37.

Recorded in Official Records, Solano County

6/23/2004
9:55 AM
AR55
41

RECORDING REQUESTED BY:

Pacific Bay Homes, LLC]

AND WHEN RECORDED, MAIL TO:
Northern California Operations
Office of Military Facilities
Department of Toxic Substances Control
8800 Cal Center Drive
Sacramento, California 95826
Attn: Rizgar Ghazi

(Request certified copy per Civil Code section 1471, subdivision *(e)* for posting on Department of Toxic Substances Control web sire.)

Skip Thomson
Assessor/Recorder

P PACIFIC BAY HOMES LLC

Doc#: 200400085397

Titles: 1 Pages: 23

Fees	73-00
Taxes	0.00
Other	156.00
PAID	$229.00

Space above this line for Recorder's Use Only

COVENANT TO RESTRICT USE OF PROPERTY
(ENVIRONMENTAL RESTRICTIONS)

THIS COVENANT *AND* AGREEMENT TO RESTRICT USE OF PROPERTY ("Covenant") is made as of the 21 *day* of June, 2004, by and between PACIFIC BAY HOMES, LLC, a Delaware limited liability company ("PBH"), GRANITE MANAGEMENT CORPORATION, a Delaware corporation ("Granite"), FN PROJECTS, INC., a California corporation ("FNP"), the CITY OF BENICIA, California, a municipal corporation ("City"), and the CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY - DEPARTMENT OF TOXIC SUBSTANCES CONTROL (the "Department" or "DTSC" or "Covenantee"). PBH, Granite, FNP and City (collectively referred to as the "Covenantors") and *the* Department, collectively referred to as *the* "Parties", hereby agree that the use of the "Restricted Areas", as defined in paragraph 2.8 below, be restricted as set forth *in* this Covenant.

ARTICLE 1
STATEMENT OF FACTS

1.1 PBH is currently the owner of parcels of real property located in the City of Benicia ("City"), County of Solano, State of California,, and more particularly described as follows:

Parcel "F" as shown on map entitled "Final Map of Southampton Unit D-6," Benicia, Solano *County*, California, filed in the Office of the Recorder, County of Solano, State of California, on August 8, 1997, in Book 67 of Maps at Page 1. [Parcel Number 083-531-170-0.03 acre}

Parcel "G" as shown on map entitled "Find Map of Southampton Unit D-6," Benicia, Solano County, California, filed in the Office of *the* Recorder, County of Solano, State of

California, on August 8, 1997, in Book 67 of Maps at Page 1. [Parcel Number 083-210-280 - 23.05 acres]

Lot Parcel "H" as shown on the map entitled "Final Map of Southampton Unit D-6," Benicia, Solano County, California, filed in the Office of the Recorder, County of Solano, State of California, on August 8, 1997, in Book 67 of Maps at Page 1. [Parcel Number 083-210-290 - 3.52 acres; Parcel Number 083-582-190 - 2.75 acres and Parcel Number 083-571-240 - 3.86 acres]

Parcel "A" as shown on the map entitled "Final Map of Southampton Unit D-5, Benicia, Solano County, California," filed in the Office of the Recorder, County of Solano, State of California, on October 10, 1995, in Book 65 of Maps at Page 74 and amended by a certificate of correction recorded March 26, 1999, Series No. 1999-00025906. [Parcel Number 083-210-260 - 19.18 acres]

Parcel "J" (except for the Open Space Access Pathway, as described below), as shown on the map entitled "Final Map of Southampton Unit D-7", Benicia, Solano County, California, filed in the Office of the Recorder, County of Solano, State of California, on August 8, 1997, in Book 67 of Maps at Page 13 [Parcel Number 083-511-220 - 7.55 acres, Parcel Number 083-521-160 - 8.46 acres]

The Open Space Access Pathway is located between the eastern property line of Lot 33 and the rear property lines of Lots 34 and 35 in Unit 0-7. It will provide access from the future location of McAllister Drive into the open space area in Parcel J. The location of the Open Space Access Pathway is shown generally on the map attached hereto as Exhibit A and incorporated herein by this reference.

City has agreed to accept PBH's dedication of ownership of the real property described above, and the City will accordingly become the owner of such real property following the recordation of this Covenant.

City is currently the owner of parcels of real property located in the City of Benicia, County of Solano, State of California, and more particularly described as follows:

Parcel "A" as shown in the Final Subdivision Map entitled "Southampton Unit D-1, Benicia, Solano County, California," filed in the Office of the Recorder, County of Solano, State of California, on September 17, 1991, in Book 61 of Maps at Page 23. [Parcel Number 083-210-180 - 11.94 acres]

Parcel Lot "B" as shown in the Final Subdivision Map entitled "Southampton Unit D-1, Benicia, Solano County, California," filed in the Office of the Recorder, County of Solano, State of California, on September 17, 1991, in Book 61 of Maps at Page 23. [Parcel Number 083-381-170 - 3.388 acres]

Parcel "A" as shown on the map entitled "Final Map of Southampton Unit D-4, Benicia, Solano County, California," filed in the Office of the Recorder, County of Solano, State of California, on May 4, 1992, in Book 62 of Maps at Page 15. [Parcel 083-210-240 - 18.45 acres]

A portion of the real property described in Exhibit B attached hereto [portion of Parcel 085-220-080, 1.8 acres]. PBH will obtain global positioning system (GPS) coordinates for the portion ofthe real property described in Exhibir B that is a Restricted Area under this Covenant. No later than July 15, 2004, PBH will prepare and record with the Solano County Recorder's Office a document to provide record notice of the GPS coordinates for such Restricted Area portion of the property described in Exhibit B.

Each of the parcels described above is referred to herein individually as an "Open Space Parcel" and collectively with others of them as "Open Space Parcels." These parcels are shown generally on the map attached as Exhibit A.

1.2 A wetland area ("South Valley Wetlands") is located within the Open Space Parcels at the general location shown on the map attached as Exhibit A. *An* area of the South Valley Wetlands shown on Exhibit A is being enhanced as mitigation for the filling of small wetland areas in other parts of the property shown on Exhibit A. Following completion of *the* mitigation wetlands, the South Valley Wetlands will cover approximately 5.198 acres.

