

RESOLUTION NO. 2015-XXX

**RESOLUTION OF THE CITY COUNCIL OF THE CITY OF CALISTOGA,
COUNTY OF NAPA, STATE OF CALIFORNIA, APPROVING AND
AUTHORIZING A LEASE DISPOSITION AND DEVELOPMENT AGREEMENT
WITH THE BOYS & GIRLS CLUBS OF ST. HELENA AND CALISTOGA TO
EFFECUTATE THE GROUND LEASE OF, AND DEVELOPMENT OF A BOYS
AND GIRLS CLUB ON, CITY PROPERTY NEAR LOGVY PARK AND
AUTHORIZING THE CITY MANAGER TO EXECUTE THE LEASE
DISPOSITION AND DEVELOPMENT AGREEMENT, GROUND LEASE, JOINT
USE AGREEMENT AND OTHER DOCUMENTS**

1 **WHEREAS**, the City of Calistoga (“City”) owns approximately 1.06 acres of
2 property near Logvy Park located at 1401 North Oak Street (“Site”); and
3

4 **WHEREAS**, the Site was purchased by the City with funding from the City’s
5 General Fund for the purpose of providing community facilities, such as a community
6 and teen center; and
7

8 **WHEREAS**, no facilities have been constructed on the Site to date and the
9 Property has served as the temporary location for a dog park and community garden
10 (with no designation for park use) pending future development of community facilities;
11 and
12

13 **WHEREAS**, the Boys & Girls Clubs of St. Helena and Calistoga (the “Club”) has
14 approached the City to use a portion of the Site (the “Property”) for the purpose of
15 constructing a new Boys and Girls Club facility, parking lot and landscaping on the
16 Property for use by the Club, City and community (the “Project”); and
17

18 **WHEREAS**, the Project includes uses similar to those contemplated when the
19 Property was originally purchased by City, which uses are consistent with the City’s
20 General Plan; and
21

22 **WHEREAS**, City and the Club have negotiated the terms of a Lease Disposition
23 and Development Agreement, Ground Lease and Joint Use Agreement, whereby City
24 would ground lease the Property to the Club for an annual rent of \$1.00 per year and
25 the Club would agree to develop the Project and provide community programming and
26 allow City use of the Project for City and community uses, all contingent on City land
27 use approvals and other conditions precedent to closing; and
28

29 **WHEREAS**, this action is exempt under the California Environmental Quality Act
30 (CEQA) pursuant to Section 15061(b)(3) of the CEQA Guidelines because it can be
31 seen with certainty that there is no possibility it will have a significant effect on the
32 environment, as the proposed Project is consistent with the General Plan and will
33

34 undergo project specific CEQA review during the land use approvals and development
35 phase; and
36

37 **WHEREAS**, the City Council desires to authorize the execution of the Lease

38 Disposition and Development Agreement in order to effectuate the development and
39 use of the Project.

40
41 **NOW, THEREFORE BE IT RESOLVED** that the City Council of the City of
42 Calistoga hereby:

43
44 1. Approves and authorizes the City Manager to execute the Lease
45 Disposition and Development Agreement (DDA) with the Boys & Girls Clubs of St.
46 Helena and Calistoga, in the form attached hereto, with minor revisions as may be
47 approved by the City Manager in consultation with the City Attorney;

48
49 2. Approves and authorizes the ground lease of the Property at a rent of
50 \$1.00 per year in accordance with the terms of the DDA and proposed Ground Lease;

51
52 3. Approves and authorizes the joint use of the project to be constructed on
53 the Property in accordance with the terms of the DDA, and proposed Ground Lease and
54 Joint Use Agreement; and

55
56 4. Authorizes the City Manager to execute the Ground Lease and Joint Use
57 Agreement, in accordance with the terms of the DDA, and to take other actions and
58 execute other documents as necessary to implement the terms of the DDA and
59 execution of the Ground Lease and Joint Use Agreement.

60
61 **PASSED, APPROVED, AND ADOPTED** by the City Council of the City of
62 Calistoga at a regular meeting held this 18th day of August, 2015, by the following vote:

- 63
64 **AYES:**
65 **NOES:**
66 **ABSTAIN:**
67 **ABSENT:**

68
69
70 **CHRIS CANNING, Mayor**

71 **ATTEST:**
72
73 _____
74 **KATHY FLAMSON, City Clerk**

**LEASE DISPOSITION AND
DEVELOPMENT AGREEMENT**

by and between the

CITY OF CALISTOGA

and

**THE BOYS & GIRLS CLUBS OF
ST. HELENA AND CALISTOGA**

Dated: _____, 2015

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EXHIBITS

Exhibit A	Site Map
Exhibit B	Legal Description of Property
Exhibit C	Schematic Plans
Exhibit D	Schedule of Performance
Exhibit E	Form of Ground Lease
Exhibit F	Form of Joint Use Agreement

LEASE DISPOSITION AND DEVELOPMENT AGREEMENT

THIS LEASE DISPOSITION AND DEVELOPMENT AGREEMENT (“**Agreement**”) dated as of this ____ day of _____, 2015 (the “**Effective Date**”), is entered into by and between the CITY OF CALISTOGA, a municipal corporation (“**City**”), and THE BOYS & GIRLS CLUBS OF ST. HELENA AND CALISTOGA, a California nonprofit corporation (“**Club**”). The City and Club may each be referred to as a “**Party**” or collectively as the “**Parties**.”

RECITALS

The following Recitals are a substantive part of this Agreement; capitalized terms used herein and not otherwise defined are defined in Section 1.1 of this Agreement:

A. The City of Calistoga (“**City**”) owns approximately 1.6 acres of property at Logvy Park located at 1401 N. Oak Street, Calistoga (“**Site**”). The Site was purchased by the City for the purpose of providing community facilities, such as a community and teen center. However, no facilities have been constructed to date and the Site is the temporary location for a dog park and community garden.

B. The Club has approached the City to use that approximately 1.0-acre portion of the Site, depicted on Exhibit A, attached hereto and incorporated herein by this reference, and legally described on Exhibit B, attached hereto and incorporated herein by this reference (the “**Property**”), for the purpose of constructing a new Boys & Girls Clubs facility, parking lot and landscaping for use by the Club and community, as shown on the Schematic Plans in Exhibit C, attached hereto and incorporated herein by reference (the “**Project**”). The Project will provide uses similar to those originally contemplated when the Site was purchased by City.

C. City and Club desire to enter into this Agreement in order to set forth the terms and conditions relating to (1) Club’s ground lease of the Property from City; (2) Club’s development of the Project on the Property; and (3) the terms under which the Parties would provide for community use of the Project through a Joint Use Agreement.

AGREEMENT

NOW, THEREFORE, City and Club hereby agree as follows:

1. DEFINITIONS / REPRESENTATIONS AND WARRANTIES / ASSIGNMENT.

1.1 Definitions.

“*Agreement*” means this Lease Disposition and Development Agreement between City and Club.

“*City*” means the City of Calistoga, a municipal corporation of the State of California, and any assignee of or successor to its rights, powers and responsibilities.

“*City’s Conditions Precedent to Ground Lease*” is defined in Section 2.6.

“*Claims*” means liabilities, obligations, orders, claims, damages, governmental fines or penalties, and expenses of defense with respect thereto, including attorneys’ fees and costs.

“*Club*” means The Boys & Girls Clubs of St. Helena and Calistoga, a California nonprofit corporation.

“*Club Pre-Approved Exceptions*” is defined in Section 2.10.

“*Club Title Policy*” is defined in Section 2.11.

“*Club’s Conditions Precedent to Ground Lease*” is defined in Section 2.7.

“*Construction Contract*” is defined in Section 2.6(f).

“*Default*” means the failure of a party to perform any action or covenant required by this Agreement within the time periods provided herein following Notice and opportunity to cure as set forth in Section 5.1.

“*Effective Date*” means the date set forth above.

“*Financing Plan*” is defined in Section 3.4.

“*Governmental Requirements*” means all laws, ordinances, statutes, codes, rules, regulations, orders and decrees, of the United States, the State of California, the County of Napa, the City, or any other political subdivision in which the Property is located, and of any other political subdivision, City or instrumentality exercising jurisdiction over City, Club or the Site.

“*Ground Lease*” means the Ground Lease, attached hereto as Exhibit E.

“*Ground Lease Rent*” means rent payable by Club to City under the Ground Lease.

“*Hazardous Materials*” means any substance, material, or waste which is or becomes regulated by any local governmental authority, the State of California, or the United States Government, including any material or substance which is: (i) defined as a “hazardous waste,” “extremely hazardous waste,” or “restricted hazardous waste” under Sections 25115, 25117 or 25122.7, or listed pursuant to Section 25140 of the California Health and Safety Code, Division 20, Chapter 6.5 (Hazardous Waste Control Law); (ii) defined as a “hazardous substance” under Section 25316 of the California Health and Safety Code, Division 20, Chapter 6.8 (Carpenter-Presley-Tanner Hazardous Substance Account Act); (iii) defined as a “hazardous material,” “hazardous substance,” or “hazardous waste” under Section 25501 of the California Health and Safety Code, Division 20, Chapter 6.95 (Hazardous Materials Release Response Plans and Inventory); (iv) defined as a “hazardous substance” under Section 25281 of the California Health and Safety Code, Division 20, Chapter 6.7 (Underground Storage of Hazardous Substances); (v) petroleum; (vi) friable asbestos; (vii) polychlorinated biphenyls; (viii) listed under Article 9 or defined as “hazardous” or “extremely hazardous” pursuant to Article 11 of Title 22 of the California Administrative Code, Division 4, Chapter 20; (ix) designated as “hazardous substances” pursuant to Section 311 of the Clean Water Act (33 U.S.C. §1317); (x) defined as a “hazardous waste” pursuant to Section 1004 of the Resource

Conservation and Recovery Act, 42 U.S.C. §6901, *et seq.* (42 U.S.C. §6903); or (xi) defined as “hazardous substances” pursuant to Section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9601, *et seq.*, as the foregoing statutes and regulations now exist or may hereafter be amended.

“*Joint Use Agreement*” means that Joint Use Agreement attached as Exhibit F.

“*Notice*” means a written notice in the form prescribed by Section 6.1.

“*Organizational Documents*” means the articles and bylaws of Club, as the same may be amended from time to time. In the event of an approved transfer or assignment, the term “Organizational Documents” shall be deemed to refer to the bylaws, operating agreement, partnership agreement or other organizational documents, as applicable, of Club’s approved successor(s)-in-interest.

“*Outside Date for Ground Lease*” is defined in Section 2.9.

“*Project*” is defined in Recital B.

“*Project Documents*” means this Agreement, the Ground Lease, and the Joint Use Agreement.

“*Property*” is defined in Recital B.

“*Schedule of Performance*” means the Schedule of Performance attached hereto as Exhibit D, setting out the dates and/or time periods by which certain obligations set forth in this Agreement must be accomplished.

“*Site*” is defined in Recital A.

“*Site Map*” means the map of the Site attached hereto as Exhibit A.

1.2 Representations and Warranties.

(a) **City Representations.** City represents and warrants to Club as follows:

(i) **Authority.** City is a municipal corporation of the State of California. City has full right, power and lawful authority to perform its obligations hereunder and the execution, performance and delivery of this Agreement by City has been fully authorized by all requisite actions on the part of City.

(ii) **No Conflict.** City’s execution, delivery and performance of its obligations under this Agreement will not constitute a default or a breach under any contract, agreement or order to which City is a party or by which it is bound.

(iii) **No Litigation or Other Proceeding.** To City’s current actual knowledge, no litigation or other proceeding (whether administrative or otherwise) is outstanding

or has been threatened which would prevent, hinder or delay the ability of City to perform its obligations under this Agreement.

Until the expiration or earlier termination of this Agreement, City shall, upon learning of any fact or condition which would cause any of the warranties and representations in this Section (a) not to be true, immediately give written Notice of such fact or condition to Club.

