



Office of the City Manager

CONSENT CALENDAR

May 26, 2015

To: Honorable Mayor and Members of the City Council

From:  Christine Daniel, City Manager

Submitted by: Michael Caplan, Manager of Office of Economic Development

Subject: Lease Agreement: Habitot Children's Museum for Existing City-owned Parking Lot at the Northeast Corner of Alcatraz Avenue & Adeline Street

RECOMMENDATION

Adopt first reading of an Ordinance authorizing the City Manager to execute a lease agreement and any amendments with the Habitot Children's Museum (Habitot) to use City property at the northeast corner of Alcatraz Avenue and Adeline Street (Parcel No. 52-1528-15-4) for a term anticipated to begin July 1, 2015 and ending June 30, 2020, with two options to extend for additional 5-year periods, contingent upon Habitot securing the necessary permits to occupy space in the adjacent building at 3271 Adeline Street/1833 Alcatraz Avenue.

FISCAL IMPACTS OF RECOMMENDATION

Habitot will pay an annual rent of \$1. The organization will complete capital improvements, with a projected value of over \$300,000, and be responsible for maintenance of the lot for the duration of the lease agreement. This lease has been entered into the City's contract management database and assigned CMS No. HGVFX. Revenues will be deposited into budget code 010-8701-363-1124.

CURRENT SITUATION AND ITS EFFECTS

The 3,600 square foot City-owned lot at the northeast corner of Adeline Street and Alcatraz Avenue has been used as long-term parking exclusively for the retention and attraction of tenants of the adjacent building at 3271 Adeline Street/1833 Alcatraz Avenue since 1991 (see Attachment 2). This building has been vacant since 2011 and during this period the adjacent City-owned lot has been unused. There is now an opportunity to leverage this City-owned parcel to help attract an anchor tenant that will occupy the adjacent vacant building, animate a key corner, generate significant foot traffic for the district and provide high quality cultural services to the Berkeley community.

BACKGROUND

The building at 3271 Adeline Street/1833 Alcatraz Avenue ('the building'), adjacent to the lot in question, is one of the largest buildings in the area, with over 24,000 square feet on two floors. It represents the single best ground floor anchor opportunity for the

Lorin District but has unfortunately remained vacant for several years. The building was recently purchased and its new ownership plans to lease it to nonprofit organizations that serve the Berkeley community. The building ownership is currently negotiating with Habitot Children's Museum to occupy the ground floor space.

Habitot is a non-profit children's museum founded in 1993 by parents and educators to meet the unique needs and interests of infants, toddlers and preschoolers in a safe and appropriate community setting. Habitot is currently located in Downtown Berkeley and the building where the museum is located is currently being planned for redevelopment. The museum's leadership would like to remain in Berkeley in a larger facility that would allow for expansion of their offerings to local families. The building at 3271 Adeline/1833 Alcatraz Avenue would provide an ideal home for Habitot, contingent on their ability to use the adjacent City-owned space as an outdoor play area for patrons.

Habitot projects that they would attract 65,000 visitors a year to their new location. According to surveys of Habitot membership, over half of museum visitors report that they frequently patronize neighboring restaurants and retail businesses when they visit Habitot. This is an opportunity for the City to leverage an underutilized parcel to spur significant economic activity in a neighborhood that has, over the past two decades, suffered from disinvestment.

Staff recommends that the City enter into a lease agreement (see Exhibit A) with Habitot to occupy the City-owned lot for \$1 per year. Habitot agrees to assume responsibility for capital improvements, lot maintenance, utilities, and refuse and janitorial services for the duration of the lease agreement. Habitot projects that they will invest over \$300,000 in capital improvements on the lot; see Attachment 3 for a description of these improvements. The lease would be contingent upon Habitot securing the necessary land use and building permit approvals to occupy the adjacent commercial building, and the organization's continued occupancy of that space. The agreement would be nullified if Habitot were to vacate the space. The lease of the City-owned lot would not be transferable to a subsequent building tenant.

ENVIRONMENTAL SUSTAINABILITY

This action would result in a slight reduction of the overall parking supply potentially available for the district. Proximity to AC Transit and Ashby BART makes the commercial district prime for alternative transportation to the area.

RATIONALE FOR RECOMMENDATION

The City can leverage an unused, City-owned parcel to help attract an anchor tenant to the Lorin district that will occupy a long-vacant commercial space, animate a key corner, generate significant foot traffic for the district and provide high quality cultural services to the Berkeley community.

ALTERNATIVE ACTIONS CONSIDERED

N/A

CONTACT PERSON

Jordan Klein, Economic Development Project Coordinator, Office of Economic
Development, 981-7534

Attachments:

1: Ordinance

 Exhibit A: Lease Agreement

2: Area Map

3: Letter from Habitot describing use of space and projected capital improvements

ORDINANCE NO. - N.S.

LEASE: HABITOT CHILDREN'S MUSEUM FOR CITY PROPERTY LOCATED AT THE
NORTHEAST CORNER OF ADELINE STREET AND ALCATRAZ AVENUE

WHEREAS, Habitot Children's Museum is a nonprofit organization providing high quality cultural programming to children and families of Berkeley and the region; and

WHEREAS, Habitot Children's Museum seeks to occupy the building at 3271 Adeline Street / 1833 Alcatraz Avenue, contingent on their ability to use the adjacent City-owned lot as an outdoor play area for patrons; and

WHEREAS, the City-owned lot at the northeast corner of Adeline Street and Alcatraz Avenue has been used as long-term parking exclusively for the retention and attraction of tenants of the adjacent building at 3271 Adeline Street/1833 Alcatraz Avenue since 1991; and

WHEREAS, Habitot will attract roughly 65,000 patrons per year, boosting commercial activity in the district and supporting neighboring small businesses; and

WHEREAS, the City can leverage this unused, City-owned parcel to help attract an anchor tenant to the Lorin district that will occupy a long-vacant commercial space, animate a key corner, generate significant foot traffic for the district and provide high quality cultural services to the Berkeley community.

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. The City Manager, or her designee, is hereby authorized to execute a lease agreement and any amendments with the Habitot Children's Museum for the property located at the northeast corner of Adeline Street and Alcatraz Avenue (APN No. 052 152801504) with a term commencing on the date this legislation goes into effect and continuing for five (5) years, with two (2) options to extend the term for an additional five (5) year period. The lease shall be substantially in the form attached hereto as Exhibit A.

Section 2. Copies of this bill shall be posted for two days prior to adoption in the glass case located near the walkway in front of Old City Hall, 2134 Martin Luther King Jr. Way within fifteen calendar days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

LEASE AGREEMENT

This LEASE AGREEMENT is made by and between the CITY OF BERKELEY, a Charter City organized and existing under the laws of the State of California ("Landlord or City"), and Habitot Children's Museum, a California nonprofit corporation located at 2065 Kittredge Street in Berkeley, California ("Tenant").

WITNESSETH

Landlord hereby leases to Tenant, and Tenant hereby leases from Landlord, the Premises for the term and subject to the terms, covenants, agreements and conditions set forth below, to each and all of which Landlord and Tenant hereby mutually agree.

1. DEFINITIONS

Unless the context otherwise specifies or requires, the following terms shall have the meanings herein specified:

A. "Affiliate," as to any person, shall mean such person's partners, members, commissioners, officers, employees, volunteers and agents.

B. "Lease Year," shall mean each twelve (12) month period during the term of the Lease commencing upon the effective date of the Lease.

C. "Premises" shall mean the property assigned APN Number 052-1528-15-4 and bounded by Alcatraz Ave to the south and Adeline Street to the west, located adjacent to 3271 Adeline street on the northern and eastern sides and totaling approximately 3,600 square feet in area in the City of Berkeley, California, as depicted on Exhibit A, attached hereto ("the Premises").

D. "Improvements" shall mean Tenant's construction of a play structure, outdoor furniture, or other structures on or about the Premises, the design and construction of which shall be subject to the City's written approval in its capacity as owner of the Premises.

2. TERM

The term of this lease shall commence on the effective date of the ordinance which authorizes this lease unless the ordinance provides otherwise and shall be for a period of five (5) years plus the partial month, if any, immediately preceding the first full calendar month of this lease.

A. The City has the right to terminate this Lease with thirty (30) days prior written notice to Tenant upon Tenant's failure to comply with any of the terms and conditions herein set forth or if, in the City Manager's exercise of reasonable discretion, revocation is necessary in the interest of public health or safety.

3. RENT

A. Minimum Rent. Tenant shall pay to Landlord for its use and occupancy of the Premises **one dollar (\$1)** per year.

B. Manner of Payment. All rent and other payments due from Tenant shall be made to Landlord in lawful money of the United States of America at Landlord's address for notice hereunder, or to such other person or at such other place as Landlord may from time to time designate in writing.

4. PROPERTY AND OTHER TAXES

A. Possessory Interest Taxes. The property interests created by this Lease may be subject to property taxation and Tenant, in whom the possessory interest is vested, will be responsible for the timely payment of any property taxes levied on such possessory interest. Tenant agrees to pay before delinquency all lawful taxes, assessments, fees or charges which at any time may be levied by the state, county, city or any tax or assessment levying body against the transfer of the leasehold interest hereunder upon recordation or otherwise, or upon any activity carried on under this Lease, any interest in this Lease or any possessory right which Tenant may have in or to the Property or the Property by reason of its use or occupancy thereof or otherwise.

