

RECORDING REQUESTED BY AND  
WHEN RECORDED RETURN TO:

City of Hercules  
111 Civic Drive,  
Hercules, CA 94547

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Area Above Reserved for Recorder's Use

## AMENDED ENCROACHMENT EASEMENT AND AGREEMENT

STATE OF CALIFORNIA  
CONTRA COSTA COUNTY  
CITY OF HERCULES

THIS ENCROACHMENT EASEMENT AND AGREEMENT (this "***Easement***") is made, dated, and entered into as of the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by and between the City of Hercules, a California municipal corporation ("***City***"), and Hercules Development Partners, a limited partner company ("***HDP***").

### R E C I T A L S

A. City is the owner of that certain real property located in the City of Hercules and identified as Lot 26, John Muir Parkway, and Lot 34, Bayfront Boulevard (collectively, "***Lots 26 & 34***"), which lots are a portion of "Parcel D" as said parcel is shown on that certain map entitled "Parcel Map MS 476-00," filed October 12, 2000, in Book 179 of Parcel Maps 38, 39, and 40 (179 PM 38) ("***Parcel D***"), in the office of the Contra Costa County Recorder; and

B. HDP is the owner of that certain real property located in the City of Hercules identified as Lot 25, which is also a portion of Parcel D, as more particularly described on **Exhibit A** attached hereto and incorporated herein by this reference (the "***HDP Lot***"), upon which the HDP's mixed-use building (the "***HDP Building***") shall be located; and

C. HDP desires to construct exterior overhead frontage structures on the second floor and above on the HDP Building facing northeast towards Lot 26 and northwest towards Lot 34 (collectively, the "***HDP Overhead Structures***," and each individually a "***HDP Overhead Structure***"); and

D. Each HDP Overhead Structure will encroach onto Lots 26 & 34 as depicted on **Exhibit B** attached hereto and incorporated herein by this reference; and

E. City, as the owner of Lots 26 & 34, desires to grant certain easement rights over Lots 26 & 34 in order to allow HDP, as the owner of the HDP Lot, to install, maintain, repair, replace and use the HDP Overhead Structures; and

F. HDP, as the owner of the HDP Lot, desires to execute this Easement for the purpose of acknowledging the terms of its use of Lots 26 & 34 for the installation, maintenance, repair, replacement and use of the HDP Overhead Structures.

## A G R E E M E N T

NOW, THEREFORE, in consideration of the premises; to enhance and protect the value of Lots 26 & 34 and the HDP Lot; and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, City does hereby grant, bargain, and convey unto HDP, its successors, heirs, and assigns the following easements, rights, covenants, and undertakings pursuant to which Lots 26 & 34 and the HDP Lot shall be owned, conveyed, transferred, occupied, and used:

1. Incorporation of Recitals. The foregoing Recitals A through F shall constitute an integral part of this Easement, and this Easement shall be construed in accordance therewith.

2. Establishment of HDP Overhead Structures Easement. City hereby grants, bargains, and conveys to HDP, as owner of the HDP Lot, a non-exclusive, perpetual right, privilege, and easement to install the HDP Overhead Structures over Lots 26 & 34 in the locations shown on Exhibit B, attached hereto and incorporated herein by this reference (the “**HDP Overhead Structures Easement**”).

The HDP Overhead Structures Easement shall include, but not be limited to, the right of construction, maintenance, repair, use, and operation of the HDP Overhead Structures by HDP within the portion of Lots 26 & 34 shown on Exhibit B. The HDP Overhead Structures shall be considered a portion of the HDP Building for *ad valorem* property tax purposes.

3. Maintenance of HDP Overhead Structures. The owner of the HDP Lot shall be solely responsible for the maintenance, repair, and replacement of the HDP Overhead Structures. The City shall have the right to enter the building located upon the HDP Lot in order to inspect the HDP Overhead Structures after providing reasonable prior written notice to the owner of the HDP Lot, unless the City has reasonable cause to believe that a health or safety risk to Lots 26 & 34 is posed by the HDP Overhead Structures, in which case no prior notice shall be required, but City shall inform the owner of the HDP Lot thereof in writing as soon as reasonably possible thereafter. Should HDP fail to repair the HDP Overhead Structures within thirty (30) days after receipt of written notice (or such longer period of time as is reasonably necessary, so long as HDP promptly commences and diligently pursues the repair), or in the case of a health or safety risk to Lots 26 & 34, ten (10) days (or such longer period of time as is reasonably necessary, so long as HDP promptly commences and diligently pursues the repair), the City shall have the right to take reasonable measures to eliminate the health or safety risk posed to Lots 26 & 34. The owner of the HDP Lot shall be responsible for the actual, out-of-pocket costs of such measures, and the provisions of Section 4 herein may also be applicable. Exercising this right shall not limit or waive any other rights or remedies the City may have under this Easement.

