

## AGREEMENT, MUTUAL RELEASE AND COVENANT NOT TO SUE

This Settlement Agreement, Release and Covenant Not to Sue ("**Agreement**") is entered into by and among the Sierra Club, Ventana Chapter ("**SCVC**") and CreekBridge Homes, LLC ("**CreekBridge**"), effective as of April \_\_\_\_, 2008 ("Effective Date"). The entities entering into this Agreement are each referred to herein as "party" and collectively as "parties."

### RECITALS

A. CreekBridge is a California Limited Liability Company seeking to develop the Marina Station Project ("**Marina Station**" or "**Project**"), a mixed-use project on the approximately 320-acre site located at the northern boundary of the City of Marina, as described in Exhibit A ("**Project Site**"). Marina Station includes 1,360 residential units, three neighborhood centers, an office center, an industrial center, parks and open space, and an Olson Elementary School Expansion site located generally along the north boundary of the City of Marina (APN# 203-011-023, 203-011-024, 175-011-038, 175-011-045 and 175-011-046). The Project is depicted and described in the Marina Station Specific Plan and related project approvals consisting of a General Plan Amendment, Zoning Map and Zoning Ordinance Amendment, Vesting Tentative Map, Site and Architectural Design Review, Use Permit, an Environmental Impact Report (EIR), and a Development Agreement (the "**Project Approvals**").

B. SCVC is a non-profit, member-supported, public interest organization that promotes the conservation of the natural environment by influencing public policy decisions - legislative, administrative, legal, and electoral. SCVC is a chapter of Sierra Club California, whose mission is to promote the preservation, restoration, and enjoyment of California's environment, and enable chapters and grassroots activists to speak as one voice to promote California conservation.

C. On February 20, 2008, SCVC submitted a letter to the City of Marina ("City"), together with exhibits consisting of reports, memoranda, correspondence and other documents regarding technical issues relating to the EIR (collectively, the "**SCVC Letter**"). The SCVC Letter alleged that the EIR for Marina Station did not adequately disclose, evaluate or mitigate certain environmental impacts including, without limitation, impacts on biological resources. CreekBridge denied and continues to deny the allegations set forth in the SCVC Letter.

D. Between February 20 and March 4, 2008, representatives of CreekBridge and SCVC met to discuss the issues raised in the SCVC Letter and potential revisions to the Project. Based on these discussions, the parties reached an agreement in principle, which was approved by the President of CreekBridge and by the SCVC Executive Committee, under which CreekBridge agreed to file an application with the City of Marina for specified revisions to the Project and SCVC agreed to withdraw its challenge to the EIR and support the application for revisions. The revisions included relocation of two playing fields from Parcel 3 to Parcel 1 and the expansion of Parcel 1 by approximately 5

acres, resulting in a revised project as shown on Exhibit B, attached. These changes will create a larger buffer between Highway 1 and the new homes on Marina Station and will allow the existing two wet meadow areas on Parcels 1 and 3 to be preserved onsite. The agreement also deals with implementation of provisions concerning the timing and location of habitat restoration.

E. Based upon this agreement in principle, at the City Council meeting of March 4, 2008, CreekBridge requested the City Council to approve the Project in its then-existing form as the proposed revisions will take several months to prepare and will need to be reviewed by the City staff and Planning Commission and then the City Council. CreekBridge also informed the City Council that it was committed to proceeding diligently to prepare and submit an application to amend the Project to incorporate the agreed-upon revisions. SCVC confirmed the existence and terms of the agreement in principle.

F. The City Council unanimously voted to approve the Project Approvals as submitted.

NOW, THEREFORE, based on the above Recitals, which are incorporated into the terms of this Agreement, and in consideration of the mutual terms, conditions and covenants set forth herein, and for other good and valuable consideration, the parties agree as follows.

## AGREEMENT

**1.1 Phase 8 Modifications.** Prior to the approval by the City of the first Final Map for the project, CreekBridge shall diligently prepare and submit an application to the City to revise Phase 8 of the Project to substantially conform to the revised map attached as Exhibit B and incorporated by this reference. These revisions include enlarging Parcel 1, relocation of some of the dwellings on Phase 8, relocation of the remaining displaced dwellings to Phase 7, and relocation of the playing fields from Parcel 3 to Parcel 1, which will allow for preservation of the two wet meadows on site, as depicted on Exhibit B. CreekBridge shall have the right to accept or reject any conditions of approval proposed to be imposed by the City in connection with such applications, provided the final application substantially conforms with the revised map attached as Exhibit B.