1.3 McAllister Drive crosses the South Valley Wetlands at the McAllister Drive Land Bridge ("Land Bridge"). The location of the Land Bridge is shown generally on the map attached as Exhibit A. The general location of the currently paved roads, *gutters*, curbs and sidewalks on the Land Bridge ("Currently Paved Land Bridge Road") *is* also shown on Exhibit A as being part of the Restricted *Area*. In addiuon, copies of the Subdivision Improvement Plans for Unit D-1 (prepared by Bissell & Karn, Inc. *and* dared 7/6/93) ("Unit D-1 Plans") and the Subdivision Improvement Plans for Unit D-6 (prepared by Robert A. Karn and Associates, Inc. and dated 8/28/96) ("Unit D-6 Plans") are on file with the City and copies may be obtained from *the* City at the notice address set forth in paragraph 7.4 below. The Unit D-1 Plans and the Unit D-6 Plans show in more derail the location of the Currently Paved Land Bridge Road. The portion of the road that crosses the Land Bridge within the boundaries of Unit D-1 is paved and constitutes the Currently Paved Land Bridge Road. The remainder of the road crosses the Land Bridge within the boundaries of Unit D-6 and is unpaved. City has not yet accepted the dedication of the Currently Paved Land Bridge Road, but has agreed to accept such dedication after the Ciry confirms *the* Currently Paved Land Bridge Road and related improvements have been constructed in accordance with the requirements of the Unit D-1 Plans. When *the* City accepts the dedication of the Currently Paved Land Bridge Road, the City *shall* become *the* owner of the Currently Paved Land Bridge Raad.

1.4 Exhibit A shows an areas identified as the "D-1 Parcel". In approving the subdivision that includes the D-1 Parcel, the City required the construction of *certain* improvements, including roads, curbs, sidewalks, gutters and utilities. The general location of the roads, *gutters*, curbs and sidewalks lying within the boundaries of the D-1 Parcel ("D-1 Roads") is shown in Exhibit A. The Unit D-1 Plans show in more detail the location of the D-1 Roads. The D-1 Roads and Utilities have been constructed, but, as of the date of this Covenant, the *City* bas nor yet accepted the dedication of the D-1 Roads. PBH *currently* owns the area of the D-1 Parcel where the D-1 Roads *are* located. The City has agreed to accept PBH's dedication of the D-1 Roads to the City after the City confirms that the D-1 Roads and related improvements have been constructed *in* accordance with the requirements ofthe Unit D-1 Plans. When the City accepts the dedication of the D-1 Roads, the Ciry shall become the owner *of* the

D-1 Roads. As shown on Exhibit A, a small portion of McAllister Drive located within Parcel D-1 is identified as a Restricted Area That portion is hereinafter referred to as the "Restricted D-1 Street Area".

1.5 Between 1944 and 1960, the U.S. Army leased real property that has come to be commonly referred to as the Tourtelot Property. The leased property ("Leased Lands") included portions of the Open Space Parcels and Unit D-1 as well as other property. The Army operated such Leased Lands as part of the Benicia Arsenal. In 1996, during preliminary site preparation associated with anticipated development of the Tourtelot Property, concrete filled howitzer shells were unearthed on property owned by FNP that is located within the Leased Lands. FNP and its parent company, Granite, initiated a preliminary investigation for ordnance and explosives(OE) and some OE items were encountered. In 1998, the U.S. Army Corps of Engineers ("USACE") conducted additional investigations within the Leased Lands and located additional OE items. In June 1999, DTSC issued an Imminent and/or Substantial Endangerment Determination and Remedial Action Order ("DTSC Order"). The requirements of the DTSC Order include (among others) the investigation and remediation of OE on the Leased Lands and adjacent lands, including the Restricted Areas (as defined in paragraph 2.8), pursuant to Chapter 6.8 of Division 20 of the Health and Safety Code under the oversight of DTSC. The DTSC Order originally named Granite, FNP, and the U.S. Army Corps of Engineers as Respondents. PBH was added as a Respondent to the Order after PBH purchased from FNP the above described parcels that PBH currently owns.

1.6 The Remedial Action Plan ("DTSC RAP") prepared by DTSC for the Tourtelot Cleanup Project, and approved by DTSC on the date set forth in paragraph 1.8 below, required site clearance activities to locate and remove OE items from the Leased Lands and adjacent properties. As detailed in the DTSC RAP, in order to minimize short-term and potential long-term environmental impacts in a cost-effective manner, the search for buried OE items did not involve excavation of all the soils in the Open Space Parcels in lifts until no OE or OE scrap was found in two consecutive lifts, or bedrock was encountered. Nor was the pavement on the Currently Paved Land Bridge Road or the Restricted D-1 Street Area removed to identify and remove OE items that might be buried beneath the pavement. Based on these search limitations, DTSC determined in the DTSC RAP that the use of the Restricted Areas (as defined in paragraph 2.8 below) for any of the Prohibited Uses (as defined in paragraph 2.7 below) would entail unacceptable health and safety risks from potential accidental detonation of OE. Consequently, the DTSC RAP provides that covenants or similar control mechanisms be provided for the Restricted Areas to limit future use of these areas and establish procedures for workers needing to perform ground-intrusive activities in areas where there is a potential to encounter OE. The Department further concluded that the Restricted Areas, as remediated, and subject to the restrictions of this Covenant and the other institutional controls and monitoring requirements described in the DTSC RAP, do not present an unacceptable threat to human health or safety or to the environment.

1.7 The City's General Plan currently identifies the laud use for the Open Space Parcels as Open Space General, and the City's Zoning Ordinance identifies the parcels as OS (Open Space). Neither the General Plan nor the Zoning Ordinance prohibit all of the Prohibited Uses.

1.8 The Department circulated a draft Remedial Action Plan, together with a draft Environmental Impact Report pursuant to the California Environmental Quality Act, Public Resources Code section 21000 er seq., for public review and comment. The final Environmental Impact Report was certified by the Department on December 19,2001, and the final DTSC RAP was approved by the Department on January 29,2002.