B. City of Berkeley Assessments. Tenant also shall be responsible for and shall pay prior to delinquency all assessments imposed against the Property and/or the Property by the City. Tenant acknowledges that City has established certain assessment districts within the City of Berkeley and that all properties within the assessment districts are subject to annual assessments. The City reserves the right to create additional districts and to terminate any such district(s). Tenant shall be billed for each such assessment in the same manner as other property owners and lessees in the City.

C. Personal Property and Other Taxes. In addition to all other sums to be paid by Tenant hereunder, Tenant shall pay, before delinquency, any and all taxes levied or assessed during the term of the Lease on Tenant's equipment, furniture, fixtures, merchandise, and other personal property located in the Property, and shall pay, or shall reimburse Landlord for, any and all assessments (including, without limitation, all assessments for public improvements, services or benefits, irrespective of when commenced or completed), excises, levies, business taxes, Lease, permit, inspection and other authorization fees, transit fees, service payments in lieu of taxes and any other fees or charges of any kind, which are levied, assessed, or imposed by any public authority: (i) upon or measured by rental payable hereunder, including without limitation, any gross income tax or excise tax levied by the City of Berkeley, Alameda County, the State of California, the Federal Government or any other government body with respect to the receipt of such rental; (ii) upon or with respect to the development, possession, leasing, operation, management, maintenance, alteration, repair, use or occupancy by Tenant of the or any portion thereof; (iii) upon, measured by or reasonably attributable to the cost or value of Tenant's

equipment, furniture, fixtures, merchandise, and other personal property located at or in the Premises or by the cost or value of any improvements made by Tenant to the Property, regardless of whether title to such improvements shall be in Tenant or Landlord; or (iv) upon this Lease or any document to which Tenant is a party creating or transferring an interest in the Property.

D. Tenant's Right to Contest. Tenant may, at no cost to Landlord, reasonably contest the legal validity or amount of any taxes, assessments, or charges for which Tenant is responsible under this Lease, and institute such proceedings as Tenant considers necessary; provided, however, that Tenant shall at all times protect Landlord from foreclosure of any lien, and that Landlord shall not be required to join in any proceeding or contest brought by Tenant.

5. SECURITY DEPOSIT

City and Tenant acknowledge that there shall be no security deposit required.

6. USE

The Premises shall be used as part of an educational museum for young children, toddlers and infants operated by Tenant in the adjacent property at 3271 Adeline Street/1833 Alcatraz Avenue. Tenant's failure to secure land use and building approval to operate the educational museum at that property within one (1) year of the execution of this agreement shall constitute default of this agreement, as outlined below in Paragraph 21. Tenant's use of the Premises shall be in accordance with all of the terms and conditions set forth in Exhibit B, attached hereto and incorporated by reference.

Tenant shall not do or permit to be done in, on, or about the Premises anything which is prohibited by or may conflict with any law, statute, ordinance or governmental rule or regulation now in force or hereafter enacted or promulgated, which is prohibited by the standard forms of special form or commercial general liability insurance or which may cause a cancellation of any insurance policy covering or the Premises or any of its contents, or (except with the prior written consent of Landlord) which may increase the existing rate of or affect any special form or commercial general liability insurance or other insurance upon or the Premises, or any of its contents. In the event Tenant does or permits to be done anything or keeps or permits to be kept anything on or about the Premises or the which increases the existing rate of such insurance upon or the Premises or any of its contents, Tenant shall pay the amount of any such increase promptly upon Landlord's demand. Tenant shall not do or permit anything to be done which will in any way obstruct or interfere with the rights of other lawful users of , including, without limitation, tenants, their employees or invitees, disturb or annoy them, or use or allow the Premises to be used for any improper, unlawful or objectionable purpose. Tenant shall not maintain or permit any nuisance in or about the Premises or commit or suffer to be committed any waste in or upon the Premises.

7. OPTION TO RENEW

A. Option Period. So long as Tenant is not in default under this lease, either at the time of exercise or at the time the extended term commences, Tenant will have two options to extend the initial term of this lease for an additional period of FIVE (5) years (the "option period") on the same terms, covenants, and conditions of this lease. In order to exercise this option, Tenant must give written notice of its election to do so to Landlord at least 180 days, but not more than one year, prior to the expiration date of the initial lease term. Tenant shall have no other right to extend the term beyond the option period.

8. HOLDING OVER

If Tenant remains in possession of the premises with Landlord's consent after the expiration of the term of this lease without having exercised any option to renew this lease, or after the termination of any such option period, such possession by Tenant shall be construed to be a tenancy from month-to-month, terminable on thirty (30) days' notice given at any time by either party. All provisions of this lease, except those pertaining to term, shall apply to the month-to-month tenancy.

9. NOTICES

A written notice shall be deemed served upon mailing said notice to the other party and depositing the same with the U.S. Post Office, first class mail, with postage paid. For purposes of this Lease, all notices to the City shall be addressed to the:

City of Berkeley
Office of Economic Development
2180 Milvia St., 5th Floor
Berkeley, CA 94704

For purposes of this Lease, all notices to Tenant shall be addressed to:

Gina Moreland
Habitot Children's Museum
1833 Alcatraz Avenue
Berkeley, CA 94703

10. MAINTENANCE, ALTERATIONS AND IMPROVEMENTS

A. Tenant shall maintain the Premises in good order, condition, and repair, including walls, planters, paving, lighting and landscaping. Tenant shall keep the Premises, up to and including the areas immediately adjacent to the Premises and up to the edge of the sidewalk abutting Adeline Street and Alcatraz Avenue, reasonably free and clear of all debris and trash. Tenant shall maintain the Premises as described herein and in Exhibit B.

B. Tenant acknowledges that City owns the Premises. Tenant accepts the Premises from City in its "as is" condition, the conditions that exist as of the Effective Date of this Lease. Tenant acknowledges that City makes no representation or warranty concerning (i) physical condition of the Premises; (ii) the Premises suitability for Tenant's proposed use; or (iii) the

presence of any Hazardous Substance in or about the Property or the Premises, except as otherwise expressly set forth in this Lease. Tenant is encouraged to make its own physical inspection of the Property and Premises and to conduct its own investigations as to the suitability of the Property and Premises.

C. Upon the execution of this Lease, Landlord approves and requires the improvements to the Premises described above in section 1(D) that shall be completed by Tenant. Tenant shall complete the improvements within the timeframe as stated in Exhibit "C". (Tenant's Work). Tenant shall not make any alterations, additions or improvements to the Premises (i) costing in excess of \$5,000 for any single instance or \$15,000 in the aggregate for any twelve (12) consecutive months or (ii) affecting the Premises, or attach any fixture or item of equipment thereto without Landlord's prior written consent except for the improvements listed in Exhibit "C". All such alterations, additions, or improvements shall be made at Tenant's sole expense in accordance with Landlord's General Design Requirements (if any) and the plans and specifications (including specifications for materials to be used in connection therewith) and a statement of the estimated cost of such work submitted to and approved by Landlord (collectively the "Plans and Specifications"). If the cost thereof exceeds \$5,000 for any single instance. Landlord, in its sole discretion, shall approve or disapprove Tenant's request and may disapprove Tenant's use of any materials or substances, including but not limited to asbestos and fiber glass, which Landlord, in its sole discretion, deems potentially hazardous, toxic or threatening to health. To the extent that Tenant's Work shall require a building permit or other permits from the City of Berkeley, and/or any other governmental agency, Tenant shall not perform any of Tenant's Work until Tenant has obtained all requisite permits. Tenant further shall comply with all prevailing wage requirements of California Labor Code Sections 1720 et seq., to the extent such requirements are applicable to Tenant's work.

D. Except as otherwise expressly provided in this Lease, Tenant shall not repair, replace or modify any utility system located on the Premises without the Landlord's prior written consent. Tenant is responsible for the repair of any damage to any utility system, facilities of Landlord or any other facilities arising out of Tenant's construction activities or Tenant's negligence or willful misconduct; provided, however, such provision is not intended to and shall not be interpreted to make any other person or entity a third party beneficiary thereof.

E. This Lease specifically prohibits Tenant, or any other party, from expanding uses or structures allowed on the Premises beyond those designated in use permits approved by the City of Berkeley.

F. If Tenant proposes to make or construct any alterations, improvements, additions or fixtures (other than those described above in section 1(D)) that affect any portion of the Premises or any structures located on the Premises that are allowed under an existing use permit, Tenant shall first provide the Landlord with thirty (30) days prior written notice. If Landlord raises no objections within thirty (30) days after receipt of such notice, Tenant may proceed, provided Tenant obtains all required permits.

G. Except as may be specifically approved in writing by Landlord, Tenant shall require all contractors to provide a labor and materials bond for the full amount of any contract for improvements that exceed \$50,000, including any applicable Exhibit B Improvements. Tenant shall pay, when due, all sums of money that may be due or become due for any labor, services, materials, supplies or equipment furnished to or for Tenant in, at, upon or about the Premises and which may be secured by any mechanic's, material men's or other lien against the Premises or Landlord's interest therein.

Upon termination of this Lease, for any reason, and at the City's sole option, Tenant shall remove any equipment, materials or improvements installed by Tenant and shall surrender the Premises to City in the same condition as provided to Tenant at the commencement of this Lease.