(b) **Club's Representations.** Club represents and warrants to City as follows:

(i) **Authority.** Club is duly organized as a non-profit corporation within and in good standing under the laws of the State of California and authorized to do business in the State of California. Club has full right, power and lawful authority to undertake all of its obligations hereunder and the execution, performance and delivery of this Agreement by Club has been fully authorized by all requisite actions on the part of Club.

(ii) **No Conflict.** Club's execution, delivery and performance of its obligations under this Agreement will not constitute a default or a breach under any contract, agreement or order to which Club is a party or by which it is bound.

(iii) **No Litigation or Other Proceeding.** To Club's current actual knowledge, no litigation or other proceeding (whether administrative or otherwise) is outstanding or has been threatened which would prevent, hinder or delay the ability of Club to perform its obligations under this Agreement.

(iv) **No Club Bankruptcy.** Club is not the subject of any bankruptcy proceeding, and no general assignment or general arrangement for the benefit of creditors or the appointment of a trustee or receiver to take possession of all or substantially all of Club's assets has been made.

Until the expiration or earlier termination of this Agreement, Club shall, upon learning of any fact or condition which would cause any of the warranties and representations in this Section (b) not to be true, immediately give written Notice of such fact or condition to City.

1.3 **Assignments by Club Prohibited.** The qualifications and identity of Club are of particular concern to City. It is because of those unique qualifications and identity that City has entered into this Agreement with Club. This Agreement is not assignable by Club. No voluntary or involuntary successor in interest of Club shall acquire any interest in the Property nor any rights or powers under this Agreement, except with the prior written approval of City, which may be granted in its sole and absolute discretion.

2. **GROUND LEASE OF THE PROPERTY.**

2.1 **Ground Lease.** Subject to the terms and conditions of this Agreement, City shall ground lease to Club and Club shall ground lease from City the Property. The ground lease for the Property shall be in the form of the Ground Lease attached hereto as Exhibit E, subject to such minor revisions as may be approved by City and Club. Club acknowledges and agrees that the ground lease of the Property to Club shall be for purposes of development of a Boys & Girls

Club facility to serve the community and for no other purpose, as set forth in more detail in the Ground Lease.

2.2 Ground Lease Rent Payments. Payments of Ground Lease Rent for the Property shall be as provided in the Ground Lease.

2.3 As-Is Conveyance. CLUB SPECIFICALLY ACKNOWLEDGES AND AGREES THAT CLUB IS LEASING THE PROPERTY ON AN “AS IS WITH ALL FAULTS” BASIS, CONDITION AND STATE OF REPAIR INCLUSIVE OF ALL FAULTS AND DEFECTS, WHETHER KNOWN OR UNKNOWN, AS MAY EXIST AS OF THE CLOSING, INCLUDING THE ENVIRONMENTAL CONDITION (“AS IS CONDITION”) AND THAT, EXCEPT AS EXPRESSLY SET FORTH HEREIN, CLUB IS NOT RELYING ON ANY REPRESENTATIONS OR WARRANTIES FROM CITY OR ANY OF CITY’S ELECTED OFFICIALS, OFFICERS, AGENTS, EMPLOYEES, REPRESENTATIVES, ATTORNEYS OR BROKERS (EACH, A “CITY PARTY” AND COLLECTIVELY, “CITY PARTIES”) AS TO ANY MATTERS CONCERNING THE PROPERTY.

2.4 Disclaimers. Club acknowledges and agrees that except as expressly set forth in this Agreement: (i) neither City, nor any City Party, has made any representations, warranties, or promises to Club, or to anyone acting for or on behalf of Club, concerning the condition of the Property, suitability of the Property for the Project or any other aspect of the Property; (ii) the condition of the Property has been independently evaluated by Club prior to the Closing; and (iii) any information, which Club has received or may hereafter receive from City or any City Party were and are furnished without warranty of any kind and on the express condition that Club has made its own independent verification of the accuracy, reliability and completeness of such information and that Club will not rely on any of the foregoing.

2.5 Waivers and Releases. Club hereby releases City from any and all manner of Claims whatsoever, in law or equity, of whatever kind or nature, whether known or unknown, direct or indirect, foreseeable or unforeseeable, absolute or contingent that Club now has or may have or which may arise in the future arising out of, directly or indirectly, or in any way connected with (i) all warranties of whatever type or kind with respect to the physical or environmental condition of the Property, whether express, implied or otherwise, including those of fitness for a particular purpose or use; (ii) use, management, ownership or operation of the Property; (iii) the physical, environmental or other condition of the Property; (iii) the application of, compliance with or failure to comply with any Governmental Requirements as to the Property; (iv) Hazardous Materials as to the Property; and (v) the As Is Condition. By releasing and forever discharging the foregoing Claims, Club expressly waives any rights under California Civil Code Section 1542, which provides:

“A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.”

INITIALS: CLUB _____

Notwithstanding the foregoing, the release and waiver of Claims set forth in this Section 2.5 shall not apply to any Claims arising from a breach by City of this Agreement. The provisions of this Section 2.5 are a material portion of the consideration given by Club to City in exchange for City's performance under this Agreement and shall survive the Closing.

2.6 City's Conditions Precedent to Ground Lease. City's obligation to proceed with the ground lease of the Property is subject to the fulfillment or waiver by City of each and all of the conditions precedent described below ("**City's Conditions Precedent to Ground Lease**"). City's Conditions Precedent to Ground Lease are solely for the benefit of City and shall be fulfilled or waived within the time periods provided for herein:

(a) **No Default.** Club shall not be in Default under this Agreement and no event shall have occurred which with the passage of time or giving of notice or both would constitute a default hereunder.

(b) **Execution of Documents.** Club shall have executed (and, where appropriate, acknowledged), as applicable, the Ground Lease, the Joint Use Agreement and any other documents required hereunder and delivered those documents into escrow.

(c) **Financing Plan.** City shall have approved Club's Financing Plan and Club shall have all funding necessary to construct and develop the Property.

(d) **Insurance.** Club shall have provided proof of insurance as required by this Agreement.

(e) **Permits and Land Use Approvals.** Club shall have obtained all City and governmental City permits and land use approvals and all other entitlements for the Project, and the period for administrative and legal challenge to such land use approvals and entitlements shall have expired and, subject to payment of all applicable fees, City shall be ready to issue building permits for construction of the Project.

(f) **Construction Contract.** Club shall have entered into a guaranteed maximum price construction contract for the Project being constructed with a licensed general contractor ("**Construction Contract**") indicating that the Club is prepared to immediately proceed with construction upon Closing. The Construction Contract shall be consistent with Club's approved Financing Plan. The City shall be indemnified and named as an additional insured in the Construction Contract.

(g) **Delivery of Bonds.** Club shall have delivered or caused to be delivered to City copies of labor and materials bonds as required by this Agreement.

(h) **Condition of the Property.** Club shall have provided Notice to City pursuant to Section 2.14 below that all physical aspects of the Property are acceptable to Club.

(i) **Relocation Payment.** Club shall have submitted the Relocation Payment as set forth in Section 3.3 below.

2.7 Club's Conditions Precedent to Ground Leases. Club's obligation to proceed with the Ground Lease is subject to the fulfillment or waiver by Club of each and all of the conditions precedent described below ("**Club's Conditions Precedent to Ground Lease**"), which are solely for the benefit of Club, and which shall be fulfilled or waived within the time periods provided for herein:

(a) **Execution of Documents by City.** City shall have executed (and, where appropriate, acknowledged), as applicable, the Ground Lease, the Joint Use Agreement and any other documents required hereunder and delivered those documents into escrow.

(b) **No Default by City.** City shall not be in Default under this Agreement, and no event shall have occurred which with the passage of time or giving of notice or both would constitute a default hereunder.

(c) **Permits and Land Use Approvals.** Club shall have obtained all City and governmental City permits and land use approvals and all other entitlements for the Project, as applicable, and the period for administrative and legal challenge to such land use approvals and entitlements shall have expired and, subject to payment of all applicable fees, City shall be ready to issue, without condition, building permits for construction of the Project.

(d) **Review and Approval of Title.** Club shall have reviewed and approved the Club Condition of Title.

(e) **Club Title Policy.** The Title Company shall, upon payment of Title Company's regularly scheduled premium, be ready to issue the Club Title Policy upon recordation of the Ground Lease.

(f) **Condition of the Property.** Club shall have provided Notice to City pursuant to Section 2.14 below that all physical aspects of the Property are acceptable to Club.

2.8 Ground Lease Escrow. Within the time set forth in the Schedule of Performance, City shall open an escrow with First American Title Company of Napa ("**Escrow Agent**") for the ground lease conveyance of the Property to Club.

(a) **Costs of Ground Lease Escrow.** All usual fees, charges, and costs chargeable for the escrow including recording fees, document fees and documentary transfer taxes, if any, due with respect to the ground lease of the Property to Club shall be paid by Club.

(b) **Escrow Instructions.** This Agreement constitutes the joint escrow instructions of Club and City with respect to the ground lease of the Property, and the Escrow Agent to whom these instructions are delivered is hereby empowered to act under this Agreement. The Parties shall use reasonable good faith efforts to close the escrow for the Ground Lease in the shortest possible time. Insurance policies for fire or casualty are not to be transferred, and City will cancel its own policies, if any, after the Closing, except as may be otherwise provided in the Ground Lease, Joint Use Agreement and related documentation. All funds received in the escrow shall be deposited in interest-bearing accounts for the benefit of the depositing party in any state or national bank doing business in the State of California. All disbursements shall be made by check or wire transfer from such accounts. If, in the opinion of

either Party, it is necessary or convenient in order to accomplish the Closing, such Party may require that the Parties sign supplemental escrow instructions; provided that if there is any inconsistency between this Agreement and the supplemental escrow instructions, then the provisions of this Agreement shall control. The Closing shall take place when both City's and Club's Conditions Precedent to Ground Lease have been satisfied or waived by the appropriate Party. Escrow Agent is instructed to release City's and Club's escrow closing statements to the respective Party.

(c) **Authority of Escrow Agent.** Escrow Agent is authorized to, and shall:

(i) Pay and charge Club for the premium of the applicable Club Title Policy, including any endorsements requested by Club.

(ii) Pay and charge Club for any escrow fees, charges, and costs of the ground lease escrow.

(iii) Disburse funds and record the Ground Lease when both Club's and City's Conditions Precedent to Ground Lease have been fulfilled or waived in writing by Club and City, as applicable.

(iv) Do such other actions as necessary, including obtaining the Club Title Policy, to fulfill its obligations under this Agreement.

(v) Direct City and Club to execute and deliver any instrument, affidavit, and statement, and to perform any act, reasonably necessary to comply with the provisions of FIRPTA, if applicable, and any similar state act and regulations promulgated thereunder.

(vi) Prepare and file with all appropriate governmental or taxing authorities uniform settlement statements, closing statements, tax withholding forms including IRS 1099-S forms, and be responsible for withholding taxes, if any such forms are provided for or required by law.

2.9 Closing. The escrow for the Ground Lease shall close within 60 days after the satisfaction, or waiver by the appropriate Party, of all of City's and Club's Conditions Precedent to Ground Lease, but in no event later than 90 ("**Outside Date for Ground Lease**"). For purposes of this Agreement, the "**Closing**" shall mean the time and day the applicable Ground Lease, or a memorandum thereof, is filed for record with the Napa County Recorder, and the "**Closing Date**" shall mean the date on which the Closing occurs. In the event that the Closing does not take place on or before the Outside Date for Ground Lease, this Agreement shall immediately terminate unless the Parties, in their sole and absolute discretion, agree to an extension.

2.10 Review and Approval of Club Condition of Title.

(a) Within the time set forth in the Schedule of Performance, Club shall cause First American Title Company or another title company mutually acceptable to City and Club ("**Title Company**") to deliver to Club and to City a standard preliminary title report with respect

to the Property, together with legible copies of the documents underlying the exceptions set forth in the preliminary title report. Club shall have the right to reasonably approve or disapprove all exceptions. Club hereby approves the following exceptions which shall be referred to herein as the “**Club Pre-Approved Exceptions**”: (a) the lien of any non-delinquent property taxes and assessments (which, if any exist, shall be prorated by the Title Company at Closing); (b) any incidental easements or other matters affecting title which do not preclude Club’s intended development and use of the Property; and (c) the covenants, conditions and restrictions set forth in the Ground Lease.

