

## OPERATING LEASE

This OPERATING LEASE (“Lease”) is entered into as of the 13th day of October, 2004, by and between the OHLONE COMMUNITY COLLEGE DISTRICT, a public agency (“College”), and the EAST BAY REGIONAL PARK DISTRICT, a California Special District (“Park”).

### RECITALS

**WHEREAS**, College owns certain real property adjacent to Park’s Mission Peak Regional Preserve; and

**WHEREAS**, College may enter into leases with political subdivisions of the State of California pursuant to the provisions of Sections 81430-81433 of the California Education Code;

**WHEREAS**, Park may enter into leases of real property pursuant to Section 5540 of the California Public Resources Code;

**WHEREAS**, College and Park desire to enter into this Lease to allow Park to utilize the property for public park, and recreation uses.

**NOW THEREFORE**, subject to the terms and conditions set forth herein, the parties agree as follows:

1. Premises.

College hereby leases to Park, and Park leases from College, the real property and any improvements thereon located in the County of Alameda, State of California (“Premises”), as depicted on Exhibit A, which is attached hereto and incorporated herein by this reference.

Exhibit A represents the best readily-available description of the Premises. The parties acknowledge, however, that it is not as complete and up-to-date as they would prefer. The parties agree to use Exhibit A until a new survey is completed. College will be responsible for the costs of a new survey and preparation of the description and map.

2. Effective Date.

This Lease shall take effect on December 1, 2004 (“Effective Date”), and supersedes any prior lease existing between the parties or their predecessors.

3. Term.

This Lease is for a term of ten years (“Lease Term”) from the Effective Date (i.e., until November 30, 2014), unless sooner terminated as provided herein.

4. Termination.

This Lease may be terminated:

- (1) By Park without cause on ninety days (90) advance written notice to College;
- (2) By College without cause on ninety days (90) advance written notice to Park.
- (3) By College immediately upon the occurrence of an event of default as provided in Section 22; or
- (4) Upon the mutual agreement of College and Park.

5. Use.

The Premises may be used by Park only for the purpose of maintaining, controlling, improving, and operating a public park, and recreational facility (“Permitted Use”). Park may not use the Premises for any other use other than the Permitted Use without College’s prior written consent, which consent may be withheld by College in its sole discretion.

(a) Restrictions on Use.

Park agrees not to construct or operate facilities or permit uses on the Premises which are not compatible with a recreational facility and agrees not to permit or institute any use or activity, although within the general definition of recreational uses, which would materially interfere or conflict with general public use of the area. Park agrees not to construct or operate facilities or permit uses within the subject property that will materially interfere with College’s use of the adjacent College lands for purposes of operating a community college. Park shall not commit or permit any damage, nuisance or waste on the Premises; nor place or permit to be placed upon the Premises any gasoline, diesel fuel, oil, other petroleum products, or any hazardous or explosive material, waste or substance.

(b) Regulatory Approvals.

Park shall undertake any environmental study required by, and shall satisfy any other requirements imposed by, any governmental body having jurisdiction over the Premises or Permitted Use for any Park activities or projects. Park shall pay all costs and expenses associated with any conditions imposed on approval by any such governmental body.

(c) Compliance with Laws.

Park shall comply with all applicable laws, regulations, rules and orders with respect to Park’s use and/or improvement of the Premises, regardless of their effective date, including, without limitation, those relating to construction, grading, signage, health, disability accommodation (including the Americans with Disabilities Act), safety, noise, environmental protection, waste disposal, and water and air quality. Park shall furnish satisfactory evidence of such compliance upon request of College.

(d) Prior Rights.

This Lease is made subject to all licenses, leases, easements, restrictions, conditions, covenants, encumbrances, liens, and claims of title that may affect Premises in effect as of the Effective Date of the Lease. The word "Lease" may not be construed as a covenant against the existence of any of these. Park hereby acknowledges the title of College to the Premises and agrees never to assail or resist said title.

(e) Priority Uses.