11. PREVAILING WAGE REQUIREMENTS

A. Tenant shall and shall cause the contractor and subcontractors to pay prevailing wages in the construction of the Improvements as those wages are determined pursuant to Labor Code Sections 1720 et seq., to employ apprentices as required by Labor Code Sections 1777.5 et seq., and the implementing regulations of the Department of Industrial Relations (the "DIR") and, if required by the City, to submit weekly payroll reports to the City. The Tenant shall and shall cause the contractor and subcontractors to comply with the other applicable provisions of Labor Code Sections 1720 et seq., 1777.5 et seq., and implementing regulations of the DIR. The Tenant shall and shall cause the contractor and subcontractors to keep and retain such records as are necessary to determine if such prevailing wages have been paid as required pursuant to Labor Code Sections 1720 et seq., and apprentices have been employed are required by Labor Code Sections 1777.5 et seq. The Tenant shall cause the contractor and subcontractors to instruct any sub-tier subcontractors of the prevailing wage responsibility. Copies of the currently applicable current per diem prevailing wages are available from DIR. During the construction of the Project, Tenant shall or shall cause the contractor to post at the Premises the applicable prevailing rates of per diem wages. The Tenant shall and shall cause the general contractor and subcontractors to review the required wage decisions and request from the City any additional classifications not included in the wage decision.

B. The Tenant shall and shall cause the contractor and subcontractors working on the Improvements to comply with the provisions of City Resolution No. 54-533 N.S. setting forth the City's local policy regarding the payment of prevailing wages in connection with City-assisted developments.

C. The Tenant shall indemnify, hold harmless and defend (with counsel reasonably acceptable to the City) the City against any claim for damages, compensation, fines, penalties or other amounts arising out of the failure or alleged failure of any person or entity (including Tenant, its contractor and subcontractors) to pay prevailing wages as determined pursuant to Labor Code Sections 1720 et seq., to employ apprentices pursuant to Labor Code Sections 1777.5 et seq., and implementing regulations of the DIR or to comply with the other applicable provisions of Labor Code Sections 1720 et seq., 1777.5 et seq., and the implementing regulations of the DIR and the City's local prevailing wage requirements in connection with the construction of the Project or any other work undertaken or in connection with the Premises. The requirements in this Subsection shall survive the repayment of the Loan, and the reconveyance of the Deed of Trust.

12. LIENS

Tenant shall keep the Premises free from any liens arising out of any work performed, materials furnished or obligations incurred by Tenant. In the event that Tenant shall not cause any such liens to be released of record, Landlord shall have, in addition to all other remedies provided herein or by law, the right (but not the obligation) to cause the same to be

released by such means as Landlord shall deem proper, including payment of the claim giving rise to such lien. All sums paid and all expenses incurred by Landlord in connection therewith shall be reimbursed by Tenant promptly on demand. Landlord shall have the right to post and keep posted on the Premises any notices (including, without limitation, notices of non-responsibility pursuant to California Civil Code Section 3094) that Landlord may deem proper for protection of Landlord and the Premises. Tenant shall give Landlord at least ten (10) business days' prior notice of the date of commencement of any Tenant's work on or in the Premises to allow Landlord to post such notices.

13. TENANT AND LANDLORD MAINTENANCE OBLIGATIONS

A. Except as provided for in subparagraph F below, Tenant agrees that during the entire term of this Lease, at its own cost and expense, it shall keep and maintain the Premises, and all leasehold improvements, fixtures, furniture, and other improvements located on the Premises in good-quality order, repair and condition. Except as otherwise provided in this Lease, Tenant shall perform, at its own cost and expense, any and all maintenance, removal of graffiti, repairs, or rehabilitation to the Premises, whether required by deterioration or by operations of Tenant or otherwise.

B. To the extent applicable, Tenant hereby waives the provisions of Civil Code Sections 1941 and 1942, and any other provision of law now or hereafter in effect, with regard to the habitability of the Property and the Premises.

C. "Good-quality order, repair and condition", as used herein, shall mean the maintenance, repair, or renovation of the equipment, furniture, fixtures, outdoor lighting, signage, and appurtenances necessary to keep and maintain the Premises in efficient and attractive condition, at any time during the term of this Lease.

D. Tenant shall provide its own janitorial and maintenance service for the Premises, and all of Tenant's rubbish shall be removed by Tenant.

E. In the event of a dispute that Landlord and Tenant cannot informally resolve, Tenant's only remedy against Landlord shall be the right to terminate this Lease, effective thirty (30) days from the delivery of written notice to Landlord.

F. Nothing in this Paragraph 10 shall be deemed to affect or impair Landlord's rights under Paragraph 9 of this Lease. Tenant acknowledges that Landlord has no obligation and has made no promises to alter, remodel, improve, or repair, the Premises, or any part thereof. Landlord has made no representations respecting the condition of the Premises, except as specifically set forth in this Lease.

14. DAMAGE OR DESTRUCTION

A. In the event the Premises are damaged by fire, flood, earthquake, act of God, the elements, or other casualty, then Tenant shall forthwith repair the same at its sole expense. In this event, Tenant shall be solely responsible for the loss, repair, and replacement of all its equipment and Lease improvements.

B. Anything in subparagraph A to the contrary notwithstanding, neither Tenant nor City shall have any obligation to repair or rebuild the Premises, as the case may be, following

damage or destruction thereto if the damage or destruction is due to any cause or casualty other than one against which the responsible party is required to carry insurance or actually does carry insurance and such party reasonably estimates that the cost of repair or rebuilding exceeds ten per cent 10% of the then replacement cost of the Premises, as the case may be. If the responsible party elects not to repair any damage or destruction pursuant to this provision, such party shall give the other party notice of such election within sixty (60) days after the date of such damage or destruction; and this Lease shall terminate as of the date of such damage or destruction.

C. Tenant hereby waives the provision of California Civil Code Sections 1932 and 1933 and any other statutes now or hereafter in effect which relate to termination of a Lease when the Premises is damaged or destroyed and agrees that such event shall be governed by the terms of this Lease.

15. COMPLIANCE WITH LAWS

A. Tenant, at its sole expense, shall promptly comply with all applicable laws, ordinances, rules, regulations, permits or requirements now or hereafter in effect (whether foreseen or unforeseen by Landlord or Tenant), with the requirements of any board of fire underwriters or similar body now or hereafter constituted; with any occupancy certificate issued by any public officer and with the provisions of all recorded documents affecting the Premises, insofar as any of the foregoing relate to or affect the condition, use or occupancy of the Premises. Such compliance by Tenant shall include, without limitation, compliance with all obligations to alter, maintain, or restore the Premises or construct improvements in or to the Premises, regardless of cost and regardless of when during the term of the Lease the work is required.

B. Tenant acknowledges that it is a public accommodation and as such is required to comply with all state and federal laws regarding access for the disabled pursuant but not limited to The Americans for Disability Act.

C. Tenant understands and agrees that Landlord is entering into this Lease in its capacity as a landowner with a proprietary interest in the Premises and not as a regulatory agency of the City of Berkeley with certain police powers. Landlord's legal status shall in no way limit the obligation of Tenant to obtain any required approvals from Landlord's departments, boards, or commissions that have jurisdiction over the Premises. By Landlord's entering into this Lease, neither Landlord nor any of City Council, boards, commissions, agencies, departments, or Affiliates obligates itself to any other governmental agent, board, commission or agency, or to Tenant, or to any other individual or entity, with regard to any discretionary action relating to development or operation of the Premises. Discretionary action includes but is not limited to rezonings, variances, environmental clearances, or any other governmental agency approvals that may be required or desirable for the improvement, alteration, or operation of the Premises. By entering into this Lease, Landlord is in no way modifying or limiting the obligation of Tenant to cause the Premises to be used and occupied in accordance with all laws.

16. ACCESS TO PROPERTY BY OTHERS

The City, its agents, and employees shall have the right to enter the Premises at any time, provided such entry does not cause unreasonable interference with Tenant's business.

17. UTILITIES

Tenant shall make all arrangements for and pay for all utilities and services furnished to or used by it to use or maintain the Premises and any improvements thereon, including without limitation, telephone, gas, electricity, garbage, water and sewer services.

18. ASSIGNMENT AND SUBLETTING PROHIBITED

This Lease is personal and exclusive to Tenant. Tenant may not assign or sublease this Lease in whole or in part without the City Manager's prior written consent, to be granted or withheld in the exercise of reasonable discretion. No reference to sublessees or assignees elsewhere in this Lease shall be construed to the contrary. If Tenant attempts to assign or sublease this Lease without the City Manager's prior consent, the City Manager shall have the sole option to terminate the Lease.

19. INDEMNIFICATION

A. To the fullest extent permitted by law, Tenant shall (1) immediately defend and (2) indemnify Landlord, and its directors, officers, and employees from and against all liabilities regardless of nature, type, or cause, arising out of or resulting from or in connection with the Lease. Liabilities subject to the duties to defend and indemnify include, without limitation, all claims, losses, damages, penalties, fines, and judgments; associated investigation and administrative expenses; defense costs, including but not limited to reasonable attorneys' fees; court costs; and costs of alternative dispute resolution. The Tenant's obligation to indemnify applies regardless of whether a liability is a result of the negligence of any other person, unless it is adjudicated that the liability is caused by the sole active negligence or sole willful misconduct of an indemnified party.

B. The duty to defend is a separate and distinct obligation from the Tenant's duty to indemnify. The Tenant shall be obligated to defend, in all legal, equitable, administrative, or special proceedings, with counsel approved by the Landlord, the Landlord and its directors, officers, and employees, immediately upon submittal to the Tenant of the claim in any form or at any stage of an action or proceeding, whether or not liability is established. A determination of comparative active negligence or willful misconduct by an indemnified party does not relieve the Tenant from its separate and distinct obligation to defend Landlord. The obligation to defend extends through final judgment, including exhaustion of any appeals. The defense obligation includes an obligation to provide independent defense counsel if Tenant asserts that liability is caused in whole or in part by the negligence or willful misconduct of the indemnified party. If it is finally adjudicated that liability was caused by the sole active negligence or sole willful misconduct of an indemnified party, Tenant may submit a claim to the Landlord for reimbursement of reasonable attorneys' fees and defense cost.