(b) Within the time set forth in the Schedule of Performance, Club shall give Notice to City of Club’s approval or disapproval of any of the title exceptions, except the Club Pre-Approved Exceptions. Club’s failure to give written disapproval of the exceptions within such time period shall be deemed Club’s approval of the exceptions. If Club delivers Notice of disapproval of any exceptions, City shall have the right, but not the obligation, to cause any disapproved exceptions to be removed within 60 days after receiving such Notice of disapproval or provide assurances satisfactory to Club that such exceptions will be removed on or before the Closing. Failure to notify Club within such 60-day period shall be deemed City’s election not to remove the disapproved exceptions. City’s election not to remove any disapproved exceptions shall not be a Default under this Agreement. If City cannot or does not elect to remove any of the disapproved exceptions within such 60-day period, Club shall have ten days after the expiration of such 60-day period to either give City Notice that Club elects, in its sole discretion, to proceed with the ground lease transaction, subject to the disapproved exceptions, or to give City Notice that Club elects to terminate this Agreement. The exceptions to title approved by Club as provided herein are hereinafter referred to as the “**Club Condition of Title**.”

(c) If any exceptions other than Club Pre-Approved Exceptions are reported by the Title Company after Club has approved the Club Condition of Title for the Property pursuant to the foregoing procedures, then any such new exception shall be subject to the same procedures for review and approval set forth above for exceptions constituting the Club Condition of Title.

2.11 **Club Title Insurance.** Concurrently with recordation of the Ground Lease, the Title Company shall issue to Club such applicable leasehold policy of title insurance for the Property (“**Club Title Policy**”) as may be required by Club, together with such endorsements as are reasonably requested by Club, insuring that Club has valid ground leasehold interests in the Property. The Club Title Policy for the Property shall be in the amount of \$ 500.00. The premium for the Club Title Policy, plus any additional costs, including the cost of surveys, and any endorsements requested by Club shall be paid by Club.

2.12 **Property Taxes and Assessments.** *Ad valorem* taxes and assessments levied, assessed or imposed on the Property for any period prior to each closing, if any, together with any costs incurred in connection with the payoff or reallocation of any such taxes and assessments, shall be paid by City. *Ad valorem* taxes and assessments levied, assessed or imposed on the Property, the Project or any other improvements thereon, if any, for the period after the Closing, including possessory interest taxes, shall be paid by Club.

2.13 **Access to Property.** Prior to the Closing, City shall cooperate to enable representatives of Club to obtain the right of access to all portions of the Property for the purpose of obtaining data and making surveys and tests which Club determines are reasonably necessary or desirable, including the investigation of the soils and environmental condition of the Property. Club agrees to provide written Notice to City at least 24 hours prior to undertaking any studies or work upon the Property. Club shall indemnify, defend, protect and hold City harmless from any Claims arising out of the acts, omissions, negligence or willful misconduct of Club or its employees, agents, contractors or representatives in connection with such studies and investigations, except for any pre-existing conditions. In addition, in the event Club causes any damage to any portion of the Property, Club shall promptly restore the Property as nearly as possible to the physical condition existing immediately prior to Club's entry onto the Property.

2.14 **Approval of Condition of Property.** As soon as practicable following Club's completion of its studies and investigations, but in any event no later than the date set forth in the Schedule of Performance, Club shall notify City in writing of whether Club approves or disapproves all physical aspects of the Property, including the soils and environmental condition of the Property. Club's failure to give written Notice of approval or disapproval within such period shall be deemed Club's approval of the physical aspects of the Property. In the event Club disapproves, or is deemed to have disapproved, the physical aspects of the Property, then this Agreement shall terminate.

2.15 **Remainder of Site.** The City will retain the remainder of the Site not ground leased to Club. The Parties agree and acknowledge that City may construct and install a recreation services or other City building on the remainder of the Site, at City's sole cost and expense (the "City Facility"). In the event City constructs a City Facility, it will do so in such a manner as to not interfere with the rights of Club under the Ground Lease. In the event that City does not construct a City Facility on the remainder of the Site, it shall negotiate in good faith with Club for the lease of such property, contingent on compliance with all local governmental requirements and subject to approval by the City.

3. **DEVELOPMENT OF THE PROJECT.**

3.1 **Land Use Entitlements and Design Review.**

(a) **General.** Before Closing, Club, at its sole cost and expense, shall secure or cause to be secured any and all land use and other entitlements, permits and approvals which may be required by City, and any other governmental agency having jurisdiction over the Project, including an amendment to the Logvy Master Plan, a use permit, design review and permits for the demolition and removal of any temporary structures or improvements on the Property. City staff will work cooperatively with Club to assist in coordinating the expeditious processing and consideration of all necessary permits, entitlements and approvals. However, the execution of this Agreement does not constitute the granting of, or a commitment to obtain, any land use permits, entitlements or approvals required by City, or any other government agency. City makes no representations as to the processing of the applications and retains discretion to approve, disapprove or condition such applications, which may include modifications to the proposed Project as approved by City in its discretion.

(b) **California Environmental Quality Act.** Review of the land use entitlements and Project applications will include environmental review under the California Environmental Quality Act (“CEQA”) and, in addition to other environmental issues, would address tree removal, traffic, archaeology and stormwater management and storage.

3.2 **Cost of Development.** All the costs of site preparation, planning, designing, constructing and developing the Project shall be borne solely by Club. The Club will pay for the costs of obtaining required land use entitlements and corresponding CEQA review, including all technical studies required in connection with the CEQA review. The Club agrees and acknowledges that development of the Property would include the requirement to pay all applicable traffic mitigation and development impact fees and water and wastewater connection fees. The Club will also be responsible for utility extensions and frontage improvements. The Club further agrees and acknowledges that fire suppression needs will be determined during the project submittal review and that a fire boost pump, alarm and monitoring system may be required.

3.3 **Relocation Costs.** Club shall work in good faith with City to find alternative locations for the dog park and community garden temporarily located on the Property. Club will pay up to \$15,000 for such relocation, provided alternative locations are designated by City (the “**Relocation Payment**”). Such payment shall be made prior to Closing.

3.4 **Financing Plan.** Club shall prepare and submit to City for City’s approval, in its reasonable discretion, a financing plan, including a detailed pro forma, demonstrating the financial viability of the Project, and setting out in detail Club’s plan for financing the costs of construction and development of the Project (“**Financing Plan**”).

3.5 **Development of Project Improvements.** Club shall construct and install the Project in accordance with the requirements of this Agreement. Club shall construct the Project in compliance with all Governmental Requirements and in accordance with the land use entitlements obtained by the City of Calistoga. During construction, Club shall provide City with monthly updates of major construction activities and schedule. Initial construction and any subsequent construction shall be at prevailing wages and Club shall cause its contractors and subcontractors to comply with prevailing wage laws and all other requirements of the California Labor Code regarding a “public work.” All such work related to the Project shall be performed by licensed contractors.

3.6 **Payment Bonds.** Club shall deliver to City for review and approval (which approval shall not be unreasonably withheld, conditioned or delayed) forms of labor and materials bonds guaranteeing payment for the Project and issued by a reputable insurance company licensed to do business in California which also meet the requirements of Club’s lenders or other institutions providing financing for the Project. The bonds shall name City as co-obligee. Prior to Closing of the Ground Lease, Club shall deliver to City copies of actually issued bonds substantially identical to the forms previously delivered to City.

3.7 **Schedule of Performance.** Club shall commence and complete construction of the Project and satisfy all of Club’s other obligations under this Agreement within the times set forth in this Agreement or established in the Schedule of Performance. The Schedule of

Performance is subject to revision from time to time as mutually agreed upon in writing between Club and City's City Manager.

3.8 City Assistance with Project.

(a) The City will assist the Club in approaching the Napa Valley Fair Association and Napa County regarding: (a) the use of and improvements to the existing fairgrounds driveway access to the north of the Property; (b) the use of the parcel behind the Property for parking or relocation of the dog park/community garden; and (c) use of the Fairgrounds as a staging area for project construction.

(b) The City will work cooperatively with the Club to seek grant funds to assist the Project, including investigating possible funds to fill gaps in the sidewalk on Washington Street to enable pedestrian travel to the Property.

3.9 Insurance Requirements.

(a) Until such time as Club has completed the Project, as evidenced by City's issuance of final certificates of occupancy for the Project, Club shall take out and maintain or shall cause its contractor to take out and maintain, Commercial General Liability and Automobile Liability policies, with minimum limits of One Million Dollars (\$1,000,000) per occurrence or accident, and if applicable, Two Million Dollars (\$2,000,000) aggregate, or such other higher policy limits as may be required by Club's lenders or other institutions providing financing for the Project. Such policy or policies shall be written on an occurrence form.

(b) Until such time as Club has completed the Project, Club shall also obtain and maintain builder's all-risk insurance in an amount not less than the full insurable cost of the Project on a replacement cost basis, or such other greater policy limits as may be required by Club's lenders or other institutions providing financing for the Project, and shall furnish or cause to be furnished to City evidence satisfactory to City that Club and any contractor with whom it has contracted for the performance of work on the Property or otherwise pursuant to this Agreement carries workers' compensation insurance as required by law.

(c) Companies writing the insurance required hereunder shall be licensed to do business in the State of California. Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A-VII or better. The commercial general liability and comprehensive automobile policies hereunder shall name City and its respective officers, agents, employees, and representatives as additional insureds.

(d) Club shall furnish City with a certificate of insurance evidencing the required insurance coverage and a duly executed endorsement evidencing such additional insured status. The certificate shall contain a statement of obligation on the part of the carrier to notify City of any material change, cancellation or termination of the coverage at least thirty (30) days in advance of the effective date of any such material change, cancellation or termination. Coverage provided hereunder by Club shall be primary insurance and shall not be contributing with any insurance, self-insurance or joint self-insurance maintained by City and the policy shall so provide. The insurance policies shall contain a waiver of subrogation for the benefit of City.

The required certificate and endorsement shall be furnished by Club to City within the time provided in the Schedule of Performance.

(e) Upon completion of construction of the Project, Club will remain subject to the insurance requirements set forth in the Ground Lease and the Joint Use Agreement.

3.10 Rights of Access. Prior to final completion of the Project, City representatives shall have the right of access to the Property, without charges or fees, at reasonable times and after prior arrangement with Club, so long as such representatives comply with all safety rules of Club and its contractors and insurers and do not unreasonably interfere with the progress of construction of the Project. Nothing herein shall be deemed to limit the ability of City to conduct code enforcement and other administrative inspections of the Property or Project in accordance with applicable law.

3.11 Compliance with Laws; Indemnity and Waiver. Club shall carry out the Project work in conformity with all applicable Governmental Requirements, including all state labor laws and standards; the City zoning and development standards; building, plumbing, mechanical and electrical codes; all other provisions of the City of Calistoga Municipal Code; and all applicable disabled and handicapped access requirements, including the Americans With Disabilities Act, 42 U.S.C. Section 12101, *et seq.*, Government Code Section 4450, *et seq.*, Government Code Section 11135, *et seq.*, and the Unruh Civil Rights Act, Civil Code Section 51, *et seq.* Club shall defend, indemnify and hold harmless City and its officers, employees, volunteers, agents and representatives from and against any and all present and future Claims, arising out of or in any way connected with Club's failure to comply with all Governmental Requirements with respect to the Project, including all state labor laws and standards including prevailing wage requirements. Club hereby waives, releases and discharges forever City and its employees, officers, volunteers, agents and representatives, from any and all present and future Claims arising out of or in any way connected with Club's failure to comply with such Governmental Requirements.

