any act or request by Developer or any other Owner requiring consent or approval shall not be deemed to waive or render unnecessary the consent to or approval of any subsequent similar acts or requests. The rights and remedies given to Developer or any Owner by this Declaration shall be deemed to be cumulative and no one of such rights and remedies shall be exclusive of any of the others, or if any other right or remedy at law or in equity which Developer or any such Owner might otherwise have by virtue of a default under this Declaration, and the exercise of one such right or remedy by Developer or any such Owner shall not impair Developer's or such Owner's standing to exercise any other right or remedy.

- 9.20 Common Ownership. One Person's ownership of more than one Tract in the Development and/or the Recreation Development shall not constitute a merger between such Tracts nor operate to terminate this Declaration.
- 9.21 Conflicts. Notwithstanding a conflict between the terms of this Declaration and either (i) the provisions of a particular agreement between an Owner and its occupant or (ii) the provisions of a particular security instrument between an Owner and a secured party, as among the Owners and their respective successors and assigns in interest, this Declaration shall control over all such occupancy agreements and security instruments.
- 9.22 Amendments. This Declaration shall be amended only by a writing executed by both the Parking Tract Owner and the Recreation Development Owner, by their respective authorized agents.
- 9.23 Exculpation of Owners and Developer. Neither Developer nor any Owner nor its partners, officers, directors, employees or shareholders shall have any personal liability with respect to any of the provisions of this Declaration, and any Owner entitled to make claims hereunder shall look solely to (i) the estate and property of the Owner in the Tracts owned by that Owner and (ii) the proceeds from the sale of any Tracts owned by Owner at the time of the act or omission upon which the claim was made, for the satisfaction of such claiming Owner's remedies, including, without limitation, the collection of any judgment or the enforcement of any other judicial process requiring the payment or expenditure of money by Owner in the event of any default or breach by that Owner with respect to any of the terms and provision of this Declaration to be observed and/or performed by that Owner, and no other assets of such Owner or any principal of that Owner shall be subject to levy, execution or other judicial process for the satisfaction of the claiming

Owner's claim.

- 9.24 Exhibits. The exhibits attached hereto are incorporated herein by this reference.
- 9.25 Counterparts. This Declaration may be executed in counterparts which, when taken together, shall constitute one (1) original.
- 9.26 Supersedes Prior Instruments. This Declaration entirely supersedes and replaces all prior documents, agreements and/or conveyances (between an Owner of any portion of the Recreation Development (or its predecessors-in-interest) and Omni (or its predecessors in interest as to the portions of the Development owned by Omni as of the date this Declaration is recorded in the Official Records of Fresno County) to the extent such prior documents, agreements and/or conveyances provide a right, license or easement for access or parking on the portion of the Development owned by Omni as of the date of the Declaration for the benefit of any portion of the Recreation Development, except that such documents, agreements and/or conveyances shall be revived upon termination of this License other than (i) under the first paragraph of Section 4.1 or (ii) for default of Recreation Development Owner. Without limiting the generality of the foregoing sentence and subject to the revivor therein, this Declaration expressly supersedes and replaces the provisions pertaining to parking and access of that certain Statement of Covenants Affecting Land Development Acknowledgment of Covenant and Easement dated September 17, 2002, and recorded on September 30, 2002, as Document No. 2002-0170716 in the Official Records of Fresno County, California. This Declaration does not modify the requirement that the Development be developed and occupied in accordance with the requirements of the Fresno Municipal Code.
- 9.27 Subordination and Attornment. If the Recreation Development Owner is the City of Fresno, Developer and Recreation Development Owner each agrees that, at the election of the Recreation Development Owner this Declaration shall be made subject and subordinate to the lien of any future bond or financing covenant given in connection with the making of such bond or financing covenant encumbering the Recreation Development and all renewals, refinancing, extensions, modifications, consolidations, and replacements of such bond or financing covenant. To confirm this subordination, Developer shall, within five (5) days after request of Recreation Development Owner, execute any further instruments or assurances in recordable form reasonably necessary to evidence or confirm the subordination. Developer additionally covenants and agrees to attorn to the transferee of Recreation Development Owner's interest in the Recreation Development by exercise of any transfer remedy provided in such bond or financing covenant (without any deductions or setoffs), if requested to do so by the transferee, and to recognize the transferee as the Owner under this Declaration. The transferee shall not be liable for any acts, omissions, or defaults of the Recreation Development Owner that

occurred before the sale or conveyance.