C. The review, acceptance or approval of any of Tenant's work or work product by any indemnified party shall not affect, relieve or reduce the Tenant's indemnification or defense

obligations. This Section survives the termination of this Lease. The provisions of this Section are not limited by and do not affect the provisions of this Lease relating to insurance.

D. Liabilities subject to this Section include any claim of discrimination or harassment, including but not limited to sexual harassment, arising from the conduct of the Tenant or any of the Tenant's officers, employees, agents, licensees, or subcontractors. In the event of a discrimination or harassment complaint against any employee, agent, licensee or subcontractor of the Tenant or its subcontractors, the Tenant shall take immediate and appropriate action in response to such complaint, including, but not limited to termination or appropriate discipline of any responsible employee, agent, licensee or subcontractor.

20. INSURANCE

A. Tenant, at its sole expense, shall procure and maintain the following insurance:

1. Commercial general liability insurance insuring Tenant against any liability arising out of its use, occupancy, repair or maintenance of the Property, with a combined single limit of not less than \$2,000,000 for injury to or death of one or more persons in any one accident or occurrence and property damage in any one accident or occurrence. Such comprehensive general liability insurance shall include fire liability coverage and public liability and property damage insurance, including personal injury, broad form property damage, blanket contractual, and other coverage as may be reasonably required by Landlord. Landlord shall have the right, from time to time, to require Tenant to increase the amount of its comprehensive general liability insurance coverage if, in Landlord's reasonable opinion, the amount of such coverage is not sufficient in light of the risks insured and Tenant's use of the Property.
2. Special form property insurance for the full replacement cost of damage to the Building, including, without limitation, alterations, Tenant's Work, trade fixtures, furnishings, equipment, goods and inventory, and, during any term of construction of Tenant's Work, builders' All-Risk Insurance. Such insurance shall include coverage for vandalism and malicious mischief and cost of demolition and increased cost of construction by reason of changes in applicable ordinances/laws and shall not contain a co-insurance clause.

B. All policies of insurance and all renewals thereof shall be approved as to form and sufficiency by Landlord's Risk Manager and shall be issued by good and responsible companies qualified to do and doing business in California and rated A+: XIII or better in the most recent version of Best's Insurance Guide. Each of the required insurance coverage's except for workers compensation (i) shall name Landlord and each of its Affiliates as additional insured and, with respect to casualty insurance, as their respective interests may appear and (ii) shall provide that it may not be canceled or altered by the insurer in such manner as to adversely affect the coverage unless sixty (60) days' prior notice is given by certified mail to Landlord at the address set forth in Paragraph 33 below, or to such place as Landlord may from time to time designate in a notice to Tenant.

C. An original certificate of each policy of insurance shall be delivered to Landlord prior to the date the Property is delivered to Tenant and from time to time during the Term. If Tenant shall fail to procure or maintain any insurance required hereunder or shall fail to furnish to Landlord any duplicate policy or certificate, Landlord may obtain such insurance; and any premium or cost paid by Landlord for such insurance shall be reimbursed by Tenant promptly upon Landlord's demand. Tenant shall make good faith efforts to ensure that at least sixty (60) days prior to the expiration of any such policy, an extension endorsement showing that such insurance coverage has been or will be renewed or extended shall be delivered to Landlord and if, despite such good faith efforts, such extension endorsement cannot be timely delivered, Tenant shall cause to be delivered to Landlord within said time other reasonable documentary evidence of renewal of coverage and shall continue exercising diligent efforts to deliver to Landlord the required extension endorsement. If such coverage is canceled or reduced, Tenant, within ten (10) days after receipt of written notice of such cancellation or reduction in coverage but in no event later than the effective date of cancellation or reduction, shall deliver to Landlord a certificate showing that the required insurance has been reinstated or provided through another insurance company(ies). Upon Tenant's failure to so deliver such certificate, Landlord may, without further notice and at its option, (1) exercise Landlord's rights as provided in this Lease or (2) procure such insurance coverage at Tenant's expense and Tenant shall promptly reimburse Landlord for such expense.

D. If any of the insurance required in this Paragraph 13 is provided under a claims-made form of policy, Tenant shall maintain such coverage continuously throughout the Term and without lapse for a period of not less than five (5) years beyond the termination of this Lease, to the effect that should occurrences during the Term give rise to claims made after termination of this Lease, such claims shall be covered by such claims-made policies.

E. Each of Tenant's property insurance policies insuring the Property and Tenant's property in the Property shall include a waiver of the insurer's right of subrogation against Landlord, or, if such waiver should be unobtainable or unenforceable, (i) an express agreement that such policy shall not be invalidated if the assured waives, before the casualty, the right of recovery against any party responsible for a casualty covered by the policy or (ii) any other form of permission concerning the assured's right to waive its right of recovery. If such waiver, agreement or permission shall not be, or shall cease to be, obtainable, Tenant shall so notify Landlord promptly after learning thereof.

F. Tenant hereby releases Landlord with respect to any claim (including a claim for negligence) which Tenant might otherwise have against Landlord for loss, damage or destruction of Tenant's property occurring during the Term to the extent to which Tenant is insured under a policy(ies) containing a waiver of subrogation or agreement or permission to release liability, as provided in E. above. If, notwithstanding the recovery of insurance proceeds by Tenant for such loss, damage or destruction, Landlord is liable to Tenant with respect thereto or is obligated under this Lease to make replacement, repair, restoration or payment, then (provided Tenant's right of full recovery under its insurance policies is not thereby prejudiced or otherwise adversely affected) the amount of the net proceeds of the Tenant's insurance against such loss, damage or destruction shall be offset against Landlord's liability to Tenant therefore or shall be made available to Landlord to pay for replacement, repair or restoration, as the case may be. Nothing contained herein shall relieve either party of any duty to repair, restore or rebuild imposed

elsewhere in this Lease or shall nullify any abatement of rent provided for elsewhere in this Lease.

G. If a death, serious personal injury or substantial property damage occurs in connection with the performance of this Lease, Tenant shall immediately notify the Landlord's Risk Manager. If any accident occurs in connection with this Lease, Tenant shall promptly submit a written report to Landlord, in such form as the Landlord may require. This report shall include the following information: 1) name and address of the injured or deceased person(s); 2) name and address of Tenant's subtenant, if any; 3) name and address of Tenant's liability insurance carrier; and 4) a detailed description of the accident, including whether any of Landlord's equipment, tools or materials were involved.

Tenant shall forward all insurance documents to:

City of Berkeley
Office of Economic Development
2180 Milvia St., 5th Floor
Berkeley, CA 94704

21. DEFAULT

The occurrence of any one of the following shall constitute an event of default on the part of Tenant:

A. Failure To Use Premises. Failure to use the Premises as specified in Paragraphs 6 and Exhibit B.

B. Nonpayment of Rent. Failure to pay any installment of rent or any other sum due and payable hereunder upon the date when such payment is due, such failure continuing for a period of five (5) days after written notice of such failure.

C. Other Obligations. Failure to perform any obligation, agreement or covenant under this Lease, such failure having continued for thirty (30) days after notice of such failure from Landlord or such longer period as is reasonably necessary to remedy such default, provided that Tenant has commenced to remedy the default within such thirty (30) day period and shall continuously and diligently pursue such remedy until such default is cured.

D. General Assignment. A general assignment by Tenant for the benefit of creditors.

E. Bankruptcy. The filing of a voluntary petition in bankruptcy by Tenant, or the filing of an involuntary petition by Tenant's creditors, which involuntary petition remains undischarged for a period of thirty (30) days. In the event that under applicable law the trustee in bankruptcy or Tenant has the right to affirm this Lease and to continue to perform the obligations of Tenant hereunder, such trustee or Tenant, in such time period as may be permitted by the bankruptcy court having jurisdiction, shall cure all defaults of Tenant hereunder outstanding as of the date of affirmance and shall provide to Landlord such adequate assurances as may be necessary to ensure Landlord of the continued performance of Tenant's obligations hereunder. Any transferee (by operation of law or otherwise) must provide Landlord with adequate assurance of its future performance under this Lease. In the event of Tenant's bankruptcy, insolvency or reorganization, the parties specifically intend that the actions of the trustee or Tenant in assuming

and/or assigning this Lease shall be governed by Section 365 of Title 11 of the United States Code applicable to shopping center leases.

F. Receivership. The employment of a receiver to take possession of all or substantially all of tenant's assets in the premises.

G. Insolvency. The attachment, execution or other judicial seizure of all or substantially all of tenant's assets in or on the premises; the admission by tenant in writing of its inability to pay its debts as they become due; the filing by tenant of a petition seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any present or future law or regulation; the filing by tenant of an answer admitting or failing timely to contest a material allegation of a petition filed against tenant in any such proceeding or if, within thirty (30) days after the commencement of any proceeding against tenant seeking reorganization or arrangement, composition, readjustment, liquidation, dissolution or similar relief under any present or future law or regulation, such proceeding shall not have been dismissed.

22. REMEDIES UPON DEFAULT

A. Termination. In the event of the occurrence of any event of default, Landlord shall have the right immediately to terminate this Lease by written notice and at any time thereafter to recover possession of the Premises or any part thereof and to expel and remove Tenant, any other person or party occupying the same and all Premises located therein, by any lawful means and to reenter the Premises without prejudice to any of the remedies that Landlord may have under this Lease or under law or equity.