Upon one week's prior written notice, College may have temporary priority use of the Premises for classes and activities such as, but not limited to, ecology, botany, zoology, geology, nature education, including associated activities. Temporary research equipment, study plot markers, etc., may be installed at user's risk, but must not obstruct any approved trail to be maintained by Park for public use. To the extent it may legally do so, College agrees to save harmless Park and its officers, directors, and employees from and against any and all claims arising out of College's priority use of the Premises except for claims caused by gross negligence or willful misconduct of Park, its officers, directors or employees.

(f) College Use.

Park accepts this Lease with the express knowledge that College may propose uses by College on, around, under or over the Premises. In the event College determines that it needs to obtain possession of all or a portion of the Premises, or needs to place restrictions on Park's use of the Premises, College shall give Park sixty (60) days notice prior to the date Park must vacate the Premises, a portion of the Premises or restrict the Permitted Use. If College requires only a portion of the Premises, this Lease shall continue in full force on the remainder of the premises; provided, however, that the entire Premises shall be deemed unusable if the extent and nature of College's activities substantially impairs Park's use of the balance of the Premises and this Lease shall terminate.

(g) Right of Entry.

College shall have the right to enter and repair Premises at any time it is open to the public.

6. Condition of Premises.

(a) "AS IS" Condition.

College leases the Premises to Park on an "AS IS," with all faults, basis and Park acknowledges that College has made no representations of any kind in connection with soils, improvements, or physical conditions on the Premises, or bearing on Park's use of the Premises, whether express or implied.

(b) Inspections.

Park has been in possession of the Premises pursuant to leases from College and is therefore familiar with the condition of the Premises. Park has investigated all matters with respect to taxes, operating expenses, insurance costs, bonds, permissible uses, historical uses, zoning, covenants, conditions and restrictions and all other matters which in Park's judgment

might bear upon the value and suitability of the Premises for Park's purposes or Park's willingness to enter into this Lease. Park acknowledges that College has made no representations and warranties regarding these matters, whether express or implied, and that Park has relied on its own inspections and examinations in entering into this Lease.

7. Considerations.

In lieu of rent, College desires that Park construct a safe trail head access to replace use of the drainage ditch as access, within nine (9) months. Park agrees that any maps that it publishes and distributes will clearly label the leased property as belonging to the College and will state that said property is subject to future college expansion.

Park agrees to provide the College with a report showing revenues received by Park from activities related to the Premises and expenditures by the Park on maintenance and improvement of the Premises. This report shall be provided to the Board of Trustees by the General Manager annually, on or before September 15<sup>th</sup>.

8. Notices.

All notices, payments, or other communications by either party to the other under this Lease shall be in writing and shall be deemed to have been given or made on the date of service if served personally or on the second business day after mailing if mailed to the party to which notice is to be given by first class mail, postage prepaid and properly addressed as follows:

To College: Office of the Vice President - Business Services  
Ohlone Community College District  
43600 Mission Boulevard  
Fremont, CA 94539-5844  
Attention: Deanna Walston

To Park: Land Department  
East Bay Regional Park District  
2950 Peralta Oaks Court  
P.O. Box 5381  
Oakland, CA 94605-0381  
Attention: Land Acquisition Manager

Either party may change its address by providing written notice to the other as provided herein.

9. Alterations.

Park shall not make or suffer to be made any alterations, additions or improvements (collectively "Alterations") in, on, or to the Premises without the prior written consent of College. Park shall be responsible for the construction of new trails and/or the reconstruction of existing trails within the subject property provided that Park shall present its plans therefor to College for its review and written approval prior to the commencement of any such work. Routine maintenance of existing trails is also the responsibility of Park; however, such work will not require prior notification to College before it is undertaken. Any Alterations Park is

permitted to make shall be made by Park at Park's sole cost and expense except as the parties may otherwise expressly agree in writing. Prior to commencement of construction of the Alterations, Park shall deliver to College, and obtain the College Board's approval of, a detailed construction plan for the Alterations. Prior to commencement of construction, Park shall also obtain and deliver to College copies of all city, county, and/or other regulatory permits required for construction of the Alterations. Park shall keep the Premises free and clear of all liens of any kind. Park shall give College at least 10 days prior written notice of commencement of any work on Alterations, so that College may post appropriate notices of non-responsibility. If any Alteration will cost \$20,000 or more, Park shall require the contractor to furnish Park a payment bond and a performance bond, each in an amount not less than the contract price. College shall be named as co-obligee on the performance bond. College shall have the right to enter onto the Premises and to inspect construction of the Alterations during construction. All Alterations and fixtures, whether temporary or permanent in character, made in or upon or added to the Premises by Park shall be College's property at the end of the Lease Term without compensation to Park, subject to the provisions of Section 24.