3.12 Liens and Stop Notices. Club shall not allow to be placed on the Property or any part thereof any lien or stop notice arising from any work or materials performed or provided or alleged to have been performed or provided by Club's contractors, subcontractors, agents or representatives. If a claim of a lien or stop notice is given or recorded affecting the Property, Club shall within thirty (30) days of such recording or service:

(a) Pay and discharge the same; or

(b) Affect the release thereof by recording and delivering to City's City Manager a surety bond in sufficient form and amount.

3.13 Right of City to Satisfy Other Liens After Closing. After Closing, and provided the requirements set forth in Section 3.12 have not been met by Club, City shall have the right, but not the obligation, to satisfy any such liens or stop notices without further notice to Club. In such event Club shall be liable for and City shall be entitled to reimbursement by Club for such paid lien or satisfied stop notice.

3.14 Mortgage, Deed of Trust, Sale and Lease-Back Financing. Leasehold mortgages and leasehold deeds of trust shall be permitted prior to completion of the construction of the Project, but only for the purpose of financing the costs of constructing the Project. Club shall not enter into any conveyance for such financing without City's prior written approval, which may be conditioned upon City's review and approval of all proposed financing or other loan documents. City's review and approval of such financing or other loan documents shall be limited to ensuring consistency with the provisions of this Agreement, the Ground Lease and the Joint Use Agreement and shall not be unreasonably withheld, delayed or conditioned. In no event shall City's fee interest in the Property be subordinated to the lien of any financing documents, leasehold mortgage or leasehold deed of trust. Following completion of the Project, Club's ability to enter into conveyances for financing purposes involving any future bond financings or other grant of leasehold mortgages or leasehold deeds of trust shall be governed by the applicable provisions of the Ground Lease.

3.15 Holder Not Obligated to Construct Improvements. The holder of any leasehold mortgage or deed of trust authorized by this Agreement shall not be obligated by the provisions of this Agreement to construct or complete the Project or to guarantee such construction or completion. Nothing in this Agreement shall be deemed to or be construed to permit or authorize any such holder to devote the Property to any uses or to construct any improvements thereon or therein other than those uses and improvements provided for or authorized by this Agreement and the Ground Lease.

3.16 Notice of Default to Mortgagee or Deed of Trust Holders; Right to Cure. With respect to any leasehold mortgage or deed of trust granted by Club as provided herein, whenever City shall deliver any Notice to Club with respect to any Default by Club hereunder, City shall at the same time deliver a copy of such Notice to each holder of record of any leasehold mortgage or deed of trust authorized by this Agreement. No Notice of Default shall be effective as to the holder unless such notice is given. Each such holder shall (insofar as the rights of City are concerned) have the right, at its option, within 60 days after the receipt of the copy of the Notice, to cure or remedy or commence to cure or remedy any such Default. In the event possession of the Property (or portion thereof) is required to effectuate such cure or remedy, the holder shall be deemed to have timely cured or remedied if it commences the proceedings necessary to obtain possession thereof within 60 days after receipt of the copy of the Notice, diligently pursues such proceedings to completion, and, after obtaining possession, diligently completes such cure or remedy.

3.17 Right of City to Cure Mortgage or Deed of Trust Default. If a leasehold mortgage or deed of trust default or breach by Club prior to the completion of the construction of the Project occurs, and the holder of any mortgage or deed of trust has not exercised its option to cure the default, City may cure the default, without acceleration of the subject loan, following ten business days' prior Notice thereof to Club. In such event, Club shall be liable for, and City shall be entitled to reimbursement from Club of, all costs and expenses incurred by City associated with and attributable to the curing of the leasehold mortgage or deed of trust default or breach. City shall also be entitled to record a lien against the Project improvements to the extent of such incurred costs and disbursements. Any such lien shall be subject and subordinate to all prior encumbrances and deeds of trust.

4. COVENANTS, RESTRICTIONS AND AGREEMENTS.

4.1 **Community Use.** The Property and Project shall be used as a Boys & Girls Club to serve the children of the City of Calistoga and neighboring communities and for other community uses, and for no other purpose, as set forth in more detail in the Ground Lease. The Club agrees and acknowledges that the City has entered into this Agreement in order to allow and provide for greater community uses on its Property and that Club's failure to provide such uses to serve the community will constitute a Default under the Project Documents.

4.2 **Joint Use Agreement.** Club and City shall enter into the Joint Use Agreement, in the form attached hereto as Exhibit F, for the shared use of the property and Project and City's ability to use the Project as a community facility. For the duration of the Ground Lease term, Club shall remain in compliance with the terms and conditions of the Joint Use Agreement.

4.3 **Priority and Subordination of Documents.** The Ground Lease and Joint Use Agreement shall have priority over any leasehold deeds of trust, except insofar as the Ground Lease otherwise expressly provides.

5. DEFAULTS AND REMEDIES.

5.1 **Default Remedies.** Failure by either Party to perform any action or covenant required by this Agreement within the time periods provided herein following Notice shall constitute a "Default" under this Agreement. A Party claiming a Default shall give written Notice of Default to the other Party specifying the Default complained of. Except as otherwise expressly provided in this Agreement, the claimant shall not institute any proceeding against the other Party if such Party within 60 days following receipt of such Notice of Default immediately, with due diligence, commences to cure, correct or remedy such failure or delay and completes such cure, correction or remedy with diligence. In addition to the foregoing, any default by either Party under one or more of the other Project Documents which is not cured following notice and expiration of any applicable cure periods thereunder shall also constitute a Default under this Agreement, and upon occurrence of such Default and without any right to further notice or additional cure period the non-defaulting Party shall have all remedies available to it under this Agreement, including the right to terminate this Agreement as set forth in Section 5.4 below.

5.2 **Dispute Resolution.** In the event that the Party receiving a Notice of Default disputes the allegations or is not intending to cure, correct or remedy the alleged default, the Parties shall promptly meet in an effort to resolve the issues raised. If the Parties fail to resolve the issues raised, mediation may be pursued by mutual agreement. It is the intent of the Parties to the extent possible that litigation be avoided as a method of dispute resolution.

5.3 **Institution of Legal Actions.** Except as otherwise specifically provided herein, upon the occurrence of a Default by Club, City shall have the right, in addition to any other rights or remedies, to institute any action at law or in equity to cure, correct, prevent or remedy any Default, or to recover damages for any Default, or to obtain any other remedy consistent with the purpose of this Agreement. Club's remedies in the event of a Default by City shall be limited to obtaining specific performance or injunctive relief. Such legal actions must be

instituted in the Superior Court of the County of Napa, State of California, or in the Federal District Court for the Northern District of the State of California. Neither Party shall have the right to recover any consequential, punitive or special damages.

5.4 Termination. This Agreement may be terminated: (1) if there is an uncured Default, after Notice from the Party not in default and expiration of all cure periods, or (2) if there is a failure of an express condition (which is not waived by the Party whom the condition benefits) by timely Notice from the Party whom the condition benefits.

5.5 Rights and Remedies Are Cumulative. The rights and remedies of the Parties are cumulative, and the exercise by either Party of one or more of such rights or remedies shall not preclude the exercise by it, at the same or different times, of any other rights or remedies for the same default or any other default by the other Party, except as otherwise expressly provided herein.

5.6 Inaction Not a Waiver of Default. Any failures or delays by either Party in asserting any of its rights and remedies as to any Default shall not operate as a waiver of any Default or of any such rights or remedies, or deprive either such Party of its right to institute and maintain any actions or proceedings which it may deem necessary to protect, assert or enforce any such rights or remedies.

6. GENERAL PROVISIONS.

6.1 Notices, Demands and Communications Between the Parties. Any approval, disapproval, demand, document or other notice (“**Notice**”) which either Party may desire to give to the other Party under this Agreement must be in writing and shall be given by certified mail, return receipt requested and postage prepaid, personal delivery, or reputable overnight courier (but not by facsimile or email), to the Party to whom the Notice is directed at the address of the Party as set forth below, or at any other address as that Party may later designate by Notice.

To City: City of Calistoga
1232 Washington Street
Calistoga, CA 94515
Attention: City Manager

To Club: The Boys & Girls Clubs of St. Helena and
Calistoga
1420 Tainter Street
St. Helena, CA 94574
Attention: Jay Templeton, Executive Director

Any Notice shall be deemed received on the date of delivery if delivered by personal service, on the date of delivery or refused delivery as shown by the return receipt if sent by certified mail, and on the date of delivery or refused delivery as shown by the records of the overnight courier if sent via nationally recognized overnight courier. Notices sent by a Party’s attorney on behalf of such Party shall be deemed delivered by such Party.

6.2 Enforced Delay; Extension of Times of Performance. Subject to the limitations set forth below, performance by either Party hereunder shall not be deemed to be in Default, and all performance and other dates specified in this Agreement shall be extended, where delays are due to: war; insurrection; strikes; lockouts; riots; floods; earthquakes; fires; casualties; acts of God; acts of the public enemy; epidemics; quarantine restrictions; freight embargoes; governmental restrictions or priority; litigation, including court delays; unusually severe weather; acts or omissions of the other Party; or acts or failures to act of City or any other public or governmental City or entity (other than the acts or failures to act of City which shall not excuse performance by City). An extension of time for any such cause shall be for the period of the enforced delay and shall commence to run from the time of the commencement of the cause, if Notice by the Party claiming such extension is sent to the other Party within 30 days of the commencement of the cause. Times of performance under this Agreement may also be extended in writing by the mutual agreement of City and Club. Club expressly agrees that adverse changes in economic conditions, either of Club specifically or the economy generally, changes in market conditions or demand, and/or Club's inability to obtain financing or other lack of funding, or to complete the work of the Project shall not constitute grounds of enforced delay pursuant to this Section 6.2. Club expressly assumes the risk of such adverse economic or market changes and/or financial inability, whether or not foreseeable as of the Effective Date.

6.3 Successors and Assigns. Subject to the restrictions on Club transfers set forth in Section 1.3 above, all of the terms, covenants and conditions of this Agreement shall be binding upon Club and City and their respective permitted successors and assigns. Whenever the term "Club" is used in this Agreement, such term shall include any permitted successors and assigns as herein provided.

6.4 Relationship Between City and Club. It is hereby acknowledged that the relationship between City and Club is not that of a partnership or joint venture and that City and Club shall not be deemed or construed for any purpose to be the agent of the other. Accordingly, except as expressly provided herein or in the exhibits hereto, City shall have no rights, powers, duties or obligations with respect to the development, operation, maintenance or management of the Project. Club shall indemnify, protect, hold harmless and defend City from any Claims made against City arising from a claimed relationship of partnership or joint venture between City and Club with respect to the development, operation, maintenance or management of the Project.

6.5 City Approvals and Actions. Whenever a reference is made herein to an action or approval to be undertaken by City, the City Manager of City or his or her designee is authorized to act on behalf of City, unless specifically provided otherwise or the context requires otherwise.

6.6 Counterparts. This Agreement may be signed in multiple counterparts each of which shall be deemed to be an original.

6.7 Integration. This Agreement, including the exhibits hereto, and the other Project Documents contain the entire understanding between the Parties relating to the transactions contemplated by this Agreement. All prior or contemporaneous agreements, understandings, representations and statements, oral or written, other than the other Project Documents, are merged in this Agreement and shall be of no further force or effect. Each Party is entering this

Agreement based solely upon the representations set forth herein and upon each Party's own independent investigation of any and all facts such Party deems material.

6.8 Brokerage Commissions. City and Club each represents to the other that it has not engaged the services of any finder or broker and that it is not liable for any real estate commissions, broker's fees, or finder's fees which may accrue by means of the acquisition or leasing of all or part of the Property. Each Party shall indemnify, defend, protect and hold the other Party harmless from any and all Claims based upon any assertion that such commissions or fees are allegedly due from the Party making such representations.

6.9 Titles and Captions. Titles and captions are for convenience of reference only and do not define, describe or limit the scope or the intent of this Agreement or of any of its terms. References to section numbers are to sections in this Agreement, unless expressly stated otherwise. References to specific section numbers shall include all subsections which follow the referenced section.