B. Continuation After Default. In the event of any default, this Lease shall continue in effect for so long as Landlord does not terminate this Lease under subparagraph A above. In such case, Landlord may enforce all its rights and remedies under this Lease, including without limitation, the right to recover rent as it becomes due, and all of its rights and remedies under law. Acts of maintenance, preservation, efforts to relet the Premises for Tenant's account or the appointment of a receiver upon application of Landlord to protect Landlord's interest under this Lease shall not constitute an election to terminate this Lease or Tenant's right to possession.

C. Damages Upon Termination. Should Landlord terminate this Lease pursuant to subparagraph A above, in addition to any other rights and remedies to which it may be entitled under applicable law, Landlord shall be entitled to recover from Tenant: (i) the worth at the time of the award of the unpaid rent and other amounts which had been earned at the time of termination; plus (ii) the worth at the time of the award of the amount by which the unpaid rent which would have been earned after termination until the time of the award exceeds the amount of such rent loss that Tenant proves reasonably could have been avoided; plus (iii) the worth at the time of the award of the amount by which the unpaid rent for the balance of the Term after the time of award exceeds the amount of such rent loss that Tenant proves reasonably could be avoided; plus (iv) any other amount necessary to compensate Landlord for all the detriment proximately caused by Tenant's failure to perform its obligations under this Lease or which, in the ordinary course of things, would likely result therefrom, including without limitation, the costs and expenses (including brokerage commissions and advertising costs) incurred by Landlord, with or without terminating the Lease, (1) in retaking possession of the Premises; (2)

in cleaning and making repairs and alterations to the Premises reasonably necessary to return the Premises to good condition for the use permitted by this Lease and otherwise to prepare the Premises for reletting;(3) in removing all persons and personal property from the Premises and transporting and storing any of Tenant's personal property left at the Premises, although Landlord shall have no obligation to remove, transport, or store any of such personal property; and (4) in reletting the Premises for such term, at such rent and upon such other terms and conditions as Landlord in its sole discretion may deem advisable; plus (v) such other amounts in addition to or in lieu of the foregoing as may be permitted from time to time under California law. The "worth at the time of award" of the amounts referred to in (i) and (ii) shall be computed with interest at the maximum rate allowed by law. The "worth at the time of award" of the amount referred to in (iii) shall be computed by discounting such amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of the award plus one percent (1%).

D. Computation of Rent For Purposes of Default. For purposes of computing unpaid rent which would have accrued and become payable pursuant to subparagraph C above, unpaid rent shall include the total rent for the balance of the term of the Lease.

E. Remedies Cumulative. All rights, privileges and elections or remedies of the parties are cumulative and not alternative to the extent permitted by law and except as otherwise specifically provided herein.

F. No Waiver. Landlord's waiver of any breach of a covenant or condition hereof, or Landlord's failure to declare any default immediately upon occurrence thereof or a delay in taking any action in connection therewith shall not waive such breach or such covenant or condition or any subsequent breach thereof. The subsequent acceptance of rent or other monies by Landlord shall not be deemed a waiver of any preceding default by Tenant, other than the failure of Tenant to pay the particular rent or other sum so accepted, regardless of Landlord's knowledge of such default at the time of its acceptance of rent.

G. No Right of Redemption. Tenant waives any right of redemption or relief from forfeiture under California Code of Civil Procedure Sections 1174 and 1179 or any other present or future law in the event Tenant is evicted or Landlord takes possession of the Premises by reason of Tenant's default.

24. ENVIRONMENTAL OBLIGATIONS

A. Tenant shall not, without Landlord's prior written consent (which consent may be granted or denied in Landlord's sole discretion), install, bring into or release or discharge in, on, under, around, or from the Premises any (i) asbestos-containing materials, (ii) electrical transformers, fluorescent light fixtures with ballasts or other equipment containing PCB's or (iii) materials which constitute hazardous, extremely hazardous or toxic materials under the Resource Conservation and Recovery Act, the California Hazardous Waste Control Act, the Comprehensive Environmental Response Compensation and Liability Act, the California Safe Drinking Water and Toxic Enforcement Act of 1986 or any other applicable law or regulation concerning hazardous or toxic materials, (collectively "Hazardous Substances") and has not done so prior to the effective date of this Lease. Any Hazardous Substances which are used, stored, treated, disposed of or released from the Premises by Tenant or its representatives, agents,

employees or invitees, shall be used, stored, treated, released and disposed of in accordance with all applicable laws and regulations.

B. If Tenant knows or has reasonable cause to believe that any Hazardous Substance has been released on or beneath the Premises, Tenant shall immediately notify the Berkeley Police Department and the Toxic Management Office and promptly give written notice of same to Landlord. If Tenant knows or has reasonable cause to believe that such substance is an imminent and material danger to public health or safety, Tenant shall take all actions necessary to alleviate such danger. Tenant shall provide to Landlord as promptly as possible, and in any event within five business days after Tenant first receives or sends the same, copies of all claims, reports, complaints, notices, warnings or asserted violations relating in any way to the Premises or Tenant's use thereof and concerning Hazardous Substances. Tenant shall not negotiate or enter into any settlement agreement, consent decree or other compromise in respect of Hazardous Substances affecting the Premises or the Premises without first giving Landlord prior written notice and full opportunity to appear, intervene or otherwise protect Landlord's rights and interests.

C. Without limitation of the provisions of Paragraph 14 hereof, Tenant shall indemnify, defend and hold Landlord and its affiliates harmless from any and all claims, judgments, damages, penalties, fines, costs, liabilities or losses which arise during or after the term of this Lease as a result of the handling of Hazardous Substances on the Premises, or by Tenant, its agents or invitees, including without limitation, all costs of monitoring, investigating, and remediation of the same, damages for diminution in the value of the Premises, damages for the loss or restriction on use of rentable or usable space or of any amenity of the Premises, damages arising from any adverse impact on marketing of any such space and sums paid in settlement of claims, attorneys' fees, consultant fees and expert fees. This indemnification by Tenant includes, but is not limited to, costs incurred in connection with any investigation of site conditions or any clean-up, remediation, removal or restoration work requested by Landlord or required by any federal, state or local governmental agency or political subdivision because of Hazardous Substance present in the soil or groundwater in, on or under the Premises or in any improvements. Without limiting the foregoing, if the presence of any Hazardous Substance in, on, under or about the Premises caused or permitted by Tenant results in any contamination of the Premises or, Tenant, at its sole expense, promptly shall take all action that is necessary to return the Premises to the condition existing prior to the introduction of such Hazardous Substance in, on, under or about the Premises; provided that Landlord's approval of such actions shall first be obtained, which approval shall not be unreasonably withheld so long as such actions could not potentially have any material adverse effect upon the Premises. Tenant's obligations under this Paragraph 21.C. shall survive the expiration or termination of this Lease.

25. CHANGES BY LANDLORD

A. The description of the Premises and the location of any Premises utility system(s), including without limitation electrical, plumbing, shall be subject to such minor changes as Landlord determines to be necessary or desirable in the course of any construction performed by or under the authorization of Landlord. No such changes shall invalidate or affect this Lease. Landlord shall effect such changes using reasonable efforts not to disturb Tenant's business.

Tenant shall have no claim against Landlord for abatement of rent or loss of business as a result of any such disturbance.

B. Landlord shall have the right in its sole discretion to, among other things, change permitted land uses, install, maintain and remove public improvements, change the arrangement, character, use or location of entrances or passageways, walkways, streets, sidewalks, parking areas, stairs, landscaping, toilets, and other facilities.. None of the foregoing shall be deemed an actual or constructive eviction of Tenant, nor shall it entitle Tenant to any reduction of rent hereunder or result in any liability of Landlord to Tenant; provided, however, Landlord shall not unreasonably obstruct or interfere with access to or the lines of sight toward the Premises.

26. LANDLORD'S RIGHT TO CURE

All covenants to be performed by Tenant shall be performed at Tenant's sole cost and expense and without abatement of rent. Without limiting Landlord's rights under any other provision of this Lease, if Tenant shall fail to pay any sum of money or shall fail to perform any other act and such failure shall have become an event of default under Paragraph 18, Landlord, without waiving or releasing Tenant from any of its obligations, may make (but shall not be obligated to make) any such payment or perform any such other act. All sums so paid by Landlord and all necessary incidental costs shall be deemed additional rent and shall be payable to Landlord immediately upon Landlord's written demand.

27. EMINENT DOMAIN

A. If all or any part of the Premises shall be taken as a result of the exercise of the power of eminent domain, this Lease shall terminate as to the part so taken on the earlier of the dates that title vests in the condemning authority or such authority takes possession of the Premises. In the case of a partial taking, either Landlord or Tenant shall have the right to terminate this Lease as to the balance of the Premises by written notice to the other party within thirty (30) days after such date of taking; provided, however, that Tenant shall have no right to terminate this Lease unless the portion of the Premises taken shall be of such extent and nature as substantially to impede or impair Tenant's use of the balance of the Premises. In the event of any such taking, Landlord shall be entitled to all compensation, damages, income, rent, awards and interest that may be paid or made in connection with such taking. Tenant shall have no claim against Landlord for the value of any unexpired Term; however, Landlord shall cooperate with Tenant if Tenant seeks to recover, at its sole expense, proceeds or awards paid to compensate for damage to the "goodwill" associated with Tenant's business. Any such amounts recovered shall belong to Tenant.