10. Maintenance and Repair.

Park shall keep the Premises, including any improvements located thereon, in safe condition and in good order, condition and repair at all times during the Lease Term at Park's sole cost and expense in a manner consistent with other Park facilities. Park shall, at Park's sole expense, repair any area damaged by Park, Park's agents, employees and visitors. Park acknowledges that College is under no duty to repair or make improvements to the Premises. If Park fails to perform Park's obligations under this Section 10, College may, after 10 days prior written notice to Park (except in the case of an emergency, in which case no notice shall be required), perform such obligations on Park's behalf and expense as provided in Section 23 (a). At the end of the Lease Term, Park shall surrender the Premises to College in the same condition as when received.

11. Liens.

Park shall not permit any mechanics' or materialmen's liens, or other liens (collectively, "Liens") to be filed against the Premises nor against Park's leasehold interest therein by reason of labor or materials furnished to the Premises at Park's instance or request. If any such liens are filed against the Premises, Park shall cause the same to be discharged of record either by payment of the claim or by posting and recording the bond contemplated by California Civil Code Section 3143, within 20 days after demand by College. Park shall indemnify, hold harmless, and defend College from and against any such liens.

12. Indemnification.

Park shall indemnify, save, protect, defend, and hold harmless, College, its boards, officers, employees, agents and contractors from and against any and all loss, liability, expense, claims, costs, suits and damages, including attorney's fees, arising out of or connected with the Premises or its use by any person other than College and their officers, employees, agents or contractors.

College shall indemnify, save, protect defend, and hold harmless Park, its boards, officers, employees, agents and contractors from and against any and all loss, liability, expense,

claims, costs, suits and damages, including attorney's fees, arising out of or connected with use of the Premises by College or College's officers, employees, agents or contractors.

The provisions of this Section shall survive the expiration or termination of this Lease.

13. Environmental Impairment.

If during the term of this Lease, Park knows or has cause to believe that any Hazardous Materials, as defined below, have come to be located in, on, under or about the Premises, other than as previously consented to by College, Park shall immediately give College written notice thereof, together with a copy of any statement, report, notice, registration, application, permit, business plan, license, claim, action or proceeding given to, or received from, any governmental authority or private party concerning said Hazardous Materials.

Should any discharge, leakage, spillage, or emission of any Hazardous Materials, as defined below, or pollution of any type occur upon or from the Premises during the Term, Park, at Park's expense, shall clean all property affected thereby to the satisfaction of College (insofar as the property owned or controlled by College is concerned) and any governmental body having jurisdiction thereover.

Park shall indemnify, hold harmless, and defend each and all of the Indemnitees from and against all liability claims, costs and expenses (including, without limitation, any fines, penalties, judgments, litigation costs, attorneys fees, and consulting, engineering and construction costs) incurred by such indemnities or any of them as a result of Park's breach of this Section, or as a result of the presence, disposal, storage, generation or release on the Premises at any time during the term of this Lease of any "hazardous materials," "hazardous substances," "hazardous wastes," or "toxic substances" as those terms may be defined in any federal, state or local legislation currently existing or enacted in the future (collectively "hazardous materials").

14. Insurance.

(a) Policies of Insurance.

Park shall maintain in full force and effect during the term of this Lease and any extension hereof, the following insurance:

(1) Worker's Compensation. As required by Section 1860 of the California Labor Code (Chapter 1000, Statutes of 1965), or any subsequent amendments or successor acts thereto governing the liability of employers to their employees, the Park shall procure and maintain Workers' Compensation coverage with an Employer's Liability limit of \$2,000,000. Park agrees to waive its rights to Worker's Compensation reimbursement.