**1.2 Habitat Restoration Requirements.** Pursuant to Mitigation Measures 4.4-1 and 4.4-13 within the Mitigation Monitoring and Reporting Program (MMRP) of the Final EIR for the Project, a restoration plan ("**Restoration Plan**") must be prepared by a qualified biologist outlining the details pertaining to onsite and offsite habitat restoration areas to mitigate for the loss of Monterey spineflower, coastal dune scrub and native grassland ("**Habitat Restoration**"). Unless the parties otherwise agree in writing, "qualified biologist" shall mean the consulting firm of Denise Duffy and Associates of Monterey, California. Possible restoration sites identified in the EIR include, in addition to the Project Site, the adjacent Armstrong Ranch, the coastal dune scrub habitat west of Highway 1 either within Monterey Peninsula Regional Park District (MPRPD) land (Marina Dunes Reserve) or under private ownership, and land south of the project site owned by MPRPD adjacent to Locke Paddon Community Park. Additional sites will also be evaluated during the

preparation of the Restoration Plan.

(a) Coastal Dune Scrub and Native Grassland Acreage. Section 4.4-13 of the MMRP requires mitigation for impacts to 33 acres of coastal dune scrub at a 2:1 ratio ( $33\text{ac} \times 2 = 66\text{ac}$ ), and 21 acres of native grassland communities through revegetation, restoration and/or preservation at a 2:1 ratio ( $21\text{ac} \times 2 = 42\text{ac}$ ). The restoration and/or preservation shall be through a bonded program which may be either on- or off-site.

(b) Monterey Spineflower Acreage. Section 4.4-1 of the MMRP requires mitigation for the loss of 51 acres of Monterey spineflower through a bonded program of seed and/or soil bank salvage, establishment of a new spineflower restoration area at a 1:1 ratio ( $51\text{ac} \times 1 = 51\text{ac}$ ). The restoration may be either on- or off-site, and requires a managing and monitoring program to ensure that there will be no net loss of spineflower affected by the Project. The spineflower may be restored either separately or within the above-referenced acreage. (EIR § 4.4-13).

(c) Restoration Plan. Sections 4.4-1 and 4.4-13 of the MMRP provide that the Restoration Plan shall be completed and approved by the City prior to issuance of any grading or building permits for the Project. The portion of the Restoration Plan pertaining to spineflower must also be approved by the City and the U.S. Fish & Wildlife Service ("USFWS") prior to the issuance of any grading or building permits. The parties agree that, consistent with the terms and timelines set forth in this Agreement, CreekBridge will file an application with the City of Marina to amend the EIR and MMRP to provide that the Restoration Plan shall be amended to allow the recording of Final Maps and construction on Phases 1 through 7 of the project, but not Phase 8, prior to the Restoration Plan being approved. Until the Restoration Plan is approved, no grading may occur on Phase 8, except as needed along the edge of Phase 7 to conform to the final grades on Phase 7. Once the Restoration Plan is approved, Phase 8 may be graded to create the final contours and the restoration work may be performed on Phase 8. Only when the Restoration Plan has been successfully implemented on all of the approved Restoration Areas pursuant to the success criteria in the Restoration Plan may CreekBridge apply for a Final Map and building permits for Phase 8 of the Project. SCVC shall support these applications to amend the EIR and MMRP. CreekBridge shall have the right to accept or reject any conditions of approval proposed to be imposed by the City in connection with such applications. CreekBridge, SCVC and the California Native Plant Society shall have the right (but not the obligation) to participate in the creation of the Restoration Plan, but these entities shall not have the legal right to approve or disapprove the Restoration Plan. Only the City of Marina and the USFWS shall have that right, except that any mitigation receiver-site property owner, such as the Monterey Peninsula Regional Park District (MPRPD) would have a legal right to approve the restoration plan along with the City and USFWS. SCVC reserves the right to legally challenge the Restoration Plan approved by the City and USFWS if it believes it to be inadequate.