4. Insurance and Indemnification.

a. Insurance. The owner of the HDP Lot agrees to maintain, on a primary basis and at its sole expense, at all times during the life of this Agreement, the following applicable coverages and limits. The requirements contained herein, as well as City's review or acceptance of insurance maintained by the owner of the HDP Lot, is not intended to and shall not in any manner limit or qualify the liabilities or obligations assumed by the owner of the HDP Lot under this Agreement.

Commercial General Liability – Combined single limit of no less than \$1,000,000 each occurrence and \$2,000,000 aggregate. Coverage shall not contain any endorsement(s) excluding nor limiting Product/Completed Operations, Contractual Liability or Cross Liability. The owner of the HDP Lot shall endorse the City as an Additional Insured on the Commercial General Liability policy. The Additional Insured endorsement shall read 'City of Hercules as its interest may appear.'

Umbrella or Excess Liability – Annual Aggregate limits on Umbrella of Excess Liability policies shall not be less than the highest 'Each Occurrence' limit for required policies. The owner of the HDP Lot shall endorse City of Hercules as an 'Additional Insured' on the Umbrella or Excess Liability policy, unless the Certificate of Insurance states the Umbrella or Excess Liability provides coverage on a "Follow-Form" basis.

Certificate of Insurance – The owner of the HDP Lot shall provide a Certificate of Insurance to City evidencing that all coverages, limits, and endorsements required by this Easement are maintained and in full force and effect. If the owner of the HDP Lot receives a non-renewal or cancellation notice from an insurance carrier affording coverage required herein, or receives notice that coverage no longer complies with the insurance requirements herein, the owner of the HDP Lot shall notify the City within five (5) business days with a copy of the non-renewal or cancellation notice, or written specifics as to which coverage is no longer in compliance. The Certificate Holder address should read:

City of Hercules  
Attn: Planning Department  
111 Civic Drive  
Hercules, California 94547

b. Indemnification. To the maximum extent allowed by law, the owner of the HDP Lot shall defend, indemnify, and hold harmless Indemnitees (hereinafter defined) from and against all Charges (hereinafter defined) that arise in any manner from, in connection with, or out of this Easement as a result of acts or omissions of the owner of the HDP Lot or its contractors or anyone directly or indirectly employed by any of them, or, as determined by a court of law, anyone for whose acts any of the forenamed may be liable. In performing its duties described in the preceding sentence, the owner of the HDP Lot shall at its sole expense defend Indemnitees with legal counsel reasonably acceptable to City. Notwithstanding the foregoing, in no event shall the owner of the HDP Lot be required to defend, indemnify, or hold harmless the Indemnities for any Charges arising directly as a result of the negligence or willful misconduct of any of the

Indemnitees. As used in the preceding sentences of this paragraph: (i) “***Charges***” means claims, judgments, costs, damages, losses, demands, liabilities, fines, penalties, settlements, and expenses included without limitation within interest and reasonable attorneys’ fees assessed as part of any such item; and amounts for alleged violations of environmental laws, regulations, ordinances, rules, or orders, and (ii) “***Indemnitees***” means City and its officers, officials, agents, and employees, excluding the owner of the HDP Lot. Nothing in this Section 4(b) shall affect any warranties, rights, or duties in favor of the City that are otherwise provided in or arise out of this Easement. This Section 4(b) is in addition to and shall be construed separately from any other indemnification provisions that may be in this Easement. This Section 4(b) shall remain in force despite termination of this Easement (whether by expiration of the term or otherwise).

5. Covenants Running with the Land. The HDP Overhead Structures Easement and the easements, rights, covenants, and undertakings contained within this Easement shall run with the land and be appurtenant to, and for the benefit of, the owner of the HDP Lot and shall be a burden upon the title to Lots 26 & 34. Any conveyance of the HDP Lot or Lots 26 & 34, or any portions thereof, shall be subject to the HDP Overhead Structures Easement and the easements, rights, covenants, and undertakings contained in this Easement, and, at the time of conveyance, the grantor in any deed of conveyance shall be relieved of future obligations thereafter arising by the owners of the lot or property interest so conveyed, but the grantor in any deed of conveyance shall not be relieved of obligations that are based on acts, omissions, or events that occurred before the time of conveyance. Any grantee of HDP or the City, as applicable, or their successors, heirs, or assigns, by recordation of a deed or other instrument of transfer or conveyance, shall be deemed to have assumed the obligations under this Easement with respect to such lot (Lot 26, Lot 34, and/or the HDP Lot, as the case may be).

