

MES

RECORDING REQUESTED BY  
CHICAGO TITLE COMPANY

Recording Requested By:  
1401 Park Avenue LLC  
1981 North Broadway, Suite 415  
Walnut Creek, CA 94596

R91

CERTIFIED TO BE A TRUE COPY OF DOCUMENT  
RECORDED 03-23-01  
AT SERIES NO. 2001-099569  
OFFICIAL RECORDS OF ALAMEDA COUNTY FOR  
Chicago Title Company

By: [Signature]

When Recorded, Mail To:  
Lawrence P. Kolb, Acting Executive Officer  
California Regional Water Quality Control Board  
San Francisco Bay Region  
1515 Clay Street, Suite 1400  
Oakland, California 94612

COVENANT AND ENVIRONMENTAL RESTRICTION  
ON PROPERTY

1401 Park Avenue  
Emeryville, California

This Covenant and Environmental Restriction on Property ("Covenant") is made as of the date fully executed by 1401 Park Avenue LLC ("Covenantor"), the Owner of record of that certain property situated at 1401 Park Avenue in the City of Emeryville, County of Alameda, State of California, described in Exhibit A attached hereto and incorporated herein by this reference (such property hereinafter referred to as the "Property"), and by the California Regional Water Quality Control Board for the San Francisco Bay Region (the "Board"), for the benefit of the Board, with reference to the following facts:

A. Residual Substances at the Property. As a result of metal plating activities which operated at the Property in the past, residual amounts of kerosene, halocarbons and chromium (the "Residual Substances") are present in the soil and groundwater beneath and adjacent to the Property. The Residual Substances in soil and groundwater constitute hazardous materials as that term is defined in Health and Safety Code Section 25260. Remediation of soil and groundwater, overseen by the Board, has dramatically decreased the concentration of the Residual Substances.

B. Site Management Plan. A Site Management Plan approved by the Board identifies procedures that effectively ameliorate any future risks related to the Residual Substances. A copy of the Site Management Plan shall be maintained at the Property. Additional copies of the Site Management Plan and this Covenant shall also be forwarded to the Board, City of Emeryville Building Department, and the Alameda County Environmental Services Agency. The Site Management Plan may be amended, but must be approved by the Board in writing before the amended version takes effect.

C. Exposure Pathways. The existing concrete slab and asphalt parking lot act as a "cap" on the Property to prevent exposure pathways, that is, ways by which there might be exposure to the Residual Substances. The Board and the City of Emeryville have approved a plan for redevelopment of the Property, which will include augmenting the existing cap by

(A) 911692-10

covering it with a larger, more significant, impermeable barrier. The Site Management Plan, which has been approved by the Board, is in place to ensure the safety of those in, around and performing work at the Property. The Residual Substances addressed in this Covenant are present in the soil and groundwater on the Property. The mitigation measures which have been performed on the Property effectively prevent human exposure to these Residual Substances. The risk of public exposure to the contaminants has been substantially lessened by the remediation and controls described herein.

D. Adjacent Land Uses. As of the date of this Covenant, the Property will be redeveloped for office and retail use, and is adjacent to what are currently commercial and residential land uses. The property is currently not in use.

E. Full and voluntary disclosure to the Board of the presence of hazardous materials at the Property has been made, and extensive sampling of the Property has been conducted.

F. Covenantor desires and intends that, in order to benefit the Board, and to protect the present and future public health and safety, the Property shall be used in such a manner as to avoid potential harm to persons or property that may result from Residual Substances that may have been deposited on portions of the Property.

## ARTICLE I GENERAL PROVISIONS

1.1 Provisions to Run with the Property. This Covenant sets forth protective provisions, covenants, conditions and restrictions (collectively referred to as "Restrictions") upon and subject to which the Property and every portion thereof shall be improved, held, used, occupied, leased, sold, hypothecated, encumbered, and/or conveyed. The restrictions set forth in Article III are reasonably necessary to protect present and future human health and safety or the environment as a result of the presence of Residual Substances. Each and all of the Restrictions shall run with the Property, and pass with each and every portion of the Property, and shall apply to, inure to the benefit of, and bind the respective successors in interest thereof, for the benefit of the Board and all Owners and Occupants. Each and all of the Restrictions are imposed upon the entire Property, unless expressly stated as being applicable to a specific portion of the Property. Each and all of the Restrictions run with the land pursuant to Section 1471 of the Civil Code. Each and all of the Restrictions are enforceable by the Board.