(2) Commercial General Liability. Park shall procure and maintain Commercial General Liability and/or Vehicle Liability, whichever is applicable. The policy shall include as additional insureds College and its directors, officers, employees and agents. The policy shall be primary and contain cross liability and severability of interest clauses.

The policy shall have a combined single limit of \$2,000,000 per occurrence, \$5,000,000 in the aggregate, for bodily injury and property damage per occurrence. This insurance shall include but not be limited to: premises and operations; contractual liability covering the indemnity provisions contained in this Agreement; personal injury; explosion, collapse and underground coverage; products and completed operations and broad form property damage. The policy shall contain a waiver of subrogation in favor of College and its directors, officers, employees, agents while acting in such capacity, and their successors and assigns, as they now, or as they may hereafter be constituted, singly, jointly or severally.

(3) Automobile Liability Insurance. Park shall procure and maintain Automobile Liability insurance providing bodily injury and property damage with a combined single limit of at least \$2,000,000 per occurrence for all owned, non-owned and hired automobiles. This insurance shall provide contractual liability covering all motor vehicles and mobile equipment to the extent coverage may be excluded from general liability insurance. Such insurance shall include, as additional insureds, College and its respective directors, officers, employees and agents. The policy shall contain a waiver of subrogation in favor of College and its directors, officers, employees, agents while acting in such capacity, and their successors and assigns, as they now, or as they may hereafter be constituted singly, jointly or severally.

(4) Additional Policies of Insurance. In addition to the requirements described above, Park shall maintain any other insurance that may be required by law, statute or governmental regulations.

(b) Evidence of Insurance.

Prior to occupying the Premises, Park shall file a Certificate of Insurance with College evidencing coverage, and upon request, a certified duplicate original of the policy(ies). The insurance company(ies) issuing such policy(ies) shall give written notice to College of any material change and provide at least 30 days notice of cancellation. Policies shall be issued by insurers acceptable to College.

(c) Failure to Maintain Insurance.

The failure to procure or maintain required insurance shall constitute a default of this Lease.

(d) Third Party Beneficiaries.

All Indemnitees who are not expressly parties to this Lease shall be deemed third party beneficiaries under this Lease for purposes of enforcing any rights to indemnification and insurance granted in this Lease, and shall be entitled to seek attorney's fees and costs as provided in Section 27 below in any dispute arising from the enforcement of said rights.

(e) Self-Insurance.

Park may self-insure the above-required coverages. Park must submit a certificate of insurance coverage to the College.

15. Public Safety.

(a) Park shall be responsible for whatever mowing, discing, vegetation removal, and fire road construction, etc., may be required on the Premises for fire prevention purposes. Additionally, Park shall provide fire protection services to the Premises at the same level that it provides these services to other park areas within its jurisdiction.

(b) Park shall provide police, ranger, or other sworn peace officer patrol of the Premises to keep peace and prevent unauthorized uses thereof at the same level that it provides these services to other park areas within its jurisdiction.

16. Barricades.

If reasonably requested by College in order to prevent unauthorized motor vehicles from entering the Premises, Park will install and maintain barricades, fences, and fence gates of a size and form satisfactory to College at such locations as may be designated by College.

17. Signage.

Park shall install and maintain: 1) signs acknowledging the cooperation of College in providing the subject property for public park, and recreational uses; 2) appropriate informational and directional signs; and, 3) appropriate signs designating permitted trail uses by the general public, regulations governing such uses, and specifically prohibiting operation of unauthorized motor vehicles. All signs will be subject to the prior approval of College's Director of Facilities.

18. Hours.

The Premises may be open to the public during the Park's operating hours.

19. Parking Fees.

Park understands that College currently charges its patrons and students a parking fee. If park users choose to park on the College campus, this fee shall also be imposed on them.

20. Transmitter/Antenna.

College has previously installed, and may maintain, a KOHL transmitter/antenna at the N37 degree 32' 14" x W121 degree 54' 14" location as indicated on Exhibit A. The physical installation consists of a self-supporting wooden pole approximately 35 feet in height. The transmitting bay is attached to a steel pole side mounted on the wooden pole.