- 9.28 Attorney's Fees. If an Owner is required to commence any proceeding or action to enforce or interpret any term, covenant, or condition herein, the prevailing party will be entitled to recover from the other party its reasonable attorney's fees and legal expenses.

[SIGNATURES ON FOLLOWING PAGE]

IN WITNESS WHEREOF, Developer has executed this Declaration as of the day and year first above written.

CITY OF FRESNO
a Municipal Corporation

OMNI FINANCIAL, LLC, a California limited liability company

By: _____
Wilma Quan, City Manager

By: CURA FINANCIAL, LLC, a California limited liability company
Its Managing Member

APPROVED AS TO FORM:
DOUGLAS T. SLOAN
City Attorney

DocuSigned by:
By: Martin Boone Manager
Name: FE7B1408...
Its: Managing Member

By:  11.13.20
Raj Singh Badhesha Date
Supervising City Attorney

ATTEST:
Yvonne Spence, MMC CRM
City Clerk

By: _____
Deputy

Attachments:
Exhibit A – Site Plan
Exhibit B – Insurance Requirements

EXHIBIT A SITE PLAN

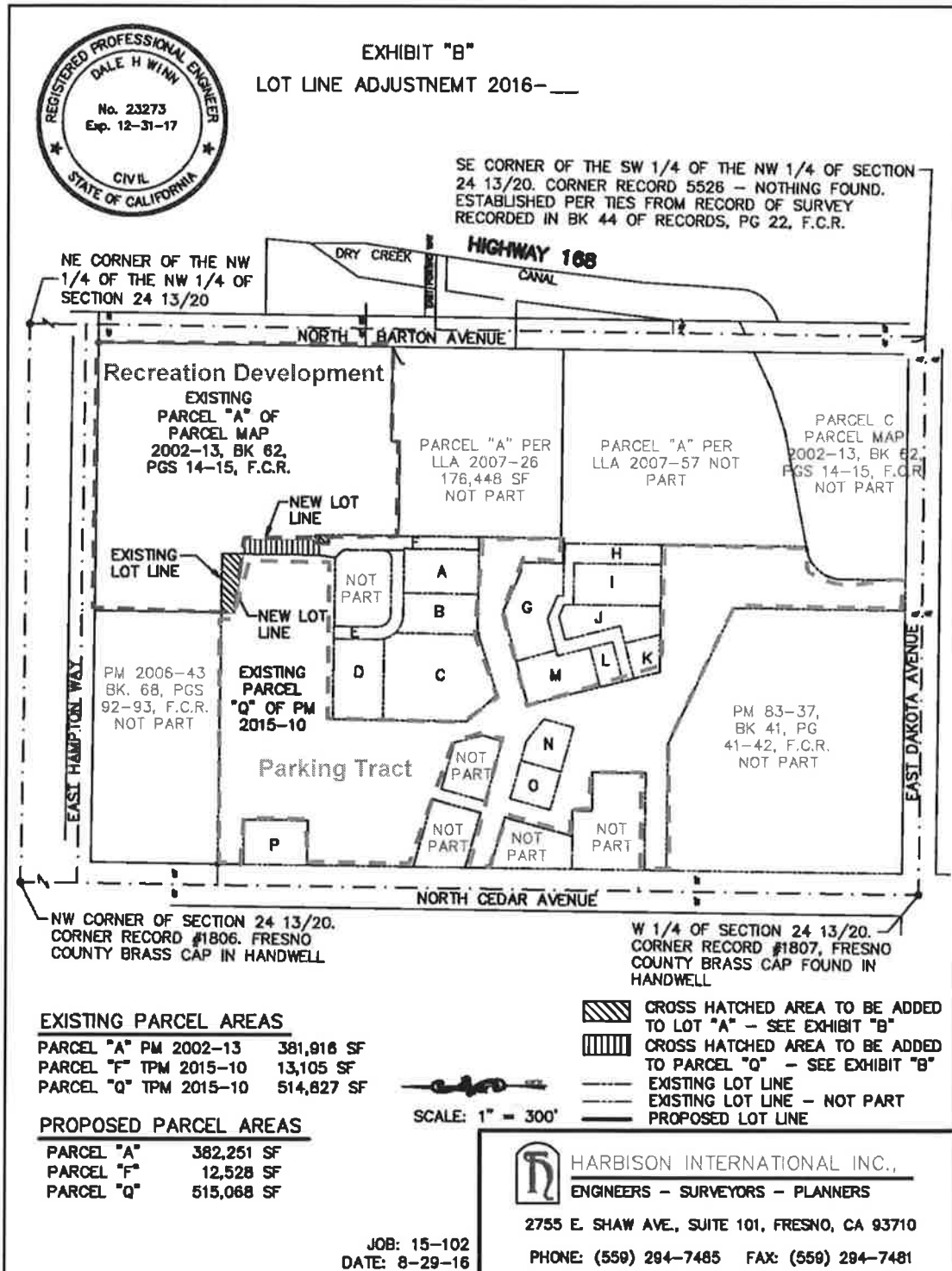


Exhibit B

INSURANCE REQUIREMENTS

(a) Throughout the life of this Agreement, OMNI and CITY shall pay for and maintain in full force and effect all insurance as required herein with an insurance company(ies) either (i) admitted by the California Insurance Commissioner to do business in the State of California and rated no less than "A-VII" in the Best's Insurance Rating Guide, or (ii) as may be authorized in writing by CITY'S Risk Manager or his/her designee at any time and in his/her sole discretion. The required policies of insurance as stated herein shall maintain limits of liability of not less than those amounts stated therein. However, the insurance limits available to OMNI or CITY, its officers, officials, employees, agents and volunteers as additional insureds, shall be the greater of the minimum limits specified therein or the full limit of any insurance proceeds to the named insured.

(b) The fact that insurance is obtained by OMNI or CITY shall not be deemed to release or diminish the liability of OMNI or CITY, including, without limitation, liability under the indemnity provisions of this Agreement. The duty to indemnify CITY shall apply to all claims and liability regardless of whether any insurance policies are applicable. The policy limits do not act as a limitation upon the amount of indemnification to be provided by either CITY or OMNI. Approval or purchase of any insurance contracts or policies shall in no way relieve from liability nor limit the liability of CITY or OMNI, vendors, suppliers, invitees, contractors, sub-contractors, subcontractors, or anyone employed directly or indirectly by any of them.