1.9 The DTSC RAP requiresthe preparation of a Contingency Action Plan to set forth the procedures that shall be followed if Excavation Activities (as defined in paragraph 2.3 below) are carried our in any Restricted Areas. The Contingency Action Plan is subject to future amendment. A copy of rhe current Contingency Action Plan dated June, 2004, and approved by the DTSC is on file with DTSC and the City. Any amendments to the Contingency Action Plan that are approved by DTSC will also be maintained on file by DTSC and the City. Copies of the Contingency Action Plan and any amendments to the Plan can be obtained from the City at the address set forth in paragraph 7.4 below.

1.10 The DTSC RAP requires that the Restricted Areas be monitored and maintained to ensure the effectiveness of the remedial actions at the project site. The operation and maintenance (O&M) activities to be included in the Operation and Maintenance Plan ("O&M Plan") include erosion control, slope stability monitoring and wetlands mitigation and other monitoring requirements. The O&M Plan is subject to future amendment. A copy of the current O&M Plan dared June, 2004, and approved by the DTSC is on file with DTSC and the City. Any amendments to the O&M Plan that are approved by DTSC will also be maintained on file by RTSC and the City. Copies of the O&M Plan and any amendments to the Plan can be obtained from the City at the address set forth in paragraph 7.4 below.

1.11 The O & M Plan and Contingency Action Plan shall be implemented pursuant to an Operation and Maintenance Agreement. The Option and Maintenance Agreement is subject to future amendment The Operations and Maintenance Agreement is expected to be executed on or about June 23, 2004. The Operations and Maintenance Agreement and my amendments to the Agreement will be maintained on file by DTSC and the City and can be obtained from the City at the address set forth in paragraph 7.4 below-

1.12 The parties enter into this Covenant pursuant to Civil Code section 1471, Health and Safety Code section 25222.1 and Health and Safety Code section 25355.5(a)(1)(C). Pursuant to Civil Code section 1471(c), the Department has determined that this Covenant is reasonably necessary to protect present or future human health and safety or the environment as a result of the potential presence of hazardous materials, as defined in Health and Safety Code section 25260, in the Restricted Areas. The Department has also determined that such protection is part of the remedy contemplated in the RAP. The Parties therefore intend that the use of the Restricted Areas be restricted as set forth in this Covenant to protect human health, safety and the environment.

ARTICLE 2
DEFINITIONS

2.1 D-1 Roads. "D-1 Roads" shall have the meaning given in paragraph 1.4 above.

2.2 Currently Paved Land Bridge Road. "Currently Paved Land Bridge Road" shall have the meaning given in paragraph 1.3 above.

2.3 Excavation Activities. "Excavation Activities" means excavation or other ground-intrusive activities in the Restricted Areas that would require any digging or other penetration of the land surface that involves: (1) the displacement of 10 cubic feet or more of soil within one foot of the surface on any portion of the Restricted Areas located in Open Space Parcels, (2) any penetration to a depth greater than one foot on any portion of the Restricted Areas located in Open Space Parcels or (3) any penetration beneath the aggregate base that underlies the asphalt and concrete surfaces of the Currently Paved Land Bridge Road or the Restricted D-1 Street Area.

2.4 Occupant(s). "Occupants" means Owners and any person or entity entitled by ownership, leasehold, or other legal relationship to occupy any portion of the Restricted Areas.

2.5 Open Space Parcel(s). Each of the parcels described in paragraph 1.1 above is referred to herein individually as a "Open Space Parcel" and collectively with others of them as "Open Space Parcels."

2.6 Owner(s). "Owner(s)" means the Covenantors and each of their successors in interest, including heirs and assigns, who at any *time* hold fee title to all or any portion of *the* Restricted *Areas*.

2.7 Prohibited Uses. "Prohibited Uses" means the activities prohibited on the Restricted Areas pursuant to paragraph 4.1 below.

2.8 Restricted Areas. "Restricted Areas" means the Open Space Parcels (but excluding the Open Space Access Pathway), the Restricted D-1 Street *Area* and the Currently Paved Land Bridge Road.

2.9 "Resuicted D-1 Street Area" shall have the meaning given *in* paragraph 1.4 above.

ARTICLE 3
GENERAL PROVISIONS

3.1 Restrictions to Run with the Land. This Covenant sets forth protective provisions, covenants, restrictions, and conditions (collectively referred to as "Restrictions"), subject to which *the* Restricted Areas and every portion thereof shall be improved, held, used, occupied, leased, sold, hypothecated, encumbered, and/or conveyed. Each and every Restriction: *(a)* runs with the land pursuant *to* Health and Safety Code sections 25222.1 and 25355.5(a)(1)(C) and Civil Code section 1471; (b) inures to the benefit of and passes with each and every portion of the Restricted *Areas*, (c) is for the benefit of, and is enforceable by the Department, and (d) is imposed upon the Restricted Areas *in* their entirety unless expressly stated as applicable only to a specific portion thereof.

3 2 Binding upon Owners/Occupants. Pursuant to Health and Safety *Code* sections 25222.1 and 25355.5(a)(1)(C), this Covenant binds all Owners, Occupants and their agents and

employees. Pursuant to Civil Code section 1471, this Covenant binds all Owners, Occupants and any other person having any interest in any portion of the Restricted Areas derived through any Owner of the Restricted Areas or any portion thereof. Pursuant to Civil Code section 1471(b), all Successive owners of the Restricted Areas or any portion thereof are expressly bound hereby for the benefit of the Department.

3.3 Written Notice of the Presence of Hazardous Substance. The Owner of the Restricted Areas, or any portion thereof, shall, prior to the sale, lease, or rental of any portion of the Restricted Areas by that Owner, give written notice that there is reasonable cause to believe that OE may be present in the soils below the surface of the Restricted Areas to the buyer, lessee, or renter of the Restricted Area, as required by Health and Safety Code section 25359.7. Owners shall structure any leases or rentals of the real property so that this notice requirement applies to all subleases and rental agreements

3.4 Incorporation into Deeds, Leases and Easements. The Restrictions set forth herein shall be incorporated by reference in each and all deeds, leases and subleases for any portion of the Restricted Areas and in all easements or other instruments that grant any third party the right to engage in any Excavation Activities in Restricted Areas. Furthermore, each Owner or Occupant shall include in any instrument conveying any interest in all or any portion of the Restricted Areas, including but not limited to deeds, leases, easements and mortgages, a notice which is in substantially the following form:

> NOTICE: THE INTEREST CONVEYED HEREBY IS SUBJECT TO AN ENVIRONMENTAL RESTRICTION AND COVENANT TO RESTRICT USE OF PROPERTY, RECORDED IN THE OFFICE OF THE RECORDER, COUNTY OF SOLANO, STATE OF CALIFORNIA ON JUNE __, 2004, IN BOOK __, PAGE __, IN FAVOR OF AND ENFORCEABLE BY THE CALIFORNIA DEPARTMENT OF TOXIC SUBSTANCES CONTROL.