(d) Success Criteria. The Restoration Plan shall include a monitoring program which describes annual monitoring efforts incorporating success criteria and contingency planning if success criteria for Habitat Restoration on the Restoration Areas described below are not met. Successful implementation shall be deemed to have occurred upon verification by a qualified biologist and City staff, in consultation with USFWS if required by the EIR, that the measures specified in the Restoration Plan have been successfully implemented. Unless the parties otherwise agree in writing, "qualified biologist" shall mean the consulting firm of Denise Duffy and Associates of Monterey, California

**1.3 Onsite Restoration Acreage.** The parties agree that restoration land shall first be designated on the Project Site. The balance of the restoration acreage ("**Remaining Acreage**") shall be located as set forth in Sections 1.4 and 1.5, below.

**1.4 Primary Restoration Area.** The parties agree that, provided appropriate agreements and conservation easements can be timely obtained, as set forth below, the balance of the Remaining Acreage will be established through a conservation easement on land adjacent to and north of Phase 8 on the Armstrong Ranch.

(a) Conservation Easement. The parties shall use diligent, commercially reasonable efforts to obtain the agreement of the Armstrong family to grant a conservation easement for the Remaining Acreage over land adjacent to and north of Phase 8 on Armstrong Ranch for Habitat Restoration. The conservation easement shall be held by a suitable non-profit entity (such as the Big Sur Land Trust) or government agency, which shall bear the cost of obtaining the easement, but shall not be responsible for any Habitat Restoration costs, which shall be borne by CreekBridge.

(b) Timing. The parties shall endeavor to negotiate and obtain the conservation easement on the Armstrong Ranch within two years of the date of recordation of the first final map for the Project ("**Map Recordation Date**"), with the objective of obtaining a completed and approved Restoration Plan within three years of such recordation date. If the parties are unable to obtain a conservation easement for the Remaining Acreage on the Armstrong Ranch within two years of the Map Recordation Date the parties shall pursue Habitat Restoration on the Secondary Restoration Area described below.

(c) Successful Implementation Goal. The parties intend that Habitat Restoration on the Primary Restoration Area and the Project Site shall be successfully implemented through designation of the restoration acreage on the Project Site and establishment of a conservation easement on the Primary Restoration Area within two years, completion and approval of the Restoration Plan within three years, and satisfaction of the success criteria specified in the Restoration Plan within nine years of the Map Recordation Date.

**1.5 Secondary Restoration Area.** If a conservation easement and approved Restoration Plan on the Armstrong Ranch north of the Project are not obtained within the

time specified in Section 1.4(c), the parties shall work together to acquire conservation easements for the Habitat Restoration for the Remaining Acreage on a single off-site State of California or MPRPD parcel within the general Marina area, but if a single restoration site is not obtained with 30 months of the Map Recordation Date, the parties shall pursue obtaining restoration rights on multiple parcels, including but not limited to (i) approximately 30 acres on MPRPD's Marina Dunes Preserve; (ii) approximately 11 acres on MPRPD's Locke-Paddon Park; and (iii) approximately 42 acres of native grassland as determined under the Restoration Plan (collectively, "**Secondary Restoration Area**"). The parties intend that Habitat Restoration on the Secondary Restoration Area and the Project Site shall be successfully implemented -- through designation of the restoration acreage on the Project Site, establishment of conservation easements on the Secondary Restoration Area, completion and approval of the Restoration Plan, and satisfaction of the success criteria specified in the Restoration Plan -- within nine years of the Map Recordation Date.

**1.6 Challenge.** In consideration of CreekBridge's agreement to modify the Project in accordance with this Agreement, SCVC agrees not to challenge the adequacy and legality of the EIR and CEQA process, directly or indirectly, or to or object to, or assist in any opposition or objection to, the Project, and shall not recommend or suggest, publicly or otherwise, any mitigation measures or conditions of approval in connection with the Project that are in addition to or different from those included in this Agreement and those imposed by the City as of the date of this Agreement. SCVC agrees to endorse the efforts, process, and spirit of cooperation of the Project with positive expectation for the success of the Primary Restoration Program. SCVC has not committed to endorsing the Project if the Primary Restoration Program is unsuccessful, but will consider endorsing the Project if the Secondary Restoration Program Plan B is successful. Nothing in this section shall foreclose SCVC from challenging the City's and/or USFWS's approval of the Restoration Plan as described in 1.2(c) above.