6.10 Interpretation. As used in this Agreement, masculine, feminine or neuter gender and the singular or plural number shall each be deemed to include the others where and when the context so dictates. The words "include" and "including" shall be construed as if followed by the words "without limitation." The Parties acknowledge that each Party and his, her or its counsel have reviewed and revised this Agreement and that the rule of construction to the effect that any ambiguities are to be resolved against the drafting Party shall not be employed in the interpretation of this Agreement or any document executed and delivered by either Party in connection with this Agreement.

6.11 Modifications. Any alteration, change or modification of or to this Agreement, in order to become effective, shall be made in writing and in each instance signed on behalf of each Party.

6.12 Severability. If any term, provision, condition or covenant of this Agreement or its application to any Party or circumstances shall be held, to any extent, invalid or unenforceable, the remainder of this Agreement, or the application of the term, provision, condition or covenant to persons or circumstances other than those as to whom or which it is held invalid or unenforceable, shall not be affected, and shall be valid and enforceable to the fullest extent permitted by law.

6.13 Computation of Time. The time in which any act is to be done under this Agreement is computed by excluding the first day, and including the last day, unless the last day is a holiday or Saturday or Sunday, and then that day is also excluded. The term "holiday" shall mean all holidays as specified in Sections 6700 and 6701 of the California Government Code. If any act is to be done by a particular time during a day, that time shall be Pacific Time Zone time.

6.14 Legal Advice. Each Party represents and warrants to the other the following: they have carefully read this Agreement, and in signing this Agreement, they do so with full knowledge of any right which they may have; they have received independent legal advice from their respective legal counsel as to the matters set forth in this Agreement, or have knowingly chosen not to consult legal counsel as to the matters set forth in this Agreement; and, they have

freely signed this Agreement without any reliance upon any agreement, promise, statement or representation by or on behalf of the other Party, or their respective agents, employees, or attorneys, except as specifically set forth in this Agreement, and without duress or coercion, whether economic or otherwise.

6.15 Time of Essence. Time is expressly made of the essence with respect to the performance by City and Club of each and every obligation and condition of this Agreement.

6.16 Cooperation. Each Party agrees to cooperate with the other in this transaction and, in that regard, shall execute any and all documents which may be reasonably necessary, helpful, or appropriate to carry out the purposes and intent of this Agreement.

6.17 Conflicts of Interest. No member, official or employee of City shall have any personal interest, direct or indirect, in this Agreement, nor shall any such member, official or employee participate in any decision relating to the Agreement which affects his personal interests or the interests of any corporation, partnership or association in which he is directly or indirectly interested.

6.18 Club's Indemnity. Club shall indemnify, defend (with counsel reasonably acceptable to City), protect and hold City and its officers, employees, agents and representatives, harmless from, all Claims relating to the development of the Project whether caused by any of Club's activities under this Agreement or by anyone directly or indirectly employed or contracted with by Club and whether such Claims shall accrue or be discovered before or after termination of this Agreement. Club's indemnity obligations under this Section 6.18 shall not extend to Claims caused solely by the active negligence or willful misconduct of City or its officers, employees, agents or representatives.

6.19 Cooperation in the Event of Legal Challenge.

(a) **Cooperation of Parties.** City and Club, at Club's sole cost and expense, shall cooperate in the event of any court action instituted by a third party or other governmental entity or official challenging the validity of any provision of this Agreement, and City shall, upon request of Club, appear in the action and defend its decision, except that City shall not be required to be an advocate for Club. To the extent Club determines to contest or defend such litigation challenges or requests that City cooperate in those defense efforts, Club shall reimburse City, within ten days following City's written demand therefor, which may be made from time to time during the course of such litigation, all costs incurred by City in connection with the litigation challenge, including City's attorneys' fees, administrative, legal and court costs, provided that City shall either: (a) elect to joint representation by Club's counsel; or (b) retain an experienced litigation attorney and require such attorney to prepare and comply with a litigation budget. If Club defends any such legal challenge, Club shall indemnify, defend, and hold harmless City and its officials and employees from and against any Claims assessed or awarded against City by way of judgment, settlement, or stipulation. Nothing herein shall authorize Club to settle such legal challenge on terms that would constitute an amendment or modification of this Agreement or any other Project Documents, unless such amendment or modification is approved by City in accordance with applicable legal requirements, and City reserves its full legislative discretion with respect thereto.

(b) **City Election to Contest or Defend.** In addition, City shall have the right, but not the obligation, to contest or defend such litigation challenges, in the event that Club elects not to do so. If City elects to contest or defend such litigation challenges, Club shall bear all related costs and expenses, including City's attorney fees and costs, and, in addition, shall indemnify, defend, and hold harmless City and its officials and employees from and against any and all Claims assessed or awarded against City by way of judgment, settlement, or stipulation, without regard to the above dollar amount cap.

6.20 **Nonliability of Officials and Employees of City.** No member, official or employee of City shall be personally liable to Club, or any successor in interest, in the event of any Default or breach by City or for any amount which may become due to Club or its successors, or on any obligations under the terms of this Agreement. Club hereby waives and releases any claim it may have against the members, officials or employees of City with respect to any Default or breach by City or for any amount which may become due to Club or its successors under the terms of this Agreement.

6.21 **Applicable Law.** The laws of the State of California, without regard to conflict of laws principles, shall govern the interpretation and enforcement of this Agreement.

[Remainder of page intentionally left blank]

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the Effective Date.

CITY:

CITY OF CALISTOGA, a municipal corporation

By: _____
Richard Spitler, City Manager

CLUB:

THE BOYS & GIRLS CLUBS OF ST. HELENA AND CALISTOGA, a California nonprofit corporation

By: Scott Le Strange

Name: Scott Le Strange

Its: President of the Board of Directors

By: L. J. Templeton

Name: L. J. Templeton

Its: Executive Director

APPROVED AS TO FORM:

By: _____
Michelle Marchetta Kenyon, City Attorney

ATTEST:

By: _____
Kathy Flamson, City Clerk

EXHIBIT B

LEGAL DESCRIPTION OF PROPERTY

The land referred to in this report is situated in the County of Napa, State of California, and is described as follows:

PARCEL A, as shown on the Record of Survey Map No. 2762, filed April 12, 1976, in Book 19 of Surveys at page(s) 70, in the office of the County Recorder of Napa County.

APN 011-140-056

EXHIBIT C

SCHEMATIC PLANS



VIEW FROM WASHINGTON

15 SEPTEMBER

**LOGVY PARK SITE
CALISTOGA BOYS & GIRLS CLUB**

Boys and Girls Club of St. Helena and Calistoga

Exhibit C-1

EXHIBIT D

SCHEDULE OF PERFORMANCE

Action	Date
1. Execution and Delivery of Agreement by the Club. The Club shall execute and deliver this Agreement to the City.	At least 14 days prior to City Council hearing on Agreement.
2. Approval and Execution of Agreement by City. The City shall hold a hearing to approve and authorize execution of this Agreement by the City. If so authorized, the City shall execute and deliver this Agreement to the Club within 10 days of approval.	Execution of Agreement by City within 10 days of approval by City.
3. Opening of Escrow. The City shall open an escrow for ground lease of the Property to the Club and cause the Title Company to issue a preliminary title report.	Within 30 days after the Effective Date.
4. Club Notification of Condition of Title. The Club shall deliver written notice of any disapproved title exception.	Within 60 days after Effective Date
5. Club Notification of Unacceptable Conditions on Property. The Club shall deliver written notice to the City if the conditions of the Property are not acceptable.	Within 90 days after the Effective Date.
6. Evidence of Financing. The Club shall submit to the City for review and approval preliminary evidence of construction and operating cost financing necessary for development of the Property.	Prior to the close of escrow.
7. Construction Contract. The Club shall submit to the City a Construction Contract for the improvements to be constructed on the Property.	Prior to the close of escrow.
8. Governmental Permits. The Club shall obtain any and all permits required by City and any other governmental agency.	Prior to the close of escrow.

<p>9. Deposit of Escrow Documents. The City and the Club shall deposit with the Escrow Agent as respectively required the escrow fees, charges and costs, and the Ground Lease and all properly executed documents prior to the close of escrow.</p>	<p>Prior to close of escrow.</p>
<p>10. Submission – Certificates of Insurance. The Club shall furnish to the City duplicate originals or appropriate certificates of insurance policies described in Section 3.9.</p>	<p>Prior to close of escrow.</p>
<p>11. Close of Escrow. The Parties shall close escrow on the Ground Lease of the Property.</p>	<p>No later than June 30, 2016</p>
<p>12. Commencement of Construction of Improvements. The Club shall commence construction of the improvements on the Property.</p>	<p>Within 45 days after the Club and City have entered into the Ground Lease.</p>
<p>13. Completion of Construction of Improvements. The Club shall have completed the construction of the improvements on the Property.</p>	<p>Within 18 months after commencement of construction.</p>

EXHIBIT E

FORM OF GROUND LEASE

**RECORDING REQUESTED BY
AND WHEN RECORDED RETURN TO:**

City of Calistoga
1232 Washington Street
Calistoga, CA 94515
Attention: City Manager

**Exempt from Recording Fees
Per Government Code Sections 6103 & 27383**

Space above this line for Recorder's use only.

GROUND LEASE

This GROUND LEASE (the "**Lease**"), dated as of _____ ("**Effective Date**"), is made and entered into by and between the City of Calistoga, a California municipal corporation ("**Landlord**"), and the Boys & Girls Clubs of St. Helena and Calistoga, a California nonprofit corporation ("**Tenant**"). Landlord and Tenant may each be referred to as a "**Party**" or collectively as the "**Parties**."

RECITALS

A. Landlord is the fee owner of that certain real property located at 1401 N. Oak Street in the City of Calistoga, California and described and depicted in more detail in Exhibit A to this Lease ("**Property**").

B. Landlord and Tenant have entered into that certain Lease Disposition and Development Agreement dated _____, (the "**DDA**") to set forth the terms and conditions relating to (1) Tenant's ground lease of the Property from City; (2) Tenant's development of the Project thereon; and (3) the terms under which the Parties would provide for community use of the Project through a Joint Use Agreement. Terms not otherwise defined in this Lease shall have the meaning set forth in the DDA.

C. Pursuant to the terms of the DDA, Landlord desires to lease the Property to Tenant subject to the terms and conditions of this Lease. The Parties have concurrently entered into that certain Joint Use Agreement dated _____.

NOW, THEREFORE, with reference to these Recitals and on the terms and conditions contained in this Lease, Landlord and Tenant agree as follows:

ARTICLE I
LEASE OF PREMISES; STATE OF TITLE

1.1 **Property.** Landlord leases to Tenant, and Tenant leases from Landlord, the Property described and depicted in Exhibit A to this Lease. Tenant shall have no rights to subsurface minerals, petroleum, and other hydrocarbon substances, and Landlord expressly reserves all of its rights to same.

1.2 **State of Title.** This Lease is subject to (a) all easements, covenants, conditions, restrictions, reservations, rights-of-way, and other matters of record; [insert other Permitted Exceptions agreed upon during title review under DDA] (“**Permitted Exceptions**”).

1.3 **As-Is Conveyance.** TENANT SPECIFICALLY ACKNOWLEDGES AND AGREES THAT LANDLORD IS LEASING THE PROPERTY ON AN “AS IS WITH ALL FAULTS” BASIS, CONDITION AND STATE OF REPAIR INCLUSIVE OF ALL FAULTS AND DEFECTS, WHETHER KNOWN OR UNKNOWN, AS MAY EXIST AS OF THE CLOSING, INCLUDING THE ENVIRONMENTAL CONDITION (“AS IS CONDITION”) AND THAT, EXCEPT AS EXPRESSLY SET FORTH HEREIN, TENANT IS NOT RELYING ON ANY REPRESENTATIONS OR WARRANTIES FROM LANDLORD OR ANY OF LANDLORD’S ELECTED OFFICIALS, OFFICERS, AGENTS, EMPLOYEES, REPRESENTATIVES, ATTORNEYS OR BROKERS (EACH A “LANDLORD PARTY” AND COLLECTIVELY, “**LANDLORD PARTIES**”) AS TO ANY MATTERS CONCERNING THE PROPERTY.