3.5 Conveyance of Restricted Areas. The conveying Owner shall provide notice to the Department not later than thirty (30) days after any conveyance of any ownership interest in the Restricted Areas (excluding mortgages, liens, and other non-possessory encumbrances). The Department shall not, by reason of this Covenant, have authority to approve, disapprove, or otherwise affect proposed conveyance, except as otherwise provided by law, by administrative order, or by a specific provision of this Covenant.

ARTICLE 4
RESTRICTIONS

4.1 Prohibited Uses. The Restricted Areas, or any portion thereof, shall not be used for any of the following Prohibited Uses:

(a) a residence, including any mobile home or factory built housing, constructed or installed for use as residential human habitation;

(b) a hospital for humans;

(c) a public or private school for persons under 21 years of age;

(d) a day care center for children;

(e) park activities and facilities of a type requiring construction of equipment or facilities that would require Excavation Activities in Restricted Areas, including, by way of example, tor lots, play lots, playgrounds, playfields and par course equipment;

(f) camping;

(g) construction of any structure (as defined in Section 220-S of the 1998 California Building Code, attached hereto as Exhibit C) to be used for commercial or industrial purposes; or

(h) Excavation Activities [unless performed in accordance with section 4.3 herein].

4.2 Soil Management. The soil management activities that the DTSC RAP requires to be performed within the Restricted Areas include erosion control, slope stability monitoring, wetlands monitoring and mitigation, and monitoring for unauthorized or improperly performed Excavation Activities. Soil management activities shall be performed pursuant to the Operation and Maintenance Agreement referred to in paragraph 1.1 above.

4.3 Excavation Activities. Excavation Activities shall be authorized or undertaken in accordance with the requirements set forth in paragraphs 4.4 through 4.7 herein

4.4 Authorization to Proceed. The Contingency Action Plan describes policies, permit requirements, internal procedures and other controls that the City will use to ensure that Excavation Activities in Restricted Areas by City employees, City Contractors or third parties have been properly authorized and that the persons who will conduct the excavation have been made aware of the procedures that the Contingency Action Plan requires be followed for excavation in the applicable Restricted Area. The City has agreed in the Operations and Maintenance Agreement to use these tools ("Authorization Tools") in processing approvals or permits for Excavation Activities in Restricted Areas.

4.5 Contingency Action Plan. During any Excavation Activities in a Restricted Area, the Owner of such Restricted Area shall comply with all of the requirements of the then current Contingency Action Plan referred to in paragraph 1.9 above.

4-6 City Notice to DTSC Regarding Changes to Authorization Tools. The City shall notify DTSC in writing at the notice address set forth in paragraph 7.4 at least thirty (30) days prior to any proposed change to the Authorization Tools and shall obtain the DTSC's written approval before implementing such proposed change.

4.7 City to Report to DTSC. Beginning in the first full calendar year after the Covenant is executed, the City will file a written report with DTSC as required by the O&M Plan and the Operations and Maintenance Agreement providing information to DTSC regarding any approvals or permits the City has granted to conduct Excavation Activities in Restricted Areas,

the approximate volume of materials removed during Excavation Activities, a description of any OE items that were detected and the treatment or disposal method used for the OE items.

4.8 Changes in Land Use Designation or Zoning. An Owner shall not request, support or authorize any change in the land use designation or zoning of the Restricted Areas that is inconsistent with the Prohibited Uses unless the written approval of the DTSC is obtained; provided, however, that this paragraph 4.8 shall not be interpreted to preclude the City from carrying out any legally required action, including (but not limited to) processing ballot initiatives relating to changes in land use designations or zoning in the manner required by applicable law.

4.9 Access for Department. The Department shall have reasonable right of entry and access to the Restricted Areas for inspection, monitoring, and other activities consistent with the purposes of this Covenant, as deemed necessary by the Department in order to protect the public health or safety, or the environment. Department personnel who enter the Restricted Areas for these purposes shall comply with all reasonable security, safety, and sanitation measures specified by the Owner.

4.10 Access for Implementing Operation and Maintenance. The entity or person responsible for implementing the operation and Maintenance Agreement shall have reasonable right of entry and access to the Restricted Areas for the purpose of implementing the Operation and Maintenance Agreement until the Department determines that no further Operation and Maintenance is required. The entity or person implementing the Operation and Maintenance Agreement shall comply with all reasonable security, safety, and sanitation measures specified by the Owner.

4.11 Non-interference with Environmental Monitoring Sampling Points. The following restrictions shall apply to all Owners and Occupants of the Restricted Areas:

(a) Activities that may disturb the environmental monitoring sampling points (e.g. excavation, grading, removal, trenching, filling, earth movement, or mining) shall not be permitted on or within 100 feet of any sampling point located in the Restricted Areas without prior review and approval by the Department. The Department shall respond to requests for such approval within twenty (20) days of a written request. Notwithstanding the foregoing, in the event of an emergency situation which requires more rapid action to protect public health and safety or the environment than the foregoing process would allow, such prior approval shall not be required. In such circumstance, the City or other Owner of the affected Restricted Areas shall endeavor to give telephonic notice to the Department as promptly as reasonably possible.

(b) All uses and development of the Restricted Areas shall preserve the integrity and physical accessibility of the environmental monitoring sampling points.

(c) Environmental monitoring sampling points located within the Restricted Areas shall not be altered without written approval by the Department.

(d) The Owner or Occupant shall notify the Department of each of the following; (i) the type, cause, location and estimated date of any damage any environmental monitoring sampling point located within the Owner's portion of the Restricted Areas and (ii) the type and date of repair of such damage. Notification to the Department shall be made as provided below within ten (10) working days of both the discovery of any such disturbance and the completion of any repairs. Notification of the discovery shall include a schedule for implementing repairs. Repairs shall be completed within 30 days of discovery unless a longer time is authorized in writing by DTSC. Timely and accurate notification by any Owner or Occupant shall satisfy these requirements on behalf of all other owners and Occupants.