**1.7 Withdrawal of Letter.** SCVC agrees that the SCVC Letter shall be deemed formally withdrawn upon full execution of this Agreement.

**1.8 SCVC Release.** Except for the ability to enforce this Agreement, SCVC, for itself, and on behalf of its officers, directors, employees, partners, professionals, agents, insurers, attorneys, predecessors, successors, transferees, lessees, licensees, assigns and affiliates, hereby releases and forever discharges CreekBridge, and each of its officers, directors, employees, partners, professionals, agents, insurers, attorneys, predecessors, successors, transferees, assigns and affiliates of any kind or nature whatsoever from any and all past or presently existing claims, demands, controversies, actions, causes of action, obligations, liabilities, costs, expenses, attorneys' fees, and damages arising out of or relating to the subject matter of the SCVC Letter.

**1.9 CreekBridge Release.** Except for the ability to enforce this Agreement, CreekBridge, for itself, and on behalf of its officers, directors, partners, employees, professionals, agents, insurers, attorneys, predecessors, successors, transferees, lessees, licensees, assigns and affiliates, hereby releases and forever discharges SCVC and each of its officers, directors, employees, partners, professionals, agents, insurers, attorneys, predecessors, successors, transferees, lessees, assigns and affiliates of any kind or nature

whatsoever from any and all past or presently existing claims, demands, controversies, actions, causes of action, obligations, liabilities, costs, expenses, attorneys' fees, and damages arising out of or relating to the subject matter of the SCVC Letter.

**1.10 Covenant Not to Sue.** Each party agrees that it will not commence, maintain, continue or voluntarily assist in any way in the prosecution by any other person or entity, of any claim or cause of action against any other party relating to or based upon any matter waived or released in this Agreement.

**1.11 Attorney Consultation.** The parties acknowledge that they have consulted with independently selected counsel, that they have reached this Agreement in consultation with their counsel, and that the terms of this Agreement have been explained to them by their counsel. The parties further acknowledge that they fully understand the terms of this Agreement, that and that they have executed this Agreement voluntarily, of their own free will and accord, and with advice of counsel. CreekBridge agrees to pay the Sierra Club's legal costs for negotiating and drafting this agreement and the terms of the conservation easement. Said cost not to exceed \$10,000 without written approval from CreekBridge.

**1.12 No Admission.** This Agreement does not constitute and may not be construed as an admission of liability or fault by any party of any fact, issue of law or violation of law, nor will compliance with the Agreement constitute or be deemed an admission by any party of any fact, issue of law or violation of law. This Agreement may not be used as evidence of any wrongdoing, misconduct or liability by any party. The parties agree that neither the fact of execution nor any of the terms of this Agreement shall be admissible in any pending or future proceeding involving the parties, or any of them, except in a proceeding to enforce the terms of this Agreement.

**1.13 Successors.** This Agreement shall be binding upon and for the benefit of the parties released herein, as well as their respective successors, grantees, lessees, devisees, trustees, receivers, executors, representatives and assigns, and each of them.

**1.14 Notice.** If any party to this Agreement is required to, or elects to, give written notice in connection with this Agreement, it shall do so in the manner set forth in this paragraph. Any such written notice shall be sent by both facsimile transmission and reputable overnight courier to each of the following representatives of the parties. Notice shall be deemed to be given and effective on the date fully received by facsimile transmission, if such notice is given by facsimile transmission to all recipients between 9:00 a.m. and 4:00 p.m. on a weekday. If notice is given by facsimile transmission after 5:00 p.m. on a weekday or on a weekend day, notice shall be deemed received on the next succeeding weekday. If the designated recipient or address of any party or its attorney changes, that party should provide notice of that change in conformance with this paragraph.

The persons who are authorized to receive notice are as follows.

**To SCVC:**

Steve Zmak

Executive Committee  
Sierra Club, Ventana Chapter  
(Monterey & Santa Cruz Counties)  
3200 Crescent Ave.  
Marina, CA 93933  
Tel: 831-883-4459

with a copy to:

Mark Wolfe, Esq.  
M.R. Wolfe & Associates  
49 Geary Street, Suite 200  
San Francisco, CA 94108  
Tel: 415-369-9400

**To CreekBridge:**

Hugh P. Bikle  
President  
CreekBridge Homes, LLC  
2093 Landings Drive  
Mountain View, CA 94043  
Tel: 831-628-0826

with a copy to:

Geoffrey L. Robinson, Esq.  
Bingham McCutchen LLP  
1333 N. California Blvd., Suite 210  
Walnut Creek, CA 94596  
Tel: (925) 975-5335

**1.15 Representations and Warranties.** Each party represents and warrants that it has the sole right and exclusive authority to execute this Agreement. Each party represents that it is duly authorized to enter into this Agreement, and each person signing on behalf of an entity represents that he or she is duly authorized to sign on behalf of that entity.