1.2 Concurrence of Owners and Lessees Presumed. All purchasers, lessees, or possessors of any portion of the Property shall be deemed by their purchase, leasing, or possession of the Property, to be in accord with the foregoing and to agree for and among themselves, their heirs, successors, and assignees, and the agents, employees, and lessees of such owners, heirs, successors, and assignees, that the Covenants herein established must be adhered to for the benefit of the Board and the Owners and Occupants of the Property, and that the interest of the Owners and Occupants of the Property shall be subject to the Covenants contained herein.

1.3 Incorporation into Deeds and Leases. Covenantor covenants that the Restrictions set out herein shall be (a) incorporated by reference in all deeds conveying any portion of the

Property, and (b) disclosed to all tenants or occupants of any portion of the Property to the extent applicable to their use of the Property and/or to the extent required by Health & Safety Code Section 25359.7 or other applicable law. Recordation of this Covenant shall be deemed binding on all successors, assigns, and lessees, regardless of whether a copy of this Covenant has been attached to or incorporated into any given deed or lease.

1.4 Purpose. It is the purpose of this instrument to convey to the Board real property rights, which will run with the land, to facilitate protection of human health and the environment by reducing the risk of exposure to Residual Substances.

## ARTICLE II DEFINITIONS

2.1 Board. "Board" shall mean the California Regional Water Quality Control Board for the San Francisco Bay Region, and shall include its successor agencies, if any.

2.2 Cap. "Cap" shall mean any Improvement on the Property capable of preventing exposure to the underlying soil.

2.3 Improvements. "Improvements" shall mean all buildings, roads, driveways, regradings, and paved parking areas, constructed or placed upon any portion of the Property.

2.4 Occupants. "Occupants" shall mean Owners and those persons entitled by ownership, leasehold, or other legal relationship to the exclusive right to occupy any portion of the Property.

2.5 Owner or Owners. "Owner" or "Owners" shall mean the Covenantor and/or its successors in interest, who hold title to all or any portion of the Property.

## ARTICLE III DEVELOPMENT, USE AND CONVEYANCE OF THE LAND

3.1 Covenants on Development and Use. Covenantor promises to restrict the use of the Property as follows:

- a. Development of the first floor of any structure at the Property shall be restricted to parking, industrial, commercial, retail (including food service), or office space.
- b. No residence for human habitation shall be permitted on the first floor of any structure at the Property unless approved in writing by the Board.
- c. No hospitals shall be permitted at the Property.
- d. No schools for persons under 21 years of age shall be permitted on the first floor of any structure at the Property unless approved in writing by the Board.

e. No daycare centers for children, or daycare centers for Senior Citizens shall be permitted on the first floor of any structure at the Property unless approved in writing by the Board.

f. No Owners or Occupants of the Property, or any portion thereof, shall conduct any excavation work at the Property unless it is conducted in accordance with the Site Management Plan, as may be amended. Any contaminated soils brought to the surface by grading, excavation, trenching, or backfilling shall be managed by Covenantor or its agent, or successor in interest or its agent, in accordance with all applicable provisions of local, state and federal law.

g. All uses and development at the Property shall be consistent with the Site Management Plan, as may be amended, which has been prepared to properly manage the Residual Substances which remain at the Property. The Site Management Plan is hereby incorporated by reference, including future amendments thereto. All uses and development shall maintain the integrity of the cap (e.g. asphalt parking lot, building slab, or other cap as defined herein) unless otherwise expressly permitted in writing by the Board.

h. No Owners or Occupants of the Property, or any portion thereof, shall drill, bore, otherwise construct or use a well for the purpose of extracting water for any use, including, but not limited to, domestic, potable, or industrial uses unless expressly permitted in writing by the Board.

i. No Owner or Occupant of the Property shall act in any manner that will increase the level of Residual Substances by disposing of hazardous materials in a manner which is inconsistent with law or regulation. All use and development of the Property shall preserve the integrity of any capped areas, unless otherwise expressly permitted in writing by the Board.

j. The Owner shall notify the Board of each of the following: (1) The type, cause, location and date of any disturbance to any cap which materially affects the ability of such cap to limit exposure to Residual Substances and (2) the type and date of repair of such disturbance. Notification to the Board shall be made by registered mail within ten (10) working days of both the discovery of such disturbance and the completion of repairs.

k. The Covenantor agrees that the Board, and/or any persons acting pursuant to Board orders, shall have reasonable access to the Property for the purposes of inspection, surveillance, maintenance, or monitoring, as provided for in Division 7 of the Water Code.