ARTICLE 5
ENFORCEMENT

5.1 Enforcement. Failure of any Covenantors or any Owner or Occupant to comply with any of the Restrictions specifically applicable to it shall be grounds for the Department to require that the breaching Covenantor or Owner or Occupant: (1) cease and remedy any Prohibited Uses of the Restricted Areas; (2) modify or remove any Improvements installed or used for any Prohibited Uses ("Improvements" herein shall mean all buildings, mads, driveways, park facilities and paved parking areas) constructed or placed upon any portion of the Restricted Areas in violation of the Restrictions and (3) cease and remedy any Excavation Activities not performed in accordance with paragraph 4.3 herein. Violation of this Covenant shall be grounds for the Department to file civil or criminal actions as provided by law.

ARTICLE 6
VARIANCE, TERMINATION, AND TERM

6.1 *Variance*. Covenantors, or any other aggrieved person, may apply to the Department for a written variance from the provisions of this Covenant. Such application shall be made and processed in accordance with Health and Safety Code section 25233.

6.2 Termination. Covenantors, or any other aggrieved person, may apply to the Department for a termination of the Restrictions or other terms of this Covenant as they apply to all or any portion of the Restricted Areas. Such application shall be made and processed in accordance with Health and Safety Code section 25234.

6.3 Term. Unless ended in accordance with the Termination paragraph above, by law, or by the Department in the exercise of its discretion, this Covenant shall continue in effect in perpetuity.

ARTICLE 7
MISCELLANEOUS

7.1 No Dedication Intended. Nothing set forth in this Covenant shall be construed to be a gift or dedication, or offer of a gift or dedication, of the Restricted Areas, or any portion thereof to the general public or anyone else for any purpose whatsoever.

7.2 Department References. All references to the Department include successor agencies/departments or other successor entity.

7.3 Recordation. The Covenantors shall record this Covenant, with all referenced Exhibits, in the County of Solano within ten (10) days of the Covenantors' receipt of a fully executed original and provide proof of recording to the Department within ten (10) days. The Department shall notify the Benicia Planning and Building Department of the recorded covenant pursuant to Health and Safety Code section 25220(d).

7.4 Notices. Whenever any person gives or serves any Notice ("Notice" as used herein includes any demand or other communication with respect to this Covenant), each such Notice shall be in writing and shall be deemed effective: (1) when delivered, if personally delivered to the person being served or to an officer of a corporate party being served, or (2) three (3) business days after deposit in the mail, if mailed by United States mail, postage paid, certified, return receipt requested:

Notice to City:

City of Benicia
Attention: City Manager and City Attorney
250 East L Street
Benicia, CA 94510
Telephone Number for Telephonic Notices: 707-746-4200

Notice to DTSC:

Northern California operations
Office of Military Facilities
Department of Toxic Substances Control
8800 Cal Center Drive
Sacramento, California 95826
Attn: Rizgar Ghazi, Project Manager for Tourtelot Cleanup Project
Telephone Number for Telephonic Notices: (916) 255-3610

Notice to USACE:

United States Army Corps of Engineers
Attention: John Esparza
1325 J Street
Sacramento, CA 95814-2922
Telephone Number for Telephonic Notices: 916-557-5100

Notice to PBH, Granite and FNP (while PBH retains ownership of any Restricted Area):

Pacific Bay Homes, LLC,
Granite Management Company and
FN Projects, Inc.

Attention: Southampton Hills Project Manager
Suite 500
4041 MacArthur Boulevard
Newport Beach, CA 92660
Telephone Number for Telephonic Notices: 949-440-7200

Any party may change its address, telephone number or the individual to whose attention a Notice is to be sent by giving written Notice in compliance with this paragraph.

7.5 Partial Invalidity. If any portion of the Restrictions or other term set forth herein is determined by a court of competent jurisdiction to be invalid for *any* reason, the surviving portions of this Covenant shall remain in full force and effect as if such portion found invalid had not been included herein

7.6 Statutory References. All statutory references include successor provisions.

7.7 Authority to Bind Party. Each signatory to this Covenant certifies *that* he or she is fully authorized by the party he or she represents to enter into this Covenant, to execute it on behalf of the party represented and legally to bind that party.

7.8 Counterparts. This Covenant may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. The parties authorize each other to detach and combine original signature pages and consolidate them into a single identical original. Any one of such completely executed counterparts shall be sufficient proof of this Covenant.

IN WITNESS WHEREOF, the undersigned have duly executed this Covenant as of the day and the year first hereinabove set forth.

PACIFIC BAY HOMES, LLC, a Delaware limited liability company
By
Richard Lewnau
Its Vice President

GRANITE MANAGEMENT CORPORATION, a Delaware corporation
By
Richard Lewnau
Its Vice President

FN PROJECTS, INC., a California corporation
By
Richard Lewnau
Its Vice President

CITY OF BENICIA

By: _____
James R. Erickson, City Manager

APPROVED AS TO FORM:

_____
Heather McLaughlin, City Attorney

DEPARTMENT OF TOXIC SUBSTANCES CONTROL

By: _____

Printed Name: _____

Its _____
Title

CITY OF BENICIA

By: _____
James R. Erickson. City Manager

APPROVED AS TO FORM:

_____
Headier McLaughlin, City Attorney

DEPARTMENT OF TOXIC SUBSTANCES CONTROL

By: Frederick S. Moss

Printed Name: Frederick S. Moss

Its Chief, Office of Military Facilities
Title

STATE OF MICHIGAN

COUNTY OF WAYNE

On JUNE 21, 2004 before me, GALE A. POTEMPA, NOTARY PUBLIC
Name and Title of Officer

personally appeared RICHARD LEWNAU,
Name(s) of Signer(s)

__ personally known to me -or- __ proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acred, executed the instrument.

WITNESS my hand and official seal.

Gale A. Potempa
Signature of Notary Public.