B. If any part of the Premises shall be so taken and this Lease shall not be terminated, then this Lease shall continue in full force and effect, except that the Rent shall be reduced in the same proportion that the rentable area of the Premises taken bears to the original rentable area of the Premises. Landlord, upon receipt of the award, shall make all necessary repairs and alterations (exclusive of Tenant's trade fixtures, furniture, furnishings, personal Premises, decorations, signs and contents) to restore the portion of the Premises remaining to as near its former condition as the circumstances will permit and to restore the Building to the

extent necessary to constitute the portion of the Building not so taken a complete architectural unit. Landlord, in any event, shall not be required to spend for such repairs and alterations an amount in excess of the amount received by Landlord as damages for the taking of such part of the Premises and/or Building; and Tenant, at its sole cost and expense, shall make all necessary repairs and alterations to Tenant's trade and lighting fixtures, furniture, furnishings, personal Premises, decorations, signs and contents.

C. As used herein, the "amount received by Landlord" shall mean that portion of the award received by Landlord as damages from the condemning authority which is free and clear of all prior claims or collections by Landlord and less reasonable attorneys' and appraisers' fees and expenses.

28. SUBORDINATION

A. This Lease shall be subject and subordinated to (i) all ground or underlying leases which have been or may hereafter be executed affecting the Premises, (ii) any Declaration of Covenants, Conditions and Restrictions now or hereafter recorded affecting , all without the necessity of having further instruments executed on behalf of Tenant to effectuate such subordination.

B. Tenant agrees to execute and deliver upon demand such further instruments or documents as may reasonably be required by Landlord to evidence any such subordination of this Lease. Tenant hereby constitutes and appoints Landlord, as Tenant's attorney-in-fact, coupled with an interest, to execute and deliver any such instrument(s) on behalf of Tenant.

29. RISK OF LOSS

Tenant bears all risk of loss under this Lease.

30. CONFORMITY WITH LAW AND SAFETY

A. Tenant shall observe and comply with all applicable laws, ordinances, codes and regulations of governmental agencies, including federal, state, municipal and local governing bodies having jurisdiction over any or all of the activities of Tenant hereunder, including the Occupational Safety and Health Act of 1979 as amended, all California Occupational Safety and Health Regulations, and all applicable federal, state, municipal and local regulations relating to health, safety, noise, environmental protection, waste disposal, hazardous materials, water and air quality. All activities conducted by Tenant on the Premises must be in accordance with these laws, ordinances, codes and regulations. Tenant shall release, defend, indemnify and hold harmless City, its officers, agents, volunteers and employees from any and all damages, liability, fines, penalties and consequences from any noncompliance or violation of any laws, ordinances, codes or regulations.

B. If a death, serious personal injury or substantial property damage occurs in connection with the performance of this Lease, Tenant shall immediately notify the City's Risk Manager. If any accident occurs in connection with this Lease, Tenant shall promptly submit a written report to City, in such form as the City may require. This report shall include the

following information: 1) name and address of the injured or deceased person(s); 2) name and address of Tenant's sublessee, if any; 3) name and address of Tenant's liability insurance carrier; and 4) a description of the accident, including if any of City's equipment, tools or materials were involved.

31. INSPECTION BY CASP

As of the date of this Lease, the Premises has not been inspected by a Certified Access Specialist.

32. INDEPENDENT CAPACITY

For purposes of this Lease, and for the duration of this Lease, Tenant and its agents and employees shall be, and are, an independent contractors and not an agent or employee of the City. Tenant has and shall retain the right to exercise full control and supervision of the services, and full control over the employment, direction, compensation and discharge of all persons assisting Tenant in the performance of this Lease. Tenant shall be solely responsible for all matters relating to the payment of its employees, including compliance with Social Security withholding taxes and all regulations governing such matters, and shall be solely responsible for its own acts and those of its agents and employees.

33. NON-DISCRIMINATION AGAINST PERSONS WITH DISABILITIES

A. If Tenant provides any aid, service or benefit to others on the City's behalf, Tenant shall, in the provision of such aid, service or benefit, observe and comply with all applicable provisions of Title II of the Americans with Disabilities Act of 1990 and any amendments thereto. Tenant shall further observe and comply with all applicable federal, state, municipal and local laws, ordinances, codes and regulations prohibiting discrimination against individuals with disabilities or ensuring that individuals with disabilities are not excluded from participating in or receiving benefits, services or activities of the City.

B. If Tenant is or becomes a "public accommodation" as defined in Title III of the Americans with Disabilities Act of 1990, Tenant shall observe and comply with all applicable provisions of the Act and any amendments thereto, and all applicable federal, state, municipal and local laws, ordinances, codes and regulations prohibiting discrimination on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations offered by the Tenant. Tenant's activities must be in accordance with these laws, ordinances, codes, and regulations, and Tenant shall be solely responsible for compliance.

34. CITY NON-DISCRIMINATION ORDINANCE

Tenant hereby agrees to comply with the provisions of BM.C. Chapter 13.26 as amended from time to time. In the performance of this Lease, Tenant agrees as follows:

A. Tenant shall not discriminate against any employee or applicant for employment because of race, color, religion, ancestry, national origin, age (over 40), sex, pregnancy, marital status, disability, sexual orientation or AIDS.

B. Tenant shall permit the City access to records of employment, employment advertisements, application forms, EEO-1 forms, affirmative action plans and any other documents which, in the opinion of the City, are necessary to monitor compliance with this non-discrimination provision. In addition, Tenant shall fill-out, in a timely fashion, forms supplied by the City to monitor this non-discrimination provision.

35. CONFLICT OF INTEREST PROHIBITED

A. In accordance with Government Code section 1090, Berkeley City Charter section 36, and B.M.C. Chapter 3.64, neither Tenant nor any employee, officer, director, partner or member of Tenant, or immediate family member of any of the preceding, shall have served as an elected officer, an employee, or a City board, committee or commission member, who has directly or indirectly influenced the making of this Lease.

B. In accordance with Government Code section 1090 and the Political Reform Act, Government Code section 87100 *et seq.*, no person who is a director, officer, partner, trustee, employee or consultant of the Tenant, or immediate family member of any of the preceding, shall make or participate in a decision made by the City or a City commission, board or committee, if it is reasonably foreseeable that the decision will have a material effect on any source of income, investment or interest in real property of that person or Tenant.

C. Interpretation of this section shall be governed by the definitions and provisions used in the Political Reform Act, Government Code section 87100 *et seq.*, its implementing regulations, manuals and codes, Government Code section 1090, Berkeley City Charter section 36 and B.M.C. Chapter 3.64.

36. NUCLEAR FREE BERKELEY

Tenant agrees to comply with B.M.C. Chapter 12.90, the Nuclear Free Berkeley Act, as amended from time to time.

37. OPPRESSIVE STATES

A. In accordance with Resolution No. 59,853-N.S., Tenant certifies that it has no contractual relations with, and agrees during the term of this Lease to forego contractual relations to provide personal services to, the following entities:

- (1) The governing regime in any Oppressive State.
- (2) Any business or corporation organized under the authority of the governing regime of any Oppressive State.
- (3) Any individual, firm, partnership, corporation, association, or any other commercial organization, and including parent-entities and wholly-owned subsidiaries (to the extent that their operations are related to the purpose of its Lease with the City), for the express

purpose of assisting in business operations or trading with any public or private entity located in any Oppressive State.

B. For purposes of this Lease, the Tibet Autonomous Region and the provinces of Abo, Kham, and U-Tsang shall be deemed Oppressive States.

C. Tenant's failure to comply with this section shall constitute a default of this Lease and City may terminate this Lease pursuant to Section 3. In the event that the City terminates Tenant due to a default under this provision, City may deem Tenant a non-responsible bidder for five (5) years from the date this Lease is terminated.

38. RECYCLED PAPER FOR WRITTEN REPORTS

If Tenant is required to prepare a written report, Tenant shall use recycled paper for said report or study when such paper is available at a cost of not more than 10% more than the cost of virgin paper, and when such paper is available at the time it is needed. Recycled paper is paper that contains at least 50% recycled product. If recycled paper is not available, Tenant shall use white paper. Reports shall be printed on both sides of the page whenever practical.

39. BERKELEY LIVING WAGE ORDINANCE (LWO)

A. Tenant hereby agrees to comply with the provisions of the Berkeley Living Wage Ordinance (LWO), B.M.C. Chapter 13.27. If Tenant is currently subject to the LWO, as indicated by the Living Wage Certification form, attached hereto, Tenant will be required to provide all eligible employees with City mandated minimum compensation during the term of this Lease, as defined in B.M.C. Chapter 13.27, as well as comply with the terms enumerated herein. Tenant expressly acknowledges that, even if Tenant is not currently subject to the LWO, cumulative Leases with City may subject Tenant to the requirements under B.M.C. Chapter 13.27 in subsequent Leases.

B. If Tenant is currently subject to the LWO, Tenant shall be required to maintain monthly records of those employees providing service under the Lease. These records shall include the total number of hours worked, the number of hours spent providing service under this Lease, the hourly rate paid, and the amount paid by Tenant for health benefits, if any, for each of its employees providing services under the Lease. These records are expressly subject to the auditing terms described in Section 30.

C. If Tenant is currently subject to the LWO, Tenant shall include the requirements thereof, as defined in B.M.C. Chapter 13.27, in any and all subleases in which Tenant engages to execute its responsibilities under this Lease. All sublessee employees who spend 25% or more of their compensated time engaged in work directly related to this Lease shall be entitled to a living wage, as described in B.M.C. Chapter 13.27 and herein.