Coverage shall be at least as broad as:

1. The most current version of Insurance Services Office (ISO) Commercial General Liability Coverage Form CG 00 01, providing liability coverage arising out of your business operations. The Commercial General Liability policy shall be written on an occurrence form and shall provide coverage for "bodily injury," "property damage" and "personal and advertising injury" with coverage for premises and operations (including the use of owned and non-owned equipment), products and completed operations, and contractual liability (including, without limitation, indemnity obligations under the Agreement) with limits of liability not less than those set forth under "Minimum Limits of Insurance."

MINIMUM LIMITS OF INSURANCE

OMNI And CITY shall procure and maintain for the duration of the contract, insurance with limits of liability not less than those set forth below. However, insurance limits available to CITY, its officers, officials, employees, agents and volunteers as additional insureds, shall be the greater of the minimum limits specified herein or the full limit of any insurance proceeds available to the named insured:

1. **COMMERCIAL GENERAL LIABILITY**
 - (i) \$1,000,000 per occurrence for bodily injury and property damage;

- (ii) \$1,000,000 per occurrence for personal and advertising injury;
- (iii) \$2,000,000 aggregate for products and completed operations; and,
- (iv) \$2,000,000 general aggregate applying separately to the work performed under the Agreement.

2. **COMMERCIAL AUTOMOBILE LIABILITY**

\$1,000,000 per accident for bodily injury and property damage.

3. **Workers' Compensation Insurance as required by the State of California with statutory limits and EMPLOYER'S LIABILITY with limits of liability not less than:**

- (i) \$1,000,000 each accident for bodily injury;
- (ii) \$1,000,000 disease each employee; and,
- (iii) \$1,000,000 disease policy limit.

UMBRELLA OR EXCESS INSURANCE

In the event OMNI Or CITY purchases an Umbrella or Excess insurance policy(ies) to meet the "Minimum Limits of Insurance," this insurance policy(ies) shall "follow form" and afford no less coverage than the primary insurance policy(ies). In addition, such Umbrella or Excess insurance policy(ies) shall also apply on a primary and non-contributory basis for the benefit of the OMNI or CITY, its officers, officials, employees, agents and volunteers.