[SEAL]

GALE A. POTEMPA
Notary Public, Macomb County, Michigan
Acting in Wayne County
My Commission Expires September 17, 2007

STATE OF MICHIGAN

COUNTY OF WAYNE

On JUNE 21, 2004 before me, GALE A. POTEMPA, NOTARY PUBLIC
Name and Title of Officer

personally appeared RICHARD LEWNAU,
Name(s) of Signer(s)

__ personally known to me -or- __ proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the insurument the person(s) or the entity upon behalf of which the person(s) acred, executed the instrument.

WITNESS my hand and official seal.

Gale A. Potempa
Signature of Notary Public.

[SEAL]

GALE A. POTEMPA
Notary Public, Macomb County, Michigan
Acting in Wayne County
My Commission Expires September 17, 2007

STATE OF MICHIGAN

COUNTY OF WAYNE

On JUNE 21 2004 before me, GALE A. POTEMPA. NOTARY PUBLIC

Name and Title of Officer

personally appeared RICHARD LEWIAD

Name(s) of Signer(s)

__ personally known to me -or- __ proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Gale A. Potempa

Signature of Notary Public.

GALE A. POTEMPA
Notary Public, Macomb County, Michigan
Acting in Wayne County
My Commission Expires September 17, 2007

[SEAL]

STATE OF _____

COUNTY OF _____

On _____ before me, _____,

Name and Title of Officer

personally appeared _____,

Name(s) of Signer(s)

__ personally known to me -or- __ proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

_____

Signature of Notary Public.

[SEAL]

STATE OF California

COUNTY OF Solano

On 06/22/2004 before me, Diane L Henry, Notary Public,

Name and Title of Officer

personally appeared James R rickson and Heather C McLaughlin,

Name(s) of Signer(s)

X personally known to me -or- __ ~~proved to me on the basis of satisfactory evidence to be the~~ person(s) whose name(s) *ware* subscribed to the within instrument and acknowledged to me that ~~he/she/they~~ executed the ~~same~~ in ~~his/her/their~~ authorized capacity(ies), and *that* by ~~his/her/their~~ signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed *the* instrument.

DIANE L. HENRY
Commission # 1484013
Notary Public - California
Solano County
My Comm. Expires May 18, 2008

[SEAL]

WITNESS my hand and official seal.

Diane L Henry
Signature of Notary Public.

STATE OF _____

COUNTY OF _____

On _____ before me, _____,

Name and Title of Officer

personally appeared _____,

Name(s) of Signer(s)

__ personally known to me -or- __ proved to me on *the* basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

_____
Signature of Notary Public.

[SEAL]

STATE OF California

COUNTY OF Sacramento

On June 21, 2004 before me, Kathleen Duncan
Name and Title of Officer

personally appeared Frederick L. Maas,
Name(s) of Signer(s)

✓ personally known to me -or- __ proved to me on the basis of satisfactory evidence to *be* the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged *to* me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, *executed* the instrument.

WITNESS my hand and official seal.

Kathleen Duncan
Signature of Notary Public.

[SEAL]:

KATHLEEN DUNCAN
Commission # 1324887
Notary Public - California
Sacramento County
My Comm. Expires Oct 28, 2005

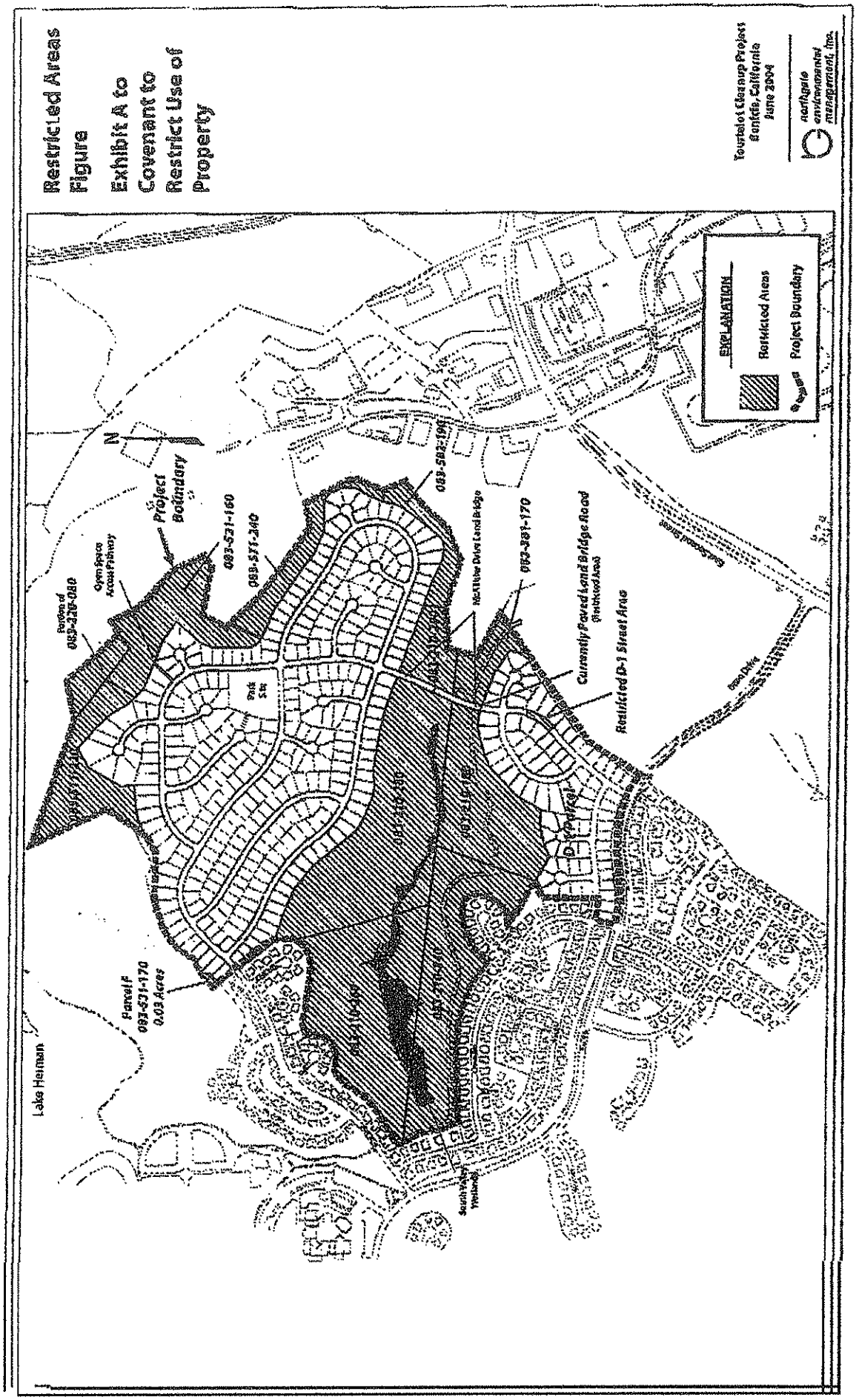
Restricted Areas Figure
Exhibit A to Covenant to Restrict Use of Property
Tourtelot Cleanup Project
Benicia, California
June 2004
Harlgarie environmental management, inc.
EXPLANATION
Restricted Areas
Project Boundary
N
Project Boundary
Lake Herman
Parcel P
083-531-170
0.03 Acres
Restricted D-1 Street Area
Currently Paved Land Bridge Road (Restricted Area)
083-582-190
083-531-160
083-571-240
Open Space Access Pathway
Portion of 083-220-080