1.4 **Disclaimers.** Tenant acknowledges and agrees that except as expressly set forth in this Agreement: (i) neither Landlord, nor any Landlord Party, has made any representations, warranties, or promises to Tenant, or to anyone acting for or on behalf of Tenant, concerning the condition of the Property, suitability of the Property for the Project or any other aspect of the Property; (ii) the condition of the Property has been independently evaluated by Tenant prior to the Closing; and (iii) any information, which Tenant has received or may hereafter receive from Landlord or any Landlord Party were and are furnished without warranty of any kind and on the express condition that Tenant has made its own independent verification of the accuracy, reliability and completeness of such information and that Tenant will not rely on any of the foregoing.

1.5 **Waivers and Releases.** Tenant hereby releases Landlord from any and all manner of rights, liabilities, claims, actions, causes of action, suits, proceedings, demands, damages, costs, expenses (including attorney’s fees and costs) or other compensation whatsoever, in law or equity, of whatever kind or nature, whether known or unknown, direct or indirect, foreseeable or unforeseeable, absolute or contingent that Tenant now has or may have or which may arise in the future arising out of, directly or indirectly, or in any way connected with (i) all warranties of whatever type or kind with respect to the physical or environmental condition of the Property, whether express, implied or otherwise, including those of fitness for a particular purpose or use; (ii) use, management, ownership or operation of the Property; (iii) the physical, environmental or other condition of the Property; (iii) the application of, compliance with or failure to comply with any federal, state or local laws, regulations or governmental requirements as to the Property; (iv) the presence of hazardous materials or substances on to the Property; and (v) the As Is

Condition (the foregoing are collectively referred to as “**Claims**”). By releasing and forever discharging the Claims, Tenant expressly waives any rights under California Civil Code Section 1542, which provides:

“A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.”

INITIALS: TENANT _____

Notwithstanding the foregoing, the release and waiver of Claims set forth in this Section shall not apply to any Claims arising from a breach by Landlord of this Lease. The provisions of this section are a material portion of the consideration given by each Party to the other in exchange for such Party’s performance under this Lease.

ARTICLE II **IMPROVEMENTS**

2.1 **Construction of Improvements.** Tenant shall bear the sole responsibility for constructing the Project and any related improvements required by the City of Calistoga or any other governmental agency, including but not limited to infrastructure for water, sewer, and other utilities to serve the Property (“**Improvements**”). Tenant is responsible for obtaining all necessary permits and approvals required to construct the Project and Improvements. The Project and Improvements shall be constructed in accordance with all applicable laws and regulations and in accordance with the requirements of the DDA.

2.2 **Title to Improvements.** Tenant shall have title to the Project and Improvements that are constructed on the Property by Tenant under this Lease during the Term. Upon termination of this Lease or expiration of the Term, title to the Project and Improvements shall immediately and automatically vest in the Landlord, without any compensation or payment to Tenant. This Section 2.2 shall survive the expiration or termination of this Lease.

ARTICLE III **TERM**

3.1 **Initial Term.** The term of this Lease shall be for 40 years from the Effective Date (“**Initial Term**”).

3.2 **Renewal Term.** Upon the conclusion of the Initial Term, this Lease may be extended for an additional term of ten years upon mutual agreement of the Parties (“**First Renewal Term**”). If applicable, at the end of the First Renewal Term, this Lease may be extended for an additional term of five years upon mutual agreement of the Parties (“**Second Renewal Term**”).

3.3 **Term.** “**Term**” as used in this Lease collectively refers to both the Initial Term and any Renewal Terms. In no event shall the Term, as extended, be longer than 55 years.

ARTICLE IV
MONETARY PROVISIONS

4.1 **Rent.** Tenant shall pay to Landlord during the Term one dollar (\$1.00) per year on or before the first day of the Initial Term and any Renewal Term, commencing on the Effective Date (“**Rent**”).

4.2 **Property Taxes; Transfer Taxes.**

a. *Personal Property Taxes.* Tenant shall pay before delinquency all taxes, assessments, license fees, and other charges that are levied and assessed on Tenant’s personal property.

b. *Real Property Taxes.* At all times during the Term, Tenant agrees to pay in a timely manner all taxes, assessments, fees, and charges that at any time during the Term may be levied or charged by the federal government, the state, county, City, or any other tax or assessment levying body on any activity carried on under this Lease, any interest in this Lease, any possessory right that Tenant may have in or to the Property, or that is levied and assessed against the land that comprises the Property and all improvements on the Property. Tenant, at no cost to Landlord, reasonably may contest the legal validity or amount of any such taxes, assessments, or charges for which Tenant is responsible, and institute such proceedings as Tenant considers necessary; provided, however, that Tenant shall at all times Indemnify Landlord or any officer, director, employee, partner, agent, or contractor of Landlord (“Authorized Representative”) against any and all Claims resulting therefrom, and protect Landlord and the Property from foreclosure of any lien, and that Landlord shall not be required to join in any proceeding or contest brought by Tenant. The term “Indemnify” includes indemnify, hold harmless, protect, and defend with counsel reasonably acceptable to the Landlord. The term “Claims” refers to all claims, damages, suits, liability, penalties, costs, and expenses, including, without limitation, attorneys’ fees.

c. *Transfer Taxes on Lease.* If any governmental authority levies, assesses, and/or imposes on Landlord a transfer tax as a result of this Lease, Tenant shall, at Landlord’s election in its sole discretion, either pay such tax directly to the governmental authority or pay the amount of such tax to Landlord, in which latter event Landlord shall pay such tax directly to the governmental authority.

4.3 **Utilities.**

a. *Payment of Utilities and Services.* Tenant, at its cost, shall be responsible for arranging for all utilities to be provided to the Property that are required to serve the Project. Tenant shall promptly pay all charges for water, gas, electricity, telephone, sewage, refuse, and any other utilities or materials used or consumed on the Property directly to the party providing such utilities or services.

b. *Interruption of Utility Services.* Landlord shall not be liable to Tenant in damages or otherwise (i) if any utility becomes unavailable from any public utility company, public authority, or any other person or entity supplying or distributing such utility; or (ii) for any disruption in any utility service caused by the making of any repairs or improvements or by

any cause beyond Landlord's reasonable control, and such interruption shall not constitute a termination of this Lease, or an eviction of Tenant, or give Tenant the right to reduce or abate Rent.

ARTICLE V

USE OF THE PREMISES

5.1 **Permitted Uses.** Tenant shall use the Property for the construction of the Project and Improvements on the Property and the subsequent utilization of the Project and Improvements by Tenant for use as a community asset. The Property and Project shall be used as a Boys & Girls Club to serve the children of the City of Calistoga and neighboring communities and for other community uses, and for no other purpose. Further, alcoholic beverages may not be served on the Property when the Boy & Girls Club is operating as a use for children in the community. Alcoholic beverages may be served for fund raising and other special events provided such use is in compliance with all license requirements of the California Department of Alcoholic Beverage Control. If Tenant desires to change the Permitted Uses on the Property to another use or uses, such change in use shall require the prior written approval of Landlord, in its sole and absolute discretion.

5.2 **Use Covenants.** The Club shall use continuously operate the Property as a Boys & Girls Club with facilities open to public use for the children of the community at least 20 hours a week with programming to serve at least 50 children on a daily basis. The Property shall be managed in a first-class fiscally responsible manner to ensure continual use of the facilities by the community.

5.3 **Joint Use Agreement.** The Parties shall comply with the provisions of the Joint Use Agreement in shared use of the Project.

5.4 **Compliance With Laws.**

a. Tenant shall, at Tenant's sole cost, promptly comply with all federal, state and local laws, ordinances and regulations ("**Laws**") and with the requirements of any governmental authority having jurisdiction over the Property, relating to or affecting the Property or the condition, use, or occupancy of the Property, including the obligation to make improvements, repairs, and alterations required by such Laws, regardless of the cost thereof, at what point in time during the Term compliance is required, and whether such compliance was foreseen or unforeseen. The judgment of any court of competent jurisdiction or the admission of Tenant in any action against Tenant, whether Landlord is a party thereto or not, that Tenant has violated any of the foregoing shall be conclusive of that fact between Landlord and Tenant. Tenant shall immediately furnish Landlord with a copy of any notices received from any governmental City in connection with the Property.

b. Tenant may reasonably and in good faith contest any Law through appropriate proceedings, and, during such contest, Tenant need not comply therewith; provided further that Tenant shall at all times reasonably protect the interests of Landlord under this Lease, shall indemnify Landlord from all Claims actually and reasonably incurred as a result of the contest, and shall promptly comply with any such contested Law if any such contest is resolved

against Tenant. Tenant agrees to Indemnify Landlord or any officer, director, employee, partner, agent, or contractor of Landlord (“**Authorized Representative**”) from and against any Claims imposed or sought to be imposed on or involving Landlord for any violation or alleged violation of any such Laws.

5.5 Landlord’s Access to Property.

a. In addition to Landlord’s rights pursuant to Section 5.3 and pursuant to the Joint Use Agreement, Landlord reserves the right for Landlord and Landlord’s Authorized Representatives to enter the Property at any reasonable time (a) to inspect the Property; (b) to determine whether Tenant is complying with Tenant’s obligations under this Lease; (c) to perform any other obligation of Tenant after Tenant’s failure to perform same; or (d) if Tenant defaults under this Lease.

b. Landlord shall be permitted to enter on the Property, as may reasonably be necessary, in order for Landlord or its designees to make improvements or do other work, or to make improvements, repairs, or maintenance to adjacent property owned by Landlord. Landlord’s entry shall not unreasonably interfere with the business and operations at the Property.

ARTICLE VI

REPAIRS AND MAINTENANCE; ALTERATIONS; NEW IMPROVEMENTS

6.1 New Improvements and Alterations. After the Project and Improvements are constructed pursuant to Article 2 of this Lease, Tenant shall not alter, add to, or modify the Project or Improvements (“**Alterations**”) without Landlord’s prior written approval, which shall not be unreasonably withheld, conditioned, or delayed. Despite the foregoing, Tenant may (a) make Alterations within the interior of the Project, if such work will not result in a use of the Project in violation of this Lease and will not cause any violation of the Joint Use Agreement or any permit or approval applicable to the Project; and (b) make Alterations required to comply with any applicable Law or insurance underwriter’s requirement.

6.2 Tenant’s Repair and Maintenance Obligations. Tenant at all times and at its sole cost shall ensure that the Property, Project, and Improvements, including without limitation landscaping, utilities, structural components, roofing materials, windows, exterior and interior features, furnishing and equipment and fire and security systems, are maintained in a first-class, structurally sound, sanitary, and safe condition and in accordance with all requirements of applicable Laws, governmental authorities, insurance underwriters, mortgages, deeds of trust, and covenants, conditions, and restrictions pertaining to the Property, Project or Improvements, including the Joint Use Agreement. To that end, Tenant shall timely perform all reasonably required repairs or replacements to the Property, Project and the Improvements located thereon (whether interior or exterior, structural or nonstructural, foreseeable or unforeseeable, ordinary or extraordinary).

6.3 Mechanics’ Liens, Notices of Nonresponsibility, and Other Alteration and Maintenance Requirements. All Alterations and repairs must be performed in a good and workmanlike manner and in accordance with all applicable Laws, insurance underwriter’s

requirements, and any recorded deeds of trust, mortgages, covenants, conditions, or restrictions by duly licensed contractors. Work may not commence until Tenant (a) has obtained any required permits or approvals and (b) has provided Landlord with at least ten business days' notice of the date for commencement of work, to permit Landlord an opportunity to post an appropriate notice of nonresponsibility. Once begun, all such work shall be diligently prosecuted to completion. If this Lease terminates before completion of any Alteration or repair by Tenant, on request Tenant shall assign its rights under any construction, design, or material supply contract required for completion of the work to Landlord or its designee.