D. If Tenant fails to comply with the requirements of this Section, the City shall have the rights and remedies described in this Section, in addition to any rights and remedies provided by law or equity.

Tenant's failure to comply with this Section shall constitute a material breach of the Lease, upon which City may terminate this Lease pursuant to Section 3. In the event that City terminates Tenant due to a default under this provision, City may deem Tenant a non-responsible bidder for not more than five (5) years from the date this Lease is terminated.

In addition, at City's sole discretion, Tenant may be responsible for liquidated damage in the amount of \$50 per employee per day for each and every instance of an underpayment to an employee. It is mutually understood and agreed that Tenant's failure to pay any of its eligible employees at least the applicable living wage rate will result in damages being sustained by the City; that the nature and amount of the damages will be extremely difficult and impractical to fix; that the liquidated damage set forth herein is the nearest and most exact measure of damage for such breach that can be fixed at this time; and that the liquidated damage amount is not intended as a penalty of forfeiture for Tenant's breach. City may deduct any assessed liquidated damages from any payments otherwise due Tenant.

40. BERKELEY EQUAL BENEFITS ORDINANCE (EBO)

A. Tenant hereby agrees to comply with the provisions of the Berkeley Equal Benefits Ordinance (EBO), B.M.C. Chapter 13.29. If Tenant is currently subject to the EBO, as indicated by the Equal Benefits Certification form, attached hereto, Tenant will be required to provide all eligible employees with City mandated equal benefits, as defined in B.M.C. Chapter 13.29, during the term of this Lease, as well as comply with the terms enumerated herein.

B. If Tenant is currently or becomes subject to the EBO, Tenant agrees to provide the City with all records the City deems necessary to determine compliance with this provision. These records are expressly subject to the auditing terms described in Section 33 of this Lease.

C. If Tenant fails to comply with the requirements of this Section, City shall have the rights and remedies described in this Section, in addition to any rights and remedies provided by law or equity. Tenant's failure to comply with this Section shall constitute a material breach of the Lease, upon which City may terminate this Lease pursuant to Section 3. In the event the City terminates this Lease due to a default by Tenant under this provision, the City may deem Tenant a non-responsible bidder for not more than five (5) years from the date this Lease is terminated.

In addition, at City's sole discretion, Tenant may be responsible for liquidated damages in the amount of \$50.00 per employee per day for each and every instance of violation of this Section. It is mutually understood and agreed that Tenant's failure to provide its employees with equal benefits will result in damages being sustained by City; that the nature and amount of these damages will be extremely difficult and impractical to fix; that the liquidated damages set forth herein is the nearest and most exact measure of damages for such breach that can be fixed at this time; and that the liquidated damage amount is not intended as a penalty or forfeiture for Tenant's breach. City may deduct any assessed liquidated damages from any payments otherwise due Tenant.

41. AUDIT

Pursuant to Section 61 of the Berkeley City Charter, the City Auditor's Office may conduct an audit of Tenant's financial, performance and compliance records maintained in connection with the operations and services performed under this Lease. In the event of such audit, Tenant agrees to provide the City Auditor with reasonable access to Tenant's employees and make all such financial, performance and compliance records available to the Auditor's Office. City agrees to provide Tenant an opportunity to discuss and respond to any findings before a final audit report is filed.

42. SETOFF AGAINST DEBTS

Tenant agrees that City may deduct from any payments due to Tenant under this Lease any monies that Tenant owes City under any ordinance, Lease or resolution for any unpaid taxes, fees, Leases, unpaid checks or other amounts.

43. GOVERNING LAW

This Lease shall be deemed to have been executed in Alameda County. The laws of the State of California, excluding its conflict of laws rules, shall govern the formation, interpretation and performance of this Lease. Venue for all litigation relative to the formation, interpretation and performance of this Lease shall be in Alameda County, California.

44. AMENDMENTS

The terms of this Lease shall not be altered or otherwise modified except by a written amendment to this Lease executed by City and Tenant.

45. CITY BUSINESS LICENSE, PAYMENT OF TAXES, TAX I D NUMBER

Tenant has obtained a City business Lease as required by B.M.C. Chapter 9.04, and its Lease number is written below; or, Tenant is exempt from the provisions of B.M.C. Chapter 9.04 and has written below the specific B.M.C. section under which it is exempt. Tenant shall pay all state and federal income taxes and any other taxes due. Tenant certifies under penalty of perjury that the taxpayer I.D. number written below is correct.

46. SEVERABILITY

If any part of this Lease or the application thereof is declared invalid for any reason, such invalidity shall not affect the other terms of this Lease which can be given effect without the invalid provision or application, and to this end the provisions of this Lease are declared to be severable.

47. WAIVER

Failure of City to insist on strict performance shall not constitute a waiver of any of the provisions of this Lease or a waiver of any other default of Tenant.

48. EFFECT ON SUCCESSORS AND ASSIGNS

This Lease shall be binding on and inure to the benefit of the heirs, executors, administrators, successors, and assigns of the parties hereto.

44. UNAVOIDABLE DELAYS

A. In the event that Tenant or Landlord is delayed, directly or indirectly, from the performance of any act or thing required to be done or performed under the terms or conditions hereof by acts of the other party to this Lease, acts of God, fire, floods, inclement weather, unavoidable governmental action, strikes or labor difficulties of any and all kinds, shortages of or delay in the delivery of materials, acts of war, riot and civil commotion, or by any other cause beyond the reasonable control of Tenant or Landlord, as the case may be, such failure shall not be deemed to be a breach of this Lease or a violation of any such covenants or conditions and the time within which Tenant or Landlord must perform any such act shall be extended by a period of time equal to the period of delay arising from any of such causes.

B. Notwithstanding any provision of this Paragraph 41 or any other provision of this Lease to the contrary, it is understood and agreed that there shall be no abatement of, or delay in the commencement of, or payment of any sum due to Landlord under this Lease

45. TIME OF THE ESSENCE

Time is of the essence of each and every covenant and condition of this Lease.

49. ENTIRE AGREEMENT

A. The terms and conditions of this Lease, all exhibits attached and any documents expressly incorporated by reference, represent the entire agreement between the parties with respect to this Lease. This Lease shall supersede any and all prior agreements, oral or written, regarding the subject matter between City and Tenant. No other agreement, statement, or promise relating to this Lease shall be valid or binding except by a written amendment to this Lease.

B. If any conflicts arise between the terms and conditions of this Lease and the terms and conditions of the attached exhibits or any documents expressly incorporated, the terms and conditions of this Lease shall control.

50. EXECUTION IN COUNTERPARTS

This Lease 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 document.

IN WITNESS WHEREOF, City and Tenant acknowledge that they have read and understand this Lease, to be effective as of the Effective Date and hereby execute this Lease.

Approved as to form:

CITY OF BERKELEY

City Attorney

Dated: _____

Registered by:

Anne Marie Hogan, City Auditor

Habitot Children's Museum, TENANT

By _____
Gina Moreland, Executive Director

Tax Identification No. _____
Berkeley Business Lease No. _____, expires
Incorporated: Yes ___ No___
Certified Woman Business Enterprise: Yes___ No.____.
Certified Minority Business Enterprise: Yes___ No ___
If yes, state ethnicity: _____
Certified Disadvantaged Business Enterprise: Yes___ No ___

Christine Daniel, City Manager

Dated: _____

Attest: _____

Mark Numainville, City Clerk

Dated: _____

EXHIBIT A

DESCRIPTION OF PREMISES

“Premises” shall mean the property assigned APN Number 052-1528-15-4 and bounded by Alcatraz Avenue to the south and Adeline Street to the west, located adjacent to 3271 Adeline Street on the northern and eastern sides, and totaling approximately 2,000 square feet in area, in the City of Berkeley, California, as depicted here:

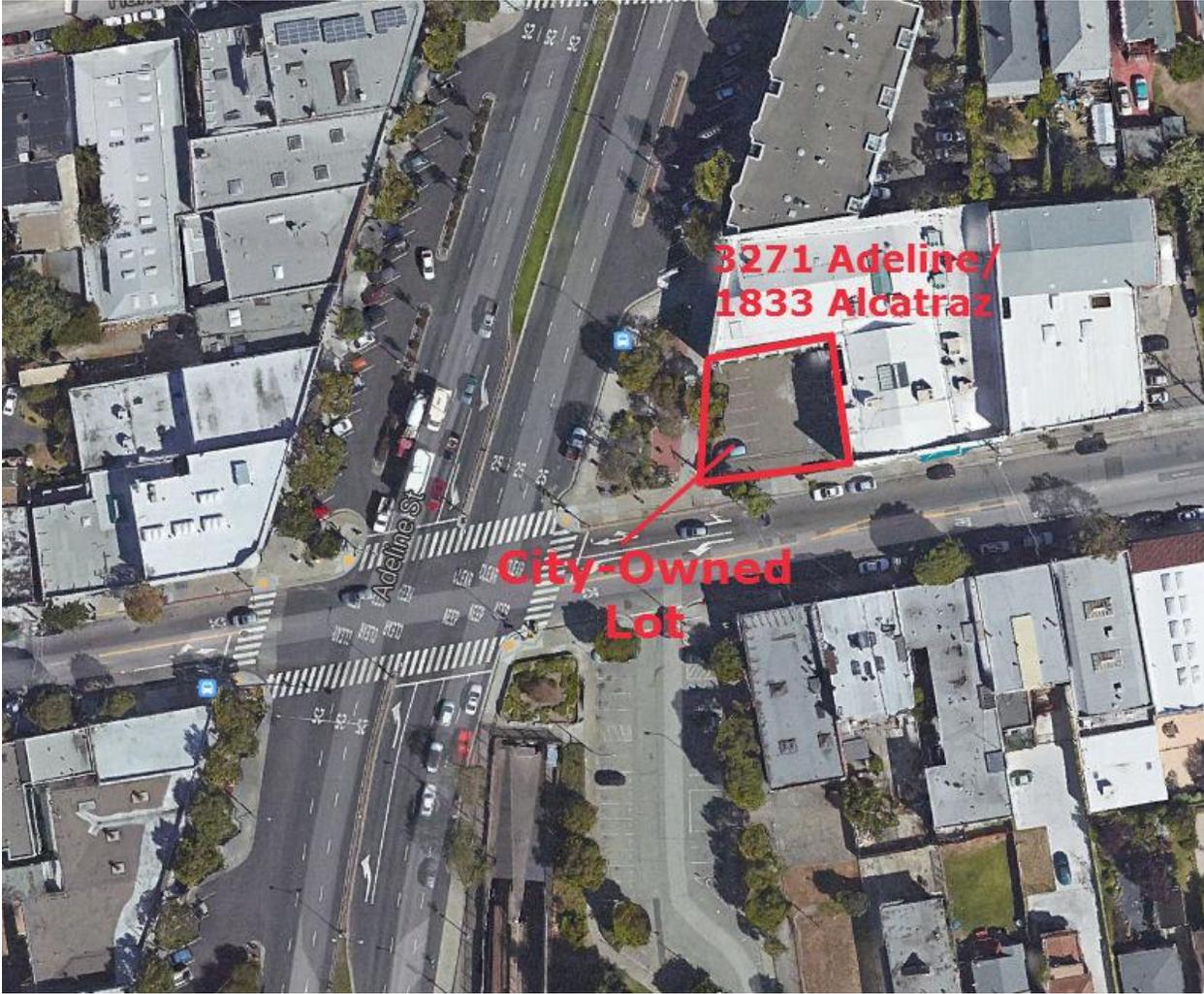


EXHIBIT B

USE OF PREMISES

1. Tenant shall operate on the Premises and in the adjacent building a Children's museum, including exhibits and activities, open at least 6 days per week (excluding federal and local holidays).
2. Tenant shall be responsible for inspecting the Premises and maintaining a clean and safe environment including keeping the Improvements, related walls, planters, paving and the general vicinity around the Premises free from graffiti, trash and other debris.
3. Tenant shall be responsible for maintaining, repairing and renovating the Improvements including any related walls, planters, paving, lighting and landscaping.
4. Tenant shall be responsible for keeping and maintaining the landscaping in good general order.
5. Tenant shall be responsible for controlling noise or disruptive behavior on and near the Premises that may be reasonably related to Tenant's activities.

Attachment 2: Area Map



To: City Manager

Re: Habitot's Use of Adjacent Lot at 3271 Adeline

Fresh air, sunshine, and outdoor play are essential to comprehensive programming for Habitot Children's Museum's primary audience, young children age 0-5. Providing **attractive, year-round opportunities for outdoor play and learning** is essential to Habitot's financial well-being and long-term sustainability.

We respectfully request that the City of Berkeley consider making the approximately 2,000 square foot, City-owned lot adjacent to 3271 Adeline available to Habitot for outdoor environmental exhibits and programming for children, adult visitors, and the community.

We ask that the lease be concurrent with our lease of the building (15 years - 5 years, with two 5 year options) and that if Habitot succeeds in purchasing the building, which is our goal, that the lot available for the museum's use for as long as Habitot owns the building.

If use is granted to Habitot, the museum would secure the perimeter with **aesthetically-pleasing, interactive, and fun fence** with the required number of emergency exits. This perimeter would make sure young children are contained safely within the space, and would prohibit non-visitors from entering at all times.

The fence would incorporate elements of color and design that would **invite passersby to engage in playful interactive components** that reflect light or create soft sounds; see and hear young children at play; and appreciate the work of muralists and other artists whose creativity would be displayed on the fence.

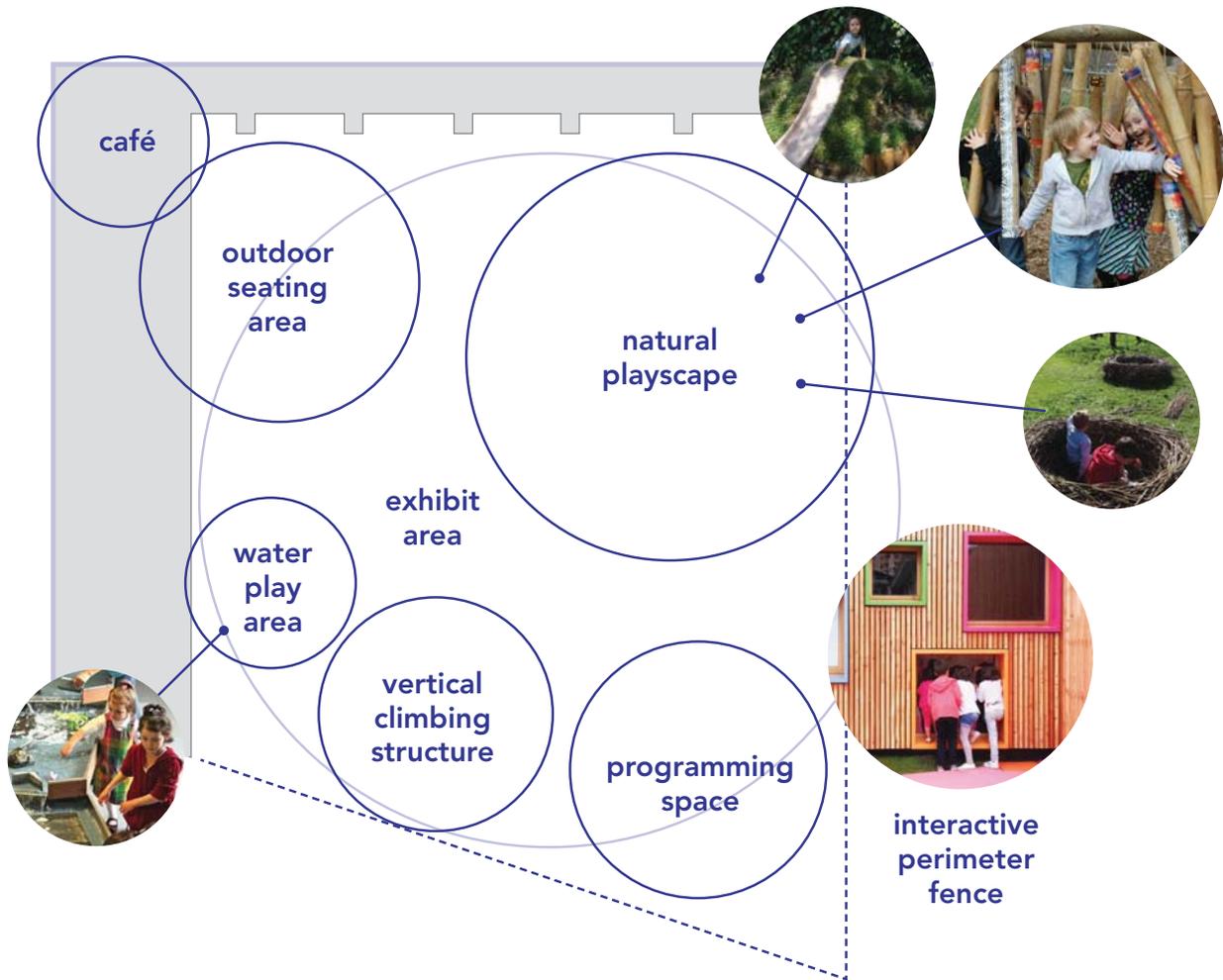
In the past, the lot has been used for parking and the asphalt is considerably degraded.

The asphalt would be removed and replaced with an appropriate and water-permeable material, and the building would be perforated to allow egress and ingress from inside the museum to the outdoor space. The outdoor space would be available to all museum visitors.



aesthetically-pleasing, interactive fencing, natural play spaces and inclusive programming will define Habitot's proposed outdoor exhibit area





preliminary exhibit and programming diagram

Close to the building, we imagine an **outdoor seating area** that would be contiguous with the Museum's indoor café area. Within the remainder of the fenced-in area, there would be a **children's play space with natural elements** — a dry stream bed, rocks for climbing and sitting, bridges, a hollow log, a bamboo grove or other **vegetation that permit imaginative play**. Small structures such as whimsical houses, forts, huts, caves or a living labyrinth may be added as well.

We also envision **climbers structures** with appropriate safety surfacing and **outdoor water play** in some form, although museum concept plans are incomplete at this time whether the water play would be plumbed or manually supported. Open space would remain for programming — **performances, music, public, community, and private events, as well as children's classes and camps**.

Habitot has received a tenant allowance of \$55,000 towards improvements to the space and will continue to raise funds to continue developing the space in the future. Habitot's liability insurance would cover the space and the City of Berkeley would be listed as an additional insured.

To maintain the space, Habitot would conduct daily safety checks to ensure that no trash or hazardous materials have appeared in the space and that all interactive elements are in safe and working order, all structures would be inspected monthly, vegetation would be maintained with water and trimming as needed, the fencing would be regularly maintained, including removal of any graffiti as needed. Partnerships with Master Gardeners and landscape students will be invited to help maintain the space.

**All images are examples only, as concepts for the space are currently in development.*