3.2 Enforcement. Failure of the Owner to comply with any of the Restrictions, as set forth in paragraph 3.1, shall be grounds for the Board, by reason of this Covenant, to have the authority to require that the Owner modify or remove any Improvements constructed in violation of that paragraph. Violation of the Covenant shall be grounds for the Board to file civil actions against the Owner as provided by law.

3.3 Notice in Agreements. After the date of recordation hereof, all Owners and Occupants shall execute a written instrument which shall accompany all purchase agreements or leases relating to the Property. Any such instruments shall contain the following statement:

The land described herein contains residual amounts of certain hazardous materials in soils and in the groundwater under the land, and is subject to a deed restriction dated as of \_\_\_\_\_, 2001 recorded on \_\_\_\_\_, 2001 in the Official Records of Alameda County, California, as Document No. \_\_\_\_\_, which deed restriction imposes certain covenants, conditions, and restrictions on usage of the property described herein. This statement is not a declaration that a hazard exists.

#### ARTICLE IV VARIANCE AND TERMINATION

4.1 Variance. Any Owner or, with the Owner's consent, any Occupant of the Property, or any portion thereof, may apply to the Board for a written variance from the provisions of this Covenant.

4.2 Termination. Any Owner or, with the Owner's consent, any Occupant of the Property, or any portion thereof, may apply to the Board for a termination of the Covenant as they apply to all or any portion of the Property.

4.3 Term. Unless terminated in accordance with Paragraph 4.2 above, by law or otherwise, this Covenant shall continue in effect in perpetuity.

#### ARTICLE V MISCELLANEOUS

5.1 No Dedication Intended. Nothing set forth herein shall be construed to be a gift or dedication, or offer of a gift or dedication, of the Property or any portion thereof to the general public.

5.2 Notices. Whenever any person gives or serves any notice, demand, or other communication with respect to this Covenant, each such notice, demand, or other communication shall be in writing and shall be deemed effective (1) when delivered, if personally delivered to the person being served or official of a government agency being served, or (2) three (3) business days after deposit in the mail, if mailed by United States Mail, postage paid certified, return receipt requested.

If to "Covenantor":  
1401 Park Avenue LLC.  
1981 North Broadway, Suite 415  
Walnut Creek, CA 94596

If to "Board":  
Regional Water Quality Control Board  
San Francisco Bay Region  
1515 Clay Street, Suite 1400  
Oakland, CA 94612 -  
Attention: Executive Officer

5.3 Partial Invalidity. If any portion of the Restrictions or terms set forth herein is determined to be invalid for any reason, the remaining portion shall remain in full force and effect as if such portion had not been included herein.

5.4 Article Headings. Headings at the beginning of each numbered article of this Covenant are solely for the convenience of the parties and are not a part of the Covenant.

5.5 Recordation. This instrument shall be executed by the Covenantor and by the Executive Officer of the Board. This instrument shall be recorded by the Covenantor in the County of Alameda within ten (10) days of the date of execution.

5.6 References. All references to Code sections include successor provisions.

5.7 Construction. Any general rule of construction to the contrary notwithstanding, this instrument shall be liberally construed in favor of the Covenant to effect the purpose of this instrument and the policy and purpose of the Water Code. If any provision of this instrument is found to be ambiguous, an interpretation consistent with the purpose of this instrument that would render the provision valid shall be favored over any interpretation that would render it invalid.

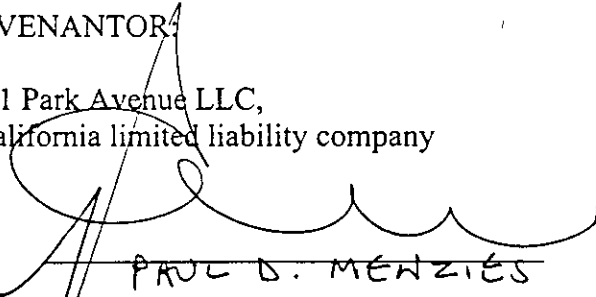
5.8 Release after Conveyance. After Covenantor has conveyed and sold the Property to another party, which shall become the new Covenantor, the original Covenantor shall automatically be released of all obligations and liabilities accruing under this Covenant after the date of such conveyance and sale.