(a) The transmitter and related equipment are housed in a 8' x 8' structure painted in accordance with the specifications provided by the East Bay Regional Park District. This structure is located at the base of the wooden pole.

(b) For the safety of park users, and to avoid the possibility of vandalism, the transmitting installation is enclosed by a cyclone-type security fence. The electrical and audio connections are underground to the site.

(c) College may relocate and/or upgrade the transmitter/antenna and may install or permit installation of a cell phone transmitter and related telephonic communications equipment. College will incur all costs for the maintenance, repair and operation of these improvements.

(d) College is aware of the Park's Communication Policy Resolution #1987-4-95 (4/7/87). College will make every attempt to comply with the conditions of this resolution and will work with Park to minimize the visual impact of any new facilities.

21. Grazing Management.

College has previously granted Park the right to enter into and administer grazing licenses on the Premises. College acknowledges the existing month-to-month grazing license between Park and James Coelho, of Coelho Ranches. Any extension or renewal of this License or any new license with James Coelho or a different licensee shall require prior written approval from College. Park shall include with any other licenses or renewals or extensions, a provision requiring its licensee to vacate upon expiration or termination of this Lease. The term of any other licenses, renewals or extensions shall not extend beyond the Lease Term. Park shall bear any relocation assistance costs relating to any licensees. Park shall credit all grazing revenues to a separate account, which revenues shall be used for maintenance, operation, and development of the Premises as part of Mission Peak Regional Preserve.

22. Default.

The occurrence of any of the following shall constitute a material breach and default ("Default") of this Lease by Park:

(1) A failure by Park to observe or perform any other provision of this Lease to be observed or performed by Park when such failure is not corrected within 10 days after written notice thereof from College; or if such failure cannot be cured within this 10 day period, as determined by College in its reasonable discretion, if such cure is not commenced within 30 days of College's written notice and thereafter diligently pursued to completion;

(2) The abandonment or the vacation of the Premises by Park for a period of more than 15 consecutive days;

(3) The happening of any of the following events: (a) the filing or institution by Park of any proceeding under the Bankruptcy Act and any amendment thereto, or any other federal or state act now or hereafter relating to the subject of bankruptcy, insolvency, arrangement, reorganization, or other form of debtor relief, (b) the institution or filing of any involuntary proceeding against Park under any of the aforementioned laws unless such proceeding is dismissed within 30 days thereafter, (c) an adjudication of bankruptcy or a finding or judgment of insolvency of Park, (d) an assignment for the benefit of creditors by Park, (e) the levy of a writ of execution of the business of Park or the assets of Park located on the Premises which is not discharged within 10 days after the date of said levy, or (f) the appointment of a receiver to take possession of any property of Park.

23. Remedies.

In the event of a Default by Park, College may, at any time thereafter:

(a) Cure said Default at Park's expense. Park shall, upon demand, immediately reimburse College for the cost of such cure together with interest at the Interest Rate from the date of the expenditure therefor by College until such reimbursement is received by College.

(b) Maintain Park's right to possession in which case this Lease shall continue in effect whether or not Park shall have vacated or abandoned the Premises, in which event College shall be entitled to enforce all of College's rights and remedies under this Lease. Acts of maintenance or preservation, efforts to re-let the Premises, or the appointment of a receiver upon the initiative of College to protect College's interest under this Lease shall not constitute a termination of Park's right to possession. No act by College other than giving written notice to Park will terminate this Lease.

(c) Terminate Park's right to possession of the Premises by any lawful means, in which case this Lease shall terminate and Park shall immediately surrender possession of the Premises to College.

(d) Pursue any other remedy now or hereafter available to College under the laws of California.

Termination of this Lease under this Section or for any reason whatsoever shall not release either party from any liability or obligation arising from an event which occurred before termination or from actions that, under the express terms of this Lease, must be performed.

24. Surrender of the Premises; Holding Over.

(a) Upon expiration or earlier termination of this Lease, Park shall leave the Premises in a neat and clean condition satisfactory to College and free of all personal property of Park. All repairs, Alterations and/or other improvements made by Park shall become the property of College.