DEDUCTIBLES AND SELF-INSURED RETENTIONS

OMNI and CITY shall be responsible for payment of any deductibles contained in any insurance policy(ies) required herein and OMNI or CITY shall also be responsible for payment of any self-insured retentions. Any self-insured retentions must be declared on the Certificate of Insurance, and approved by, the CITY'S Risk Manager or his/her designee.

OTHER INSURANCE PROVISIONS/ENDORSEMENTS

- (i) All policies of insurance required herein shall be endorsed to provide that the coverage shall not be cancelled, non-renewed, reduced in coverage or in limits except after thirty (30) calendar days written notice has been given to CITY, except ten (10) days for nonpayment of premium. OMNI is also responsible for providing written notice to the CITY under the same terms and conditions. Upon issuance by the insurer, broker, or agent of a notice of cancellation, non-renewal, or reduction in coverage or in limits, OMNI shall furnish CITY with a new certificate and applicable endorsements for such policy(ies). In the event any policy is due to expire during the work to be performed for CITY, OMNI shall provide a new certificate, and applicable endorsements, evidencing renewal of such policy not less than fifteen (15) calendar days prior to the expiration date of the expiring policy.
- (ii) The Commercial General insurance policies shall be written on an occurrence form.

- (iii) The Commercial General insurance policies shall be endorsed to name City, its officers, officials, agents, employees and volunteers as an additional insured. OMNI shall establish additional insured status for the City and for all ongoing and completed operations under the Commercial General Liability policy by use of ISO Forms or an executed manuscript insurance company endorsement providing additional insured status. The Commercial General endorsements must be as broad as that contained in ISO Forms: GC 20 10 11 85 or both CG 20 10 & CG 20 37.
- (iv) The Commercial General Liability insurance shall contain, or be endorsed to contain, that the OMNI'S insurance shall be primary to and require no contribution from the City. These coverages shall contain no special limitations on the scope of protection afforded to OMNI or City, its officers, officials, employees, agents and volunteers. If OMNI maintains higher limits of liability than the minimums shown above, OMNI and City requires and shall be entitled to coverage for the higher limits of liability maintained by either CITY or OMNI.
- (v) Should any of these policies provide that the defense costs are paid within the Limits of Liability, thereby reducing the available limits by defense costs, then the requirement for the Limits of Liability of these policies will be twice the above stated limits.
- (vi) For any claims related to this Agreement, OMNI'S insurance coverage shall be primary insurance with respect to the CITY, its officers, officials, agents, employees and volunteers. Any insurance or self-insurance maintained by the CITY, its officers, officials, agents, employees and volunteers shall be excess of the OMNI'S insurance and shall not contribute with it.
- (vii) The Commercial General Liability Insurance policy shall contain, or be endorsed to contain, a waiver of subrogation as to CITY, its officers, officials, agents, employees and volunteers.
- (viii) The Commercial General Liability insurance policies shall contain, or be endorsed to contain, a waiver of subrogation as to CITY, its officers, officials, agents, employees and volunteers.

PROVIDING OF DOCUMENTS - OMNI and CITY shall furnish each other with all certificate(s) and applicable endorsements effecting coverage required herein **All certificates and applicable endorsements are to be received and approved by the CITY'S Risk Manager or his/her designee prior to CITY'S execution of the Agreement.** All non-ISO endorsements amending policy coverage shall be executed by a licensed and authorized agent or broker. Upon request of either CITY or OMNI, the other party shall immediately furnish the requesting party with a complete copy of any insurance policy required under this Agreement, including all endorsements, with said copy certified by the underwriter to be a true and correct copy of the original policy. This requirement shall survive expiration or termination of this Agreement. All subcontractors working under the direction of OMNI shall also be required to provide all documents noted herein.

Claims-Made Policies - If any coverage required is written on a claims-made coverage form:

- (i) The retroactive date must be shown, and must be before the effective date of the Agreement or the commencement of work by OMNI.
- (ii) Insurance must be maintained and evidence of insurance must be provided for at least five (5) years after completion of the work or termination of the Agreement, whichever first occurs.
- (iii) If coverage is canceled or non-renewed, and not replaced with another claims-made policy form with a retroactive date prior to the effective date of the Agreement, or work commencement date, OMNI must purchase "extended reporting" period coverage for a minimum of five (5) years after completion of the work or termination of the Agreement, whichever first occurs.
- (iv) A copy of the claims reporting requirements must be submitted to CITY for review.
- (v) These requirements shall survive expiration or termination of the Agreement.