6. Amendment and Termination. This Easement may be modified, amended, or terminated only by written agreement of the owners of the HDP Lot and the owners of Lots 26 & 34, and shall be duly acknowledged in a manner suitable for and effective upon recording in the Office of the Register of Deeds of Contra Costa County, California. In addition, should the HDP Overhead Structures be removed and not replaced by the owner of the HDP Lot (or its authorized agents) for a period of ten (10) consecutive years, this Easement shall be terminated upon recording a notice of termination in the Office of the Register of Deeds of Contra Costa County. This Section 6 is subject to Section 13 (Performance of Government Functions).

7. Governing Law. This Easement shall be governed by and construed in accordance with the laws of the State of California without regard to principles of conflict of laws.

8. No Public Dedication; No Third Party Beneficiaries or Consents. This Easement is not intended, and shall not be construed: (a) as a dedication to the public of any interests in the HDP Overhead Structures described herein; (b) to give any member of the public, or any person, entity, or party other than as provided herein, any right whatsoever herein or therein; or (c) to require any consent or other action of any other person, entity, or party other than as expressly provided herein to any amendment to or waiver of any provision of this Easement.

9. Severability. This Easement is intended to be performed in accordance with, and only to the extent permitted by, all applicable laws, ordinances, rules, and regulations. If any provision of this Easement or the application thereof to any person or circumstance shall, for any reason and to any extent, be invalid or unenforceable, but the extent of such invalidity or unenforceability does not destroy the basis of the bargain expressed herein, the remainder of this Easement and the application of such provision to other persons or circumstances shall not be affected thereby, but rather shall be enforced to the greatest extent permitted by law.

10. Compliance Certificate. Upon the written request of the owner of the HDP Lot or Lots 26 & 34, or the holder of any first lien deed of trust or first lien mortgage on any such parcel, any such owner shall execute, have acknowledged, and deliver a certificate stating whether, to the knowledge of the signatory party, the requesting party is otherwise in compliance with this Easement.

11. Waiver. This Easement may not be waived orally or impliedly, but only by written document executed by the party against which such waiver is sought. Neither the failure of a party to complain of any violation of this Easement, regardless of how long such failure continues, nor the failure of a party to invoke (or the election by a party not to invoke) any right, remedy, or recourse for a violation hereof, shall waive the rights, remedies, and recourses of the party with respect to such violation. No waiver by a party of any provision of this Easement shall be deemed to be a waiver of any other provision hereof.

12. Rights Cumulative. All rights, powers, and privileges conferred hereunder shall be cumulative and in addition to, and not to the exclusion of, those provided at law or in equity.

13. Performance of Government Functions. Nothing contained in this Easement shall be deemed or construed to in any way estop, limit, or impair the City from exercising or performing any regulatory, policing, legislative, governmental, or other powers or functions, including the power of eminent domain.

14. Authority to Perform. City covenants that it has done nothing to impair title to Lots 26 & 34 in any manner that would impair, in part or in whole, City's ability to perform its obligations under this Easement.

15. Counterparts. This Easement may be executed in one or more counterparts, each of which shall be deemed to be an original and all of which taken together shall be considered as one and the same instrument.

16. Headings. The paragraph headings in this Easement are for convenience only, and shall in no way define or limit the scope or content of this Easement, and shall not be considered in any construction or interpretation of this Easement or any part thereof.

17. Notice.

a. All notices and other communications required or permitted by this Easement shall be in writing and shall be given either by personal delivery, fax, or certified United States mail, return receipt requested, addressed as follows:

To the City:

City Manager  
City of Hercules  
111 Civic Drive  
Hercules, California 94547  
Fax: (510) 799-2521

To HDP:

Hercules Development Partners, LP  
c/o Leducor Properties, Inc.  
114 Pacifica, Suite 100  
Irvine, California 92618

b. A change of address, fax number, or person to receive notice may be made by either party by notice given to the other party. Any notice or other communication under this Easement shall be deemed given at the time of actual delivery, if it is personally delivered or sent by fax. If the notice or other communication is sent by United States mail, it shall be deemed given upon the third calendar day following the day on which such notice or other communication is deposited with the United States Postal Service or upon actual delivery, whichever first occurs.

18. Confirmation of Grant of Easement. City as grantor hereby expressly grants to HDP as grantee the Overhead Structures Easement and all privileged and appurtenances thereunto.

[illegible]

I, a Notary Public of \_\_\_\_\_ County, State of California certify that \_\_\_\_\_ (the “Signatory”) personally came before me this day and acknowledged that she is the City Clerk of the City of Hercules, California, and that by authority duly given and as the act of said City, the foregoing instrument was signed in its name by the Mayor of the City of Hercules, California, and attested by them as City Clerk to the City of Hercules, California.