(b) If Park, without College's written consent, remains in possession of all or part of the Premises after expiration or earlier termination of this Lease, such occupancy shall be construed to be a tenancy from month-to-month, subject to the terms and conditions of this Lease.

25. Condemnation

If all or part of the Premises is acquired by eminent domain or by purchase in lieu thereof, Park shall have no claim to any compensation awarded for the taking of the Premises or any portion thereof, including Park's leasehold interest therein or any bonus value of this Lease, or to any compensation paid as severance damages, or for loss of or damage to Park's Alterations or improvements.

26. Assignment and Subletting.

Park shall not assign or otherwise Transfer, as defined below, except for transfer to public agency successor to Park, its interest in this Lease without the prior written consent of College. College shall not unreasonably withhold consent to any Transfer in the event the proposed sublessee or assignee (“Transferee”) meets College’s credit, business/qualification and reputation requirements and the proposed occupancy is consistent with the general character of the use permitted by this Lease. For purposes of this Lease, the term “Transfer” means any assignment, encumbrance, transfer or subletting. As a condition to College’s consideration of any Transfer, Park will pay to College, whether or not consent is ultimately given, College’s reasonable attorneys’ fees incurred in connection with each request for such consent. No Transfer, even with College’s written consent thereto, shall release Park from its obligations hereunder. College’s consent to one Transfer shall not constitute its consent to any other Transfer, or a waiver of College’s rights hereunder. Park’s Transferee shall agree in writing to be bound by all of the terms and conditions of this Lease that are to be performed by Park. Any purported Transfer in violation of this Section shall be void and constitute a default hereunder, and at the option of College, terminate this Lease.

27. Attorney’ Fees.

If either party brings any action against the other to enforce any provision of this Lease or collect any sum due hereunder, or if College brings an action for unlawful detainer of the Premises, the prevailing party shall be entitled to recover its costs, including reasonable attorneys’ fees, in addition to any other remedies to which it may be entitled.

28. Miscellaneous Provisions.

(a) Non-Waiver.

College’s failure to enforce or exercise its rights with respect to any provision hereof shall not be construed as a waiver of such rights or of such provision. Acceptance of Rent or any other sum shall not be a waiver of any preceding breach by Park of any provision hereof, regardless of College’s knowledge of such preceding breach at the time of acceptance of such Rent; nor shall such acceptance be a waiver of College’s right to terminate this Lease for any reason.

(b) Time of Essence.

Time is of the essence of each provision of this Lease. Any reference to “days” shall mean calendar days except as otherwise expressly provided in this Lease.

(c) Entire Agreement; Modification.

This Lease sets forth the entire agreement between the parties with respect to the leasing of the Premises and supersedes all prior and/or contemporaneous agreements, communications, and representations, oral or written, express or implied, since the parties intend that this be an integrated agreement. This Lease shall not be modified except by written agreement of the parties.

(d) Successors and Assigns.

Subject to the provisions of this Lease relating to assignment, subletting, this Lease shall bind the successors and permitted assigns of any and all of the parties hereto.

(e) Authority.

Each individual executing this Lease represents and warrants that he or she is duly authorized to execute and deliver this lease on behalf of the party for which he or she acts, and that this Lease is binding upon such party in accordance with its terms.

(f) Governing Law.

This Lease shall be governed by and construed in accordance with the laws of the State of California as applied to contracts that are made and performed entirely in California.

(g) Captions.

All captions and headings in this Lease are for the purposes of reference and convenience and shall not limit or expand the provisions of this Lease.

(h) Counterparts.

This Lease may be entered into in counterparts, each of which shall be deemed an original but both of which together shall be deemed a single agreement.

(i) Cost Responsibility.

Whenever this Lease requires Park to perform any act or provide any service it is understood that such act or service is to be provided or performed at Park's sole cost and expense.

IN WITNESS WHEREOF, the parties hereto have executed this Lease as of the day and year first above written.

OHLONE COMMUNITY COLLEGE  
DISTRICT

EAST BAY REGIONAL PARK DISTRICT

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

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

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

**EXHIBIT A**  
**DESCRIPTION AND MAP OF PREMISES**