**1.16 Interpretation.** Each party mutually acknowledges that it and its attorneys have participated in the preparation and negotiation of this Agreement. In cases of uncertainty, this Agreement shall be construed without regard to which of the parties caused the uncertainty to exist.

**1.17 Entire Agreement.** This Agreement sets forth the entire understanding of the parties relating to the transactions it contemplates, and supersedes all prior writings, documents, negotiations, proposed agreements, correspondence and understandings

relating to them, whether written or oral. There are no obligations, commitments, representations or warranties relating to them except those expressly set forth in this Agreement.

**1.18 No Third party Beneficiaries.** Nothing in this Agreement, whether express or implied, is intended to confer any benefits, rights or remedies under or by reason of this Agreement on any persons other than the express parties to it, and their respective permitted successors and assigns.

**1.19 Amendments; Waivers.** No amendment of, supplement to or waiver of any obligations under or provisions of this Agreement will be enforceable or admissible unless set forth in a writing signed by the party against which enforcement or admission is sought. No delay or failure to require performance of any provision of this Agreement shall constitute a waiver of that provision as to that or any other instance. Any waiver granted shall apply solely to the specific instance expressly stated.

**1.20 Available Remedies.** If legal action is brought by either party to enforce any term or provision of this Agreement, the full range of remedies available at law or in equity shall be available, including injunctive relief and specific performance.

**1.21 Prevailing party Attorneys' Fees.** If legal action or other proceeding, including but not limited to an arbitration or judicial reference proceeding, and whether in contract, tort or otherwise, is commenced as a result of a dispute which arises under or relates to any provision of this Agreement, the losing party shall pay the prevailing party's actual attorneys' fees, costs, expert witness fees and other expenses incurred in preparation for and conduct of that action or proceeding, appeal of judgment, and enforcement and collection of judgment or award. These fees and expenses include but are not limited to those spent on arbitration, confirming an arbitration award in court and collection of the resulting judgment. All these fees and expenses shall be made part of any judgment or award entered as a result of any dispute arising under or relating to any provision of this Agreement.

**1.22 No Business Relationship.** Nothing contained in this Agreement shall be construed to constitute the parties as partners, joint venturers, co-owners, agents or otherwise as participants in a joint or common undertaking.

**1.23 Counterparts.** The parties may execute and deliver this Agreement in any number of counterparts or copies (which may be transmitted by facsimile), and each counterpart shall be deemed an original and taken together shall be considered to be the entire Agreement.

**1.24 Reasonable Cooperation.** Each party agrees to take any and all reasonable actions requested by any other party to this Agreement that are reasonably necessary for the implementation of this Agreement, provided that no party shall be required under this paragraph to incur any monetary obligation, liability, loss or expense in connection with taking any such action.



IN WITNESS WHEREOF, the parties hereto have executed this Agreement individually or by their duly authorized representatives.

SIERRA CLUB, VENTANA CHAPTER

By:   
Name: Steve Zmak  
Title: Chapter Executive Committee Member

By: \_\_\_\_\_  
Name: Rita Delessio  
Title: Chapter Executive Committee Chair

CREEKBRIDGE HOMES, LLC

By:   
Hugh P. Bikle  
President

1.1 the resulting judgment. All these fees and expenses shall be made part of any judgment or award entered as a result of any dispute arising under or relating to any provision of this Agreement.

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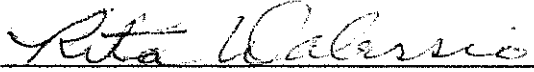
IN WITNESS WHEREOF, the parties hereto have executed this Agreement individually or by their duly authorized representatives.