Witness my hand and official stamp or seal, this the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

My Commission Expires: \_\_\_\_\_

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	<p><b>HDP/GRANTEE:</b></p> <p><b>Hercules Development Partners, LP</b> a California limited partner company</p> <p>By: Hercules Development, Incorporated, its General Partner</p> <p>By: _____</p> <p><b>Patrick B. Patterson,</b> <b>Chief Operating Officer, Development</b></p>
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STATE OF CALIFORNIA

COUNTY OF \_\_\_\_\_

I certify that the following person(s) personally appeared before me this day, each acknowledging to me that he or she voluntarily signed the foregoing document for the purpose stated therein and in the capacity indicated:

Patrick B. Patterson, Senior Vice President

Date: \_\_\_\_\_ Official Signature of Notary: \_\_\_\_\_

Notary's printed or typed name:

\_\_\_\_\_

My commission expires: \_\_\_\_\_

**(MUST BE FULLY LEGIBLE)**

**(Notarial Stamp/Seal)**



## EXHIBIT "A"

### **LEGAL DESCRIPTION**

Real property in the City of Hercules , County of Contra Costa, State of California, described as follows:

BEING A PORTION OF PARCEL D AS SAID PARCEL IS SHOWN ON THAT CERTAIN MAP ENTITLED "PARCEL MAP MS 476-00", FILED OCTOBER 12, 2000, IN BOOK 179 OF PARCEL MAPS AT PAGES 38, 39, AND 40 (179 PM 38), IN THE OFFICE OF THE RECORDER OF CONTRA COSTA COUNTY, SAID PORTION BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE INTERSECTION OF THE SOUTHERLY RIGHT OF WAY LINE OF BAYFRONT BOULEVARD (PUBLIC RIGHT OF WAY VARIES) AND THE SOUTHWESTERLY RIGHT OF WAY LINE OF JOHN MUIR PARKWAY (PUBLIC RIGHT OF WAY VARIES) AS SAID BOULEVARD AND PARKWAY ARE DESCRIBED AS PARCEL 34 AND PARCEL 26, RESPECTIVELY, IN THE GRANT DEED TO THE CITY OF HERCULES RECORDED JULY 27, 2012, AS DOCUMENT NUMBER 2012-0178483-00 (2012-178483), CONTRA COSTA COUNTY RECORDS; THENCE SOUTHEASTERLY ALONG SAID SOUTHWESTERLY RIGHT OF WAY LINE OF JOHN MUIR PARKWAY THE FOLLOWING TWO (2) COURSES: 1) SOUTH 37°46'59" EAST 372.32 FEET; 2) ALONG A CURVE TO THE LEFT HAVING A RADIUS OF 373.00 FEET THROUGH A CENTRAL ANGLE OF 13°43'19", AN ARC DISTANCE OF 89.33 FEET TO THE NORTHEASTERLY LINE OF CREEKSIDE TRAIL AS SAID TRAIL IS DESCRIBED AS PARCEL 13 IN SAID GRANT DEED (2012-1782483); THENCE LEAVING SAID SOUTHWESTERLY RIGHT OF WAY LINE OF JOHN MUIR PARKWAY ALONG SAID NORTHEASTERLY LINE THE FOLLOWING THREE (3) COURSES: 1) NORTH 74°39'05" WEST 539.71 FEET; 2) ALONG A CURVE TO THE RIGHT HAVING A RADIUS OF 186.00 FEET THROUGH A CENTRAL ANGLE OF 37°41'14", AN ARC DISTANCE OF 122.34 FEET TO THE BEGINNING OF A COMPOUND CURVE HAVING A RADIUS OF 256.00 FEET; 3) ALONG SAID COMPOUND CURVE HAVING A RADIUS OF 256.00 FEET THROUGH A CENTRAL ANGLE OF 11°20'17", AN ARC DISTANCE OF 50.66 FEET TO THE AFOREMENTIONED SOUTHERLY RIGHT OF WAY LINE OF BAYFRONT BOULEVARD AND A POINT ON A CURVE, CONCAVE NORTHERLY, HAVING A RADIUS OF 367.00 FEET, FROM WHICH THE CENTER BEARS NORTH 01°40'05" WEST; THENCE EASTERLY ALONG THE LAST SAID LINE THE FOLLOWING TWO (2) COURSES: 1) ALONG SAID CURVE THROUGH A CENTRAL ANGLE OF 17°11'31", AN ARC DISTANCE OF 110.12 FEET; 2) NORTH 71°08'24" EAST 261.47 FEET TO THE POINT OF BEGINNING.

APN: 404-730-004-3

# EXHIBIT "B"