EXHIBIT 8

LEGAL DESCRIPTION

Real property in the City of Benicia, County of Solano, State of California, described as follows:

Beginning at the most southerly corner of said Tract A, said point of beginning also being an angle paint on the westerly line of the Borges Ranch as said Ranch is shown on a Record of Survey filed in the Office of the County Recorder of Solano County, California, 2 December, 1960 in Book 7 of Surveys ar Page 57, said point of beginning also being a point on the northerly line of a parcel ofbnd acquired by Benicia Associates of California and Washington by Deed recorded 21 July, 1961 in Book 1090 of Official Records of Solano County, California at Page 597, Instrument No. 15737; thence along the northerly line of said Benicia Associates, North 60° 16' West, 2015.64 feet; North 62° 07' West, 844.14 feet; North 61° 23' West, 1281.72 feet; and North 60° 25' West, 79.20 feet to the easterly line of a parcel of land acquired by Anthony Borges by Deed recorded 25 November, 1941 in Book 251 of Official Records of Solano County, California at Page 42, Instrument No. 11152; thence along said easterly line North 26° 00' East, 130.00 feet; North 24° 25' East, 2244.00 feet; thence North 24° 17' East, 1306.70 feet to a point approximately 100 feet South of Lake Herman Road, also known as County Road No. 133; thence South 88° 34' 28" East, 1058.01 feet; South 66" 25' East, 1725.00 feet; South 81° 20' East, 1500.00 feet; South 68° 00' East, 1760.00 feet; South 55° 45' East, 1065.00 feet to the westerly line of that parcel of land acquired by Benicia Associates of California and Washington by Deed recorded 29 May, 1962 in Book 1143 of official Records of Solano County, California at Page 155, Instrument No. 13459; thence along said westerly line South 5° 06' East, 642.92 feet; South 34° 14' East, 791.34 feet; thence leaving said westerly line South 53° 44' West, 116.49 feet to the most easterly corner of Tract 4 as said Tract is described in the Deed recorded 1 August, 1950 in Book 540 of Official Records at Page 481, Instrument No. 9821, Solano County Records; thence along the bounds of said Tract 4, South 85° 42' West, 322.00 feet; North 51° 32' West 244.00 feet; North 34° 30' West, 282.00 feet; North 61° 42' West, 426.00 feet; South 23° 13' West, 297.00 feet; South 72° 10' East, 274.00 feet; thence South 28° 36' East, 688.38 feet to the most southerly paint of said Tract 4, being also a point on the boundary line of a parcel acquired by Benicia Associates of California and Washington by Deed recorded 3 October, 1961 in Book 1102 of Official Records of Solano County, California, at Page 70, Instrument No. 21660; thence along the bounds of said Benicia Associates Parcel South 54° 44' West, 229.81 feet; North 53° 16' West, 627.66 feet; North 72° 21' West, 912.12 feet; South 32° 23 West, 31.02 feet; South 27° 37' East, 547.80 Feet; South 31° 45' West, 837.54 feet; South 58° 05' East, 260.04 Feet; thence South 24° 35' West, 692.34 feet to the northerly line of the hereinbefore referred to Record of Survey; thence along the northeasterly line of said Record of Survey North 60° 20' West 370.92 feet; North 63" 16' West, 239.58 feet, North 60° 53' West, 1075.14 feet; thence South 280 40' West, 1320.00 feet to the point of beginning.

EXCEPTING THEREFROM:

That portion deeded to First Nationwide Bank, recorded January 3, 1990 as Instrument No. 90-466, Official Records, further described as follows:

From the point of beginning, said point king the southerly terminus of the line designated as "N. 25° 19' 02" E, 691.73"" on the Record of Survey filed June 24, 1981 in Book 15 at Page 72 of Surveys, Solano County Records, along the northwesterly line of the 110.010 acre parcel as shown on said Record of Survey North 25° 19' 02" East, 691.73 feet; thence, North 57° 20' 58" West, 259.81 feet; thence, North 32° 29' 02" East, 561.81 feet; thence, leaving said northwesterly line South 79° 36' 00" West, 68.44 feet; thence, South 37° 00' 00" West, 117.00 feet; thence, South 64° 00' 00" West, 80.00 feet; thence North 88° 20' 00" West, 256.70 feet;

EXHIBIT B

LEGAL DESCRIPTION

Real property in the City of Benicia, County of Solano, State of California, described as follows:

Beginning at the most southerly corner of said Tract A, said point of beginning *also* being an angle paint on the westerly line of the Borges Ranch as said Ranch is shown on a Record of Survey filed in the Office of the County Recorder of Solano County, California, 2 December, 1960 in Book 7 of Surveys at Page 57, said point of beginning also being a point on the northerly line of a parcel of land acquired by Benicia Associates of California and Washington by Deed recorded 21 July, 1961 in Book 1090 of Official Records of Solano County, California at Page 597, Instrument No. 15737; thence along the northerly line of said Benicia Associates, North 60° 16' West, 2015.64 feet; North 62° 07' West, 844.14 feet; North 61° 23' West, 1281.72 feet; and North 60" 2S West, 79.20 feet to the easterly line of a parcel of land acquired by Anthony Borges by Deed recorded 25 November, 1941 in Book 251 of Official Records of Solano County, California at Page 42, Instrument NO. 11152; thence along said easterly fine North 26° 00' East, 130.00 feet; North 24° 25' East, 2244.00 feet; thence North 24° 17' East, 1306.70 feet to a point approximately 100 Feet South of Lake Herman Road, also known as County Road No. 133; thence South 88° 34' 28" East, 1058.01 feet; South 66° 25' East, 1725.00 feet; South 81° 20' East, 1500.00 feet; South 68° 00' East, 1760.00 feet; South 55° 45' East, 1065.00 feet to the westerly line of that parcel of land acquired by Benicia Associates of California and Washington by Deed recorded 29 May, 1962 in Book 1143 of Official Records of Solano County, California at Page 155, Instrument No. 13459; thence along said westerly line South 5" 05' East, 642.92 feet; South 34° 14' East, 79134 feet; thence leaving said westerly line South 53° 44' West, 116.49 feet to the most easterly corner of Tract 4 as said Tract is described in the Deed recorded 1 August, 1950 in Book 540 of Official Records at Page 481, Instrument No. 9821, Solano County Records; thence along the bounds of said Tract 4, South 85° 42' West, 312.00 feet; North 51° 32' West, 244.00 feet; North 34° 30' West, 282.00 feet; North 61° 42' West, 426.00 feet; South 23° 13' West, 297.00 feet; South 72° 10' East, 274.00 feet; thence buth 28° 36' East, 688.38 feet to the most southerly point of said Tract 4, being also a point on the boundary line of a parcel acquired by Benicia Associates of California and Washington by Deed recorded 3 October, 1961 in Book 1102 of Official Records of Solano County, California, at Page 70, Instrument No. 21660; thence along the bounds of said Benicia Associates Parcel buth 54° 44' West, 229-81 feet; North 53° 16' West, 627.66 feet; North 72° 21' West, 912.12 feet; South 32° 25' West, 31.02 feet; South 27° 37' East, 547.80 Feet; South 31° 45' West, 837.54 feet; South 58° 05' East, 260.04 feet; thence South 24° 35' West, 692.34 feet to the northerly lint of the hereinbefore referred to Record of Survey; thence along the northeasterly line of said Record of Survey North 60° 20' West, 370.92 feet; North 63° 16' west, 239.58 feet; North 60° 53' West, 1075.14 feet; thence South 28° 40' West, 1320.00 feet to the paint of beginning.

EXCEPTING THEREFROM.

That portion deeded to First Nationwide Bank, recorded January 3, 1990 as Instrument No. 90-466, Official Records, further described as follows:

From the point of beginning, said point being the southerly terminus of the line designated as "N. 25° 19' 02" E., 691.73"" on the Record of Survey piled June 24, 1981 in Book 15 at Page 72 of Surveys, Solano County Records, along the northwesterly fine of the 110.010 acre parcel as shown on said Record of Survey North 25° 19' 02' East, 691.73 feet; thence, North 57° 20' 58" West, 259.81 feet; thence, North 32° 29' 02" East, 561.81 feet; thence, leaving said northwestarly line South 79" 36' 00" West, 68.44 feet; thence, South 37° 00' 00" West, 117.00 feet; thence, South 64° 00' 00" West, 80.00 feet; thence North 88° 20' 00" West, 256.70 feet;

:hence, South 72° 06' 00" West, 214.36 feet; thence, South 57° 00'00" West, 100.00 feet; chence, South 46° 00' 00" West, 295.00feec; thence, buth 50° 07' 57" West, 335.03 Feet; thence South 63° 30' 00" West, 70.00 Feet; thence South 87° 30' 00" West, 60.76feet to a point on the northeasterly line of the 505.244 acre parcel as shown on the Record of Survey filed December 2, 1960 in Book 7 at Page 67 of Surveys, Solano County Records; thence, along said northeasterly line South 60° 07' 15" East, 534.61feer; thence, South 62° 50' 15" East, 239.59 feet; thence, South 59° 54' 15' East, 370.92 feet to the point of beginning.

ALSO EXCEPTING THEREFROM:

All that portion of the following described property that lies within the herein above described property, as follows:

Beginning at the most easterly corner of Lot 123 of "Southampton Unit C-7" as shown in Book 57 of Maps at Page 17, Solano County Records, chence along said "Southampton, Unit C-7" North 09° 11' 35" West, 409.56 feet; thence leaving said Subdivision North 39° 29' 30" East, 75.00 feet; thence North 50° 30' 30" West, 198.94 feec; thence along the arc of a curve to the right, the radius point of which bears North 39° 29' 30" East, 30.50 Feet, through a central angle of 152° 59' 30", an arc length of 82.51; chence along the arc of a reverse curve to the left, the radius point of which bears North 14° 29' 00" East, 590.50 feet, through a central angle of 17° 47' 57", an arc length of 183.44 Feet; thence North 86° 41' 03" East, 116.59 feer; thence along the arc of a curve to the right, the radius point of which bears buth 03° 18' 57" East, 349.50 feet, through a central angle of 127° 10' 54", an arc length of 775.80 feet; chence South 33° 51' 57" West, 234.44 Feet, to a point on the northerly right of way of Rose Drive as shown in Book 61 of Maps at Page 92, Solano County Records; thence westerly along the arc of a curve to the left, the radius point of which bears South 31° 12' 38" West, 572.00 feet, through a central angle of 17° 50' 23", an arc length of 178.10 feet; thence North 76° 37' 45" West, 174.37 feet to the point of beginning, containing an area of 7.945 acres, more or less.

APN: 083-220-080

EXHIBIT C

Under Section 220-S of the 1998 California Building Code, a "Structure" is that which is built or constructed, an edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner.

35003\6000\384581.1

Government Code 27361.7

I certify under penalty *of* perjury that the notary seal on the document to which this statement is attached reads as follows:

Name of Notary DIANE HENRY

Commission Number 1484013

Commissioned in SOLANO COUNTY

Date Commission Expires 5-15-08

Vendor ID number N/A

Date: 6-23-04

X

By:

PACIFIC BAY HOMES

Firm Name (if any)