6.4 No Landlord Obligation. Landlord shall have no obligation whatsoever to maintain, repair, alter, improve, or reconstruct the Property or the Improvements or to comply with any applicable Law or with any other legal or insurance requirement concerning the condition or repair of the Property, Project or Improvements. Tenant expressly recognizes that, because of the potential length of the Term of this Lease, it may be necessary for Tenant to perform substantial maintenance, repair, rehabilitation, or reconstruction of the Project or Improvements in order to ensure that the Project or Improvements are kept in the condition required by this Lease. In this regard, Tenant expressly waives (a) all defenses to its maintenance obligations under this Lease; (b) the right to require Landlord to make repairs; (c) any right to make repairs at the expense of Landlord; (d) the right to reduce or offset rent as a consequence of the condition of the Property, Project or Improvements; (e) the benefits of California Civil Code §§1932, 1941, and 1942, as amended from time to time; and (f) any law, judicial pronouncement, or common law principle similar thereto, which is now or hereafter in effect or is otherwise inconsistent with the provisions of this Lease. However, these waivers do not limit Tenant's rights or Landlord's obligations arising out of the gross negligence or willful misconduct of Landlord or its agents, representatives, employees, contractors, or invitees.

6.5 Right to Enter. Tenant will permit Landlord and its Authorized Representatives to enter the Property at all times during usual business hours, on giving Tenant reasonable written notice, to inspect the same and to perform any work required of Tenant by this Lease that Tenant has failed to perform within 30 days following written notice to Tenant of default; provided, however, that in the event of any Tenant default that creates an imminent threat to life or property, Landlord may enter the Property without notice and may take such actions as may be required to relieve such threat. As additional rent, Tenant shall reimburse Landlord for the cost of any repairs, replacements, or improvements to the Property, Project or Improvements incurred by Landlord under this Section, promptly on receipt of an invoice. Nothing in this Section shall imply any duty on the part of Landlord to make any inspection, take any action, or do any such work, nor shall Landlord's performance of any repairs, alterations, or improvements constitute a waiver of Tenant's default in failing to do the same. Except to the extent arising out of the gross negligence or willful misconduct of Landlord, or its agents, representatives, employees, contractors, or invitees, no exercise by Landlord of any rights herein reserved shall entitle Tenant to any compensation, abatement of Rent, damages, reimbursement, or other relief for any interference with any business conducted on the Property or any other injury, property damage, loss, or liability as a consequence of such entry or repairs.

ARTICLE VII

INSURANCE

7.1 **Insurance Required of Tenant.** Tenant shall, at Tenant's expense, obtain and provide insurance on or before the commencement of construction on the Property, and shall maintain in full force and effect at all times thereafter during the Term the insurance coverages set forth in this Section.

a. ***Casualty Insurance.*** Casualty Insurance includes Broad Form or Special Form Casualty Insurance in an amount not less than the full replacement value covering the Project and Improvements located on the Property. Such replacement value shall be redetermined from time to time during the Term not less frequently than every three years. Such policy or policies of insurance shall name Landlord as an additional insured. Landlord and Tenant agree that the proceeds from any such policy or policies shall be used for the reconstruction of the Project and Improvements located on the Property.

b. ***Earthquake Insurance.*** At Landlord's election, Tenant shall take out and maintain earthquake insurance covering the Project and Improvements located on the Property, in amounts and deductibles as determined by Landlord in its sole discretion.

c. ***Liability Insurance.*** Liability Insurance includes commercial general liability insurance, including, without limitation, products liability coverage, liquor liability (if applicable), broad form contractual liability endorsement, and with such limits and deductibles as may reasonably be required and permitted by Landlord from time to time, but not less than one million dollars (\$1,000,000.00) for bodily injury (including death) and personal injury to any one person, injury, and/or death to any number of persons in any one incident, and for property damage in any one occurrence. Such policy or policies shall be written on a claims-made basis, and shall name Landlord as an additional insured. Such liability insurance shall specifically insure the indemnity provisions of Section 10.2, and shall contain a provision that Landlord, although an additional insured, shall nevertheless be entitled to recover under such policy or policies for any damage or injury to Landlord or its Authorized Representatives by reason of acts or omissions of Tenant or its Authorized Representatives.

7.2 **Policy Form.** All insurance required of Tenant shall be in a form reasonably satisfactory to Landlord, and written by one or more insurance companies reasonably approved by Landlord and that are licensed to do business in the State of California. Insurance companies must be rated at least A-VII or better as rated in the most current available "Best's Insurance Reports," or equivalent rating. All such insurance may be carried under a blanket policy covering the Property and other locations, provided that the coverage afforded Landlord by such blanket policy shall not be reduced or diminished by reason of the use of such blanket policy of insurance, and provided further that the requirements of this Article 7 are otherwise satisfied. All such insurance shall contain endorsements that (a) such insurance shall not be canceled or amended except on thirty (30) days' prior notice to Landlord by the insurance company; (b) Tenant shall be solely responsible for payment of premiums; and (c) Tenant's insurance is primary in the event of overlapping coverage, which may be carried by Landlord. The minimum limits of the commercial general liability insurance policy required by Section 7.1 shall in no way limit or diminish Tenant's liability under this Lease. Tenant shall deliver to Landlord at

least thirty (30) days prior to the time such insurance is first required to be carried by Tenant and thereafter at least thirty (30) days prior to the expiration of such policy a duplicate original clearly showing compliance by Tenant with Tenant's obligations under this Lease, together with evidence satisfactory to Landlord of the payment of the premiums. Landlord may require an increase in any policy limits required in this Article 7 every three (3) years during the Lease Term.

7.3 Waiver of Subrogation. Provided the respective insurance carriers recognize the waivers of the Parties in this Section 7.3, the Parties release each other, and their respective Authorized Representatives, from any Claims for damage and/or injury to any part of the Property, and the Project and Improvements on the Property that are caused by or result from risks insured against under any insurance policies carried by the Parties and in force at the time of any such damage to the extent of the available insurance proceeds. Each Party shall cause each casualty or property damage insurance policy carried by it to be written to provide that the insurance company waives all right of recovery by way of subrogation against either Party in connection with any damage covered by any policy.

ARTICLE VIII **ASSIGNMENT**

8.1 Prohibition Against Assignment. The qualifications and identify of Tenant are of particular concern to Landlord and material considerations for entering into this Lease. Tenant shall not have the right during the Term to assign all or any portion of Tenant's interest in this Lease, the Property, and/or the Project without Landlord's prior approval, which Landlord may withhold in its sole and absolute discretion. The terms "Assignment" and "Assign" are all-inclusive and include any and all assignments or transfers of any right, title, or interest in this Lease except arising from death or otherwise expressly exempt by the provisions of this Lease. In the event that City sells or transfer the Property, it shall assign its rights and obligations under the Lease.

ARTICLE IX **DEFAULT; REMEDIES**

9.1 Remedies. If Tenant at any time shall be in default in the payment of Rent or any other monetary sum called for by this Lease for more than ten (10) days following written notice from Landlord to Tenant, or if Tenant at any time shall be in default in the keeping and performing of any of its other covenants or agreements in this Lease, and should such other default continue for thirty (30) days after written notice thereof from Landlord to Tenant specifying the particulars of such default, or if such other default is of a nature that curing the default will take more than thirty (30) days and Tenant has failed to commence to cure the default within thirty (30) days and diligently pursue completion of such cure, then, in addition to any and all other rights and remedies of Landlord hereunder and by law provided, Landlord may terminate this lease by giving Tenant notice of termination. On the giving of the notice, all Tenant's rights in the Property shall terminate. In addition to the foregoing, any default by Tenant under the DDA or the Joint Use Agreement which is not cured following notice and expiration of any applicable cure periods thereunder shall also constitute a default under this Lease, and upon occurrence of such default, City shall have all remedies available to it under this

Lease, including the right to terminate this Agreement as set forth herein. Promptly after notice of termination, Tenant shall surrender and vacate the Property and shall commence and diligently prosecute the restoration of the Property to its pre-Lease condition as required by Section 2.4 of this Lease. Landlord may reenter and take possession of the Property and all remaining improvements and eject all parties in possession. Termination under this Section shall not relieve Tenant from the payment of any sum then due to Landlord or from any claim for damages previously accrued or then accruing against Tenant.

9.2 Damages. Should Landlord elect to terminate this Lease under the provisions of Section 9.1, Landlord shall be entitled to recover from Tenant as damages an amount, including any attorneys' fees and court costs, necessary to compensate Landlord for all detriment proximately caused by Tenant's default, including, without limitation, costs of removing the Project and Improvements from the Property.

9.3 Landlord's Right to Cure Tenant's Default. Landlord, at any time after Tenant commits a default, can cure the default at Tenant's cost. If Landlord at any time, by reason of Tenant's default, pays any sum, the sum paid by Landlord shall be due immediately from Tenant to Landlord at the time the sum is paid, and if paid at a later date shall bear interest at the maximum rate allowed by law from the date the sum is paid by Landlord until Landlord is reimbursed by Tenant. The sum, together with interest on it, shall be additional rent.

ARTICLE X **INDEMNITY**

10.1 Tenant's Indemnity. Tenant shall Indemnify Landlord and its Authorized Representatives from all Claims arising from or in connection with (a) the conduct or management of the Property or of any business therein, or any work or thing whatsoever done, or any condition created in or about the Property during the Term; (b) any act, omission, or negligence of Tenant or any of Tenant's Authorized Representatives, invitees, and sub-tenants, and their respective Authorized Representatives and invitees; (c) any accident, injury, or damage whatsoever occurring in or at the Property; (d) any breach or default by Tenant in the full and prompt payment of any amount due Landlord under this Lease, and for any breach, violation, or nonperformance of any term, condition, covenant, or other obligation of Tenant under this Lease or any representation made by Tenant; and (e) any liens or encumbrances arising out of any work performed or materials furnished by or for Tenant, including any work Landlord may have performed or caused to be performed for Tenant for which Tenant has not paid Landlord. In the event Landlord, without fault on Landlord's part, is made a party to any litigation commenced by or against Tenant, then Tenant shall Indemnify Landlord from all Claims resulting from such litigation, and shall pay all costs, expenses, and attorney fees incurred or paid by Landlord in connection with such litigation.

ARTICLE XI **MISCELLANEOUS PROVISIONS**

11.1 Holding Over. If Tenant shall hold over the Property after the expiration of the Term with the consent of Landlord, either express or implied, such holding over shall be construed to be only a tenancy from month to month subject to all the covenants, conditions and

obligations contained in this Lease. Tenant hereby agrees to continue payment of all monetary sums (such as taxes, insurance, etc.) which are the Tenant's obligation under this Lease.

11.2 Quiet Possession. Landlord agrees that Tenant, upon paying the Rent and performing the covenants and conditions of this Lease, shall quietly have, hold and enjoy the Property throughout the Term; and Landlord warrants to Tenant that as of the Effective Date there shall be no existing tenancies on the Property.

11.3 Notices. Any notice to be given or other document to be delivered by either Party to the other hereunder shall be in writing and delivered to either Party personally or by depositing same in the United States mail, duly certified, with postage thereon fully prepaid and addressed to the Party for whom intended, as follows:

To Landlord: City of Calistoga
Attn: City Manager
1232 Washington Street
Calistoga, CA 94515

To Tenant: The Boys & Girls Clubs of St. Helena and Calistoga
Attn: Jay Templeton, Executive Director
1420 Tainter Street
St. Helena, CA 94574

Either Party hereto, from time to time by written notice to the other Party, may designate a different address which shall be substituted for the one above specified. Notices shall be effective when received. Any notice or other document sent by certified mail, as aforesaid, shall be deemed received 72 hours after the mailing thereof, as above provided.

11.4 Waiver. No waiver of any breach of any of the terms, covenants, agreement, restrictions or conditions of this Lease shall be construed as a waiver of any succeeding breach of the same or other covenants, agreements, restrictions and conditions hereof.