SIERRA CLUB, VENTANA CHAPTER

By: \_\_\_\_\_

Name: Steve Zmak  
Title: Chapter Executive Committee  
Member

By: \_\_\_\_\_

  
Name: Rita Dalessio  
Title: Chapter Executive Committee Chair

CREEKBRIDGE HOMES, LLC

**EXHIBIT A**

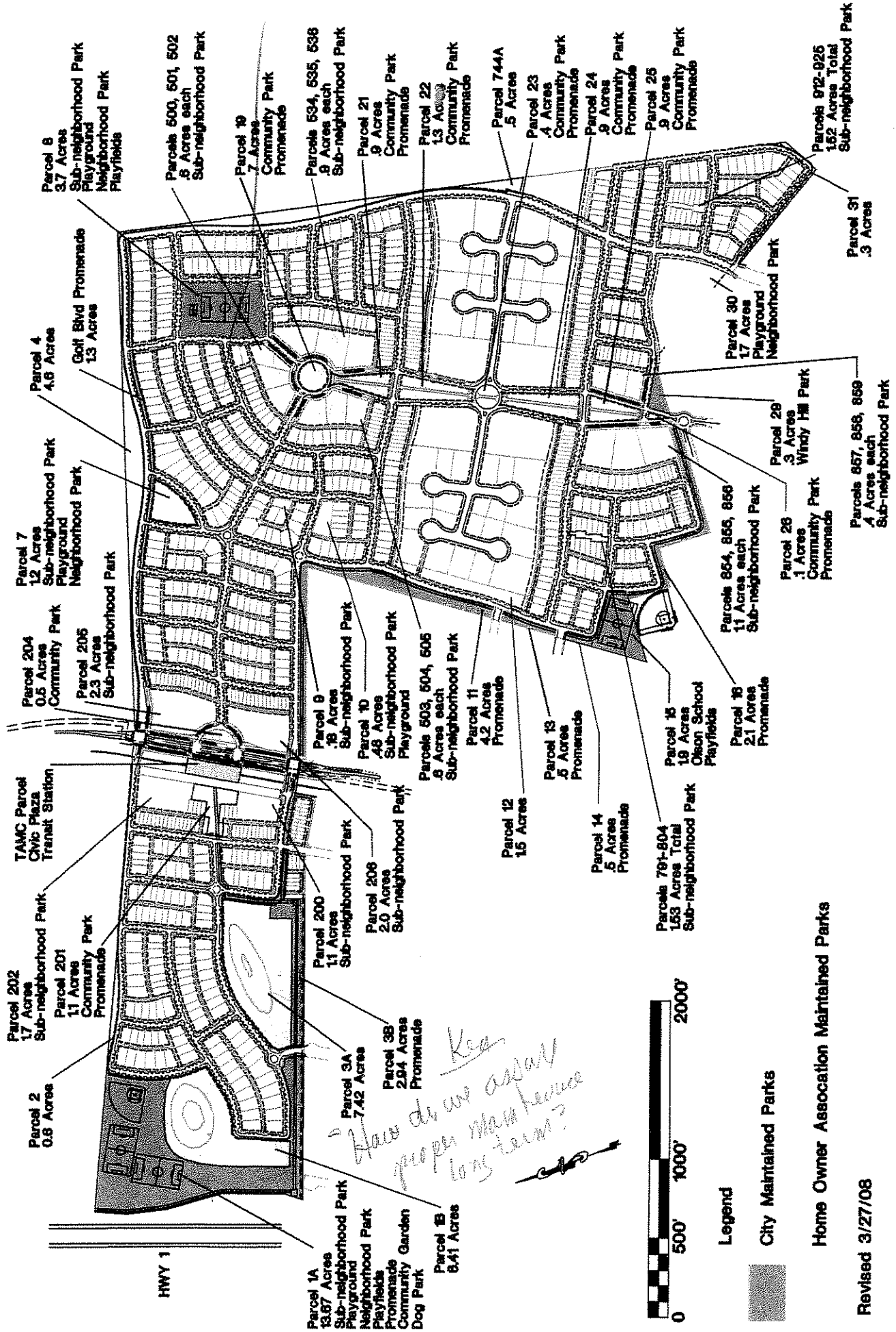
**Legal Description of Project Site**

**EXHIBIT B**

**Map Depicting Project Revisions**

# Park Maintenance

# Exhibit



*How do we assure proper maintenance long term?*

*Ken*

Home Owner Association Maintained Parks

Revised 3/27/08