11.5 Binding. Subject to the restrictions set forth herein regarding assignment of the leasehold estate, each of the terms, covenants and conditions of this lease shall extend to and be binding on and shall inure to the benefit of not only Landlord and Tenant but to each of their respective heirs, administrators, executors, successors and assigns.

11.6 Disclaimer of Partnership. The relationship of the Parties hereto is that of Landlord and Tenant, and it is expressly understood and agreed that Landlord does not in any way or for any purpose become a partner of Tenant or a joint venturer with Tenant in the conduct of Tenant's business or otherwise.

11.7 Interpretation. The titles to the paragraphs of this Lease are not a part of this Lease and shall have no effect upon the construction or interpretation of any part of the Lease.

11.8 Covenants and Conditions. Each term and each provision, including, without limitation, the obligation for the payment of Rent, to be performed by Tenant or Landlord as the case may be, shall be construed to be both a covenant and a condition of this Lease.

11.9 Integration. This Lease, together with the exhibits incorporated by reference, constitutes the entire agreement between the Parties and there are no conditions, representations or agreements regarding the matters covered by this Lease which are not expressed herein.

11.10 Estoppel Certificate. If, upon any sale, assignment or hypothecation of the Property by Landlord, an offset statement shall be required from Tenant, Tenant agrees to deliver within ten days after written request therefor by Landlord, a statement addressed to any such proposed mortgagee or purchaser, or to Landlord, in a form requested by Landlord's mortgagee or purchaser, certifying that this Lease is unmodified and in full force and effect (if such be the case), certifying the commencement and termination dates of the Lease term, certifying that there has been no assignment or sublease of this Lease and that there are no defenses or offsets hereto, or stating those claimed by Tenant, and containing such other information as reasonably may be requested by the Party to whom such certificate is addressed. In the event Tenant fails to deliver such offset statement to Landlord within the ten day period above provided, it shall be deemed that this Lease is in full force and effect and that Tenant has no defenses or offsets against Landlord, and that the other information contained in the requested statement is correct.

11.11 Counterparts. This Lease may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. This Lease shall be deemed executed when each Party notifies the other in writing that a counterpart has been signed by the notifying Party.

IN WITNESS WHEREOF, the Parties have executed this Lease as of the Effective Date.

LANDLORD:

CITY OF CALISTOGA, a municipal corporation

By: _____
Richard Spitler, City Manager

TENANT:

THE BOYS & GIRLS CLUBS OF ST. HELENA AND CALISTOGA, a California nonprofit corporation

By: _____

Name: _____

Its: _____

By: _____

Name: _____

Its: _____

APPROVED AS TO FORM:

By: _____
Michelle Marchetta Kenyon, City Attorney

ATTEST:

By: _____
Kathy Flamson, City Clerk

EXHIBIT A

LEGAL DESCRIPTION OF THE PROPERTY

EXHIBIT F

FORM OF JOINT USE AGREEMENT

This JOINT-USE FACILITY AGREEMENT (“**Agreement**”) is made and entered into as of _____ (the “**Effective Date**”), by and between the CITY OF CALISTOGA, a California municipal corporation (“**City**”), and THE BOYS & GIRLS CLUBS OF ST. HELENA AND CALISTOGA, a California nonprofit organization duly organized and operated under the laws of the State of California (“**Club**”). City and Club may each be referred to as a “**Party**” or collectively as the “**Parties**.”

RECITALS

A. City and Club have entered into that certain Lease Disposition and Development Agreement dated _____, (the “**DDA**”) to set forth the terms and conditions relating to (1) Club’s ground lease of the Property from City; (2) Club’s development of the Project thereon; and (3) the terms under which the Parties would provide for community use of the Project through a Joint Use Agreement. Terms not otherwise defined in this Agreement shall have the meaning set forth in the DDA.

B. Pursuant to the terms of the DDA, City has leased the Property to Tenant subject to the terms and conditions set forth in the Ground Lease.

C. The Club and City desire to set forth the terms of their joint use of the Club Facilities through this Agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual promises, covenants and conditions contained herein, the City and Club agree as follows:

1. Recitals.

The above recitals are true and correct and material to this Agreement.

2. No Conveyance.

This Agreement does not constitute the conveyance of any interest in the Club Facilities, nor does it create any lease in any person.

3. Purpose of Agreement – Applicable Law.

The purpose of this Agreement is for the City and Club to work together to provide for community use of the Club Facilities and to coordinate and schedule uses of the Club Facilities by the City.

4. Use of Club Facilities by City.

(a) The Club hereby grants to the City the right and privilege of using the Club Facilities for public, community and/or recreational purposes in accordance with the terms and conditions of this Agreement and in accordance with applicable law.

(b) The Club and the City agree that they will coordinate the times and programs necessary to allow the best appropriate use of the Club Facilities. The Club will develop a quarterly and annual master calendar with input from City.

(c) Each Party shall be responsible for supervising their own respective activities at the Club Facilities.

5. Scheduling and Use of Club Facilities.

(a) The Club shall be responsible for and shall have the authority to schedule all use of the Club Facilities.

(b) The Club shall give first priority to the City at no cost to City to use the Club Facilities during non-Club hours for City community recreation programs. Second priority shall be for non-profit community groups at reduced cost during non-Club hours. For purposes of this Agreement, "non-Club hours" shall mean any time outside of normal Club operating hours, which are (a) on school days, Monday through Friday from 2 pm to 7 pm, with earlier opening hours on early dismissal days; and (b) on non-school days, such as teacher's in-service days, school holidays or summer days, Monday through Friday from 8 am to 6 pm. The Club will give community organizations, the next priority to the Club Facilities. For the City to exercise its priority on the use of any Club Facility at a particular non-Club time, the City will have to schedule that use with the Club at least 10 days in advance of the use.

(c) The Club shall establish appropriate scheduling systems for the Club Facilities, including a procedure for establishing priorities for various public, civic and/or recreational uses.

6. Maintenance and Repair.

The Club shall provide and pay for regular janitorial service for the Club Facilities and pay for all other costs of operating, maintaining, and repairing the Club Facilities, including structural, electrical, and plumbing maintenance and repairs.

7. Charges for Use of Facility.

The City may charge persons or organizations that participate in recreation programs at the Club Facilities a user fee or a charge for such use. However, the City shall not be charged by the Club for use of Club Facilities for these purposes. Non-profit community groups shall be charged at a reduced cost for their use of the Club Facilities. Otherwise, the Club may charge a reasonable fee for use of the Club Facilities by other persons or entities.

8. Term.

The term of this Agreement shall be for and run concurrently with the term of the Ground Lease.

9. Indemnification and Insurance.

(a) The City agrees to and does hereby indemnify, hold harmless and defend the Club, its governing board, its officers, agents and employees from every claim or demand or expense of any nature whatsoever, including but not limited to injury to or death of person(s) or damage to any property which arises as a result of the negligence or willful misconduct of the City, its officers, agents or employees in the performance of this Agreement.

(b) The Club agrees to and does hereby indemnify, hold harmless and defend the City, its City Council members, its officers, agents and employees from every claim or demand or expense of any nature whatsoever, including but not limited to injury to or death of person(s) or damage to any property which arises as a result of the negligence or willful misconduct of the Club, its officers, agents or employees in the performance of this Agreement.

(c) The City and the Club each agree to maintain comprehensive general liability insurance and all other insurance as set forth in the Ground Lease.

(d) The Club agrees that it shall insure for its full replacement value the premises and all fixtures and equipment in, on, or at the Club Facilities, as set forth in the Ground Lease.

10. Notices.

Any notices to be given hereunder by either Party to the other in writing may be effected either by personal delivery or by mail. Mailed notices shall be addressed to the address of the Party to be notified which appears below, but each Party may change its address by written notice given in accordance with this paragraph. Notices delivered personally will be deemed communicated as of actual receipt. Mailed notices will be deemed communicated and received as of 72 hours following the date of mailing of the notice.

CITY:

City of Calistoga
Attn: City Manager
1232 Washington Street
Calistoga, CA 94515

CLUB:

The Boys & Girls Clubs of St. Helena and
Calistoga
Attn: Jay Templeton, Executive Director
1420 Tainter Street
St. Helena, CA 94574

11. Governing Law.

This Agreement will be governed by and construed in accordance with the laws of the State of California. Any legal action in which enforcement of the terms and conditions of this Agreement is requested, or in which it is alleged that a breach of this Agreement has taken place, shall be filed and prosecuted in the County of Napa, California.

12. Breach of Agreement.

If Club defaults in the performance of any of the terms or conditions of this Agreement, it shall have 30 days after service upon it of written notice of such default in which to cure the default by rendering a satisfactory performance. In the event that the Club fails to cure its default within such period of time, the City shall have the right, notwithstanding any other provision of this Agreement, to terminate this Agreement without further notice and without prejudice to any other remedy to which it may be entitled at law, in equity, or under this Agreement. The failure of City to object to any default in the performance of the terms and conditions of this Agreement shall not constitute a waiver of either that term or condition or any other term or condition of this Agreement. In addition to the foregoing, any default by Club under the DDA or the Ground Lease which is not cured following notice and expiration of any applicable cure periods thereunder shall also constitute a default under this Agreement, and upon occurrence of such default and without any right to further notice or additional cure period the City shall have all remedies available to it under this Agreement, including the right to terminate this Agreement.

If City defaults in the performance of any of the terms or conditions of this Agreement, it shall have 30 days after service upon it of written notice of such default in which to cure the default by rendering a satisfactory performance. In the event that the City fails to cure its default within such period of time, Club shall have the right to pursue an action for specific performance or injunctive relief. The failure of Club to object to any default in the performance of the terms and conditions of this Agreement shall not constitute a waiver of either that term or condition or any other term or condition of this Agreement. In no event shall Club be entitled to any actual, punitive, special or consequential damages.

13. Severability.

If any provision in this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions will nevertheless continue in full force without being impaired or invalidated in any way.

14. Successors and Assigns.

(a) Neither Party may assign its interest in this Agreement without the express written consent of the other Party.

(b) The terms and conditions of this Agreement shall be binding on the successors and assigns of the Parties to this Agreement.

15. Employees.

(a) For purposes of this Agreement, all persons employed in the performance of services and functions for the City shall be deemed City employees and no City employee shall be considered as an employee of the Club under the jurisdiction of the Club, nor shall such City employees have any Club pension, civil service, or other status while an employee of the City.

(b) For purposes of this Agreement, all persons employed in the performance of services and functions for the Club shall be deemed Club employees and no Club employee shall be considered as an employee of the City under jurisdiction of the City, nor shall such Club employees have any City pension, civil service, or other status while an employee of the Club.

16. Recreation Program Costs.

Except as otherwise provided, neither Party shall be responsible to the other Party for the cost of their own recreation programs or the cost of any third party organization which might benefit from a particular aspect of this Agreement. The City covenants and agrees to bear all costs that it incurs in respect to the operation of any City recreation program, including the cost of service of its employees and incidental costs in connection therewith. Club covenants and agrees to bear all costs that incur in respect to the operation of any Club-sponsored activity, including the cost of service of its employees and incidental costs in connection therewith.

17. Applicable Law.

This Agreement shall be governed by and construed in accordance with the laws of the State of California and to the extent that there is any conflict between this Agreement and the laws of the State of California, the laws of the State of California shall prevail.

IN WITNESS WHEREOF, the Club and the City have executed this Agreement as of the date first above written.

[Signatures on the following page]

CITY:

CITY OF CALISTOGA, a municipal corporation

By: _____
Richard Spitler, City Manager

CLUB:

THE BOYS & GIRLS CLUBS OF ST. HELENA AND CALISTOGA, a California nonprofit corporation

By: _____

Name: _____

Its: _____

By: _____

Name: _____

Its: _____

APPROVED AS TO FORM:

By: _____
Michelle Marchetta Kenyon, City Attorney

ATTEST:

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Kathy Flamson, City Clerk