IN WITNESS WHEREOF, the parties execute this Covenant as of the date set forth above.

COVENANTOR:

1401 Park Avenue LLC,  
a California limited liability company

By:



Title:

PAUL D. MENZIES  
MANAGER

Date:

JANUARY 22, 2001

STATE OF CALIFORNIA )  
COUNTY OF CONTRA COSTA )

On JANUARY 22, 2001 before me, the undersigned Notary Public in and for said state, personally appeared PAUL D. MENZIES (Covenantor), personally known to me or proved to me on the basis of satisfactory evidence to be the person who executed the within instrument.

WITNESS my hand and official seal.

Judith L. Daniels  
Notary Public in and for said County and State



AGENCY:

State of California  
Regional Water Quality Control Board  
San Francisco Bay Region

By: Loretta K. Barsamian  
LORETTA K. BARSAMIAN  
Title: Executive Officer  
Date: March 2, 2001

STATE OF CALIFORNIA )  
COUNTY OF Alameda )

On March 2, 2001 before me, the undersigned Notary Public in and for said state, personally appeared Loretta K. Barsamian (Covenantor), personally known to me or proved to me on the basis of satisfactory evidence to be the person who executed the within instrument.

WITNESS my hand and official seal.

Gloria S. Ayon  
Notary Public in and for said County and State

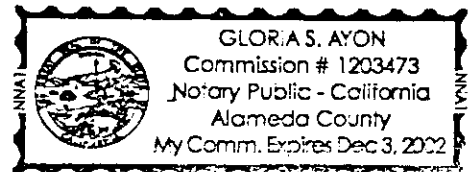


EXHIBIT A

Legal Description of Property



LEGAL DESCRIPTION EXHIBIT

CITY OF EMERYVILLE

BEGINNING AT THE POINT OF INTERSECTION OF THE WESTERN LINE OF HOLDEN STREET WITH THE SOUTHERN LINE OF PARK AVENUE, AS SAID STREET AND AVENUE ARE SHOWN ON THE MAP HEREINAFTER REFERRED TO; AND RUNNING THENCE SOUTHERLY ALONG SAID WESTERN LINE OF SAID HOLDEN STREET, 250 FEET; THENCE WESTERLY AND PARALLEL WITH SAID SOUTHERN LINE OF SAID PARK AVENUE, 100 FEET; THENCE NORTHERLY AND PARALLEL WITH SAID WESTERN LINE OF SAID HOLDEN STREET, 250 FEET TO SAID SOUTHERN LINE OF SAID PARK AVENUE; AND THENCE EASTERLY ALONG SAID SOUTHERN LINE OF SAID PARK AVENUE, 100 FEET TO THE POINT OF BEGINNING.

BEING A PORTION OF BLOCK 21, AS SAID BLOCK IS SHOWN ON THE "MAP OF PART OF PLOT 6, KELLERSBERGER'S SURVEY OF VICENTE & DOMINGO PERALTA RANCHO, PROPERTY OF J. S. EMERY", FILED MARCH 1, 1889, IN THE OFFICE OF THE COUNTY RECORDER OF ALAMEDA COUNTY.

ASSESSOR'S PARCEL NO. 049-0617-015-01

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

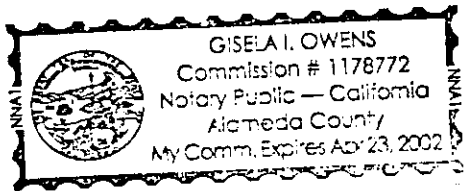
No. 5907

State of California  
County of Alameda

On 1-22-2001 before me, Gisela I Owens  
DATE NAME, TITLE OF OFFICER - E.G., "JANE DOE, NOTARY PUBLIC"

personally appeared Paul Menezes  
NAME(S) OF SIGNER(S)

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



WITNESS my hand and official seal.  
[Signature]  
SIGNATURE OF NOTARY

OPTIONAL

Though the data below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent reattachment of this form.

CAPACITY CLAIMED BY SIGNER

- INDIVIDUAL
- CORPORATE OFFICER
- \_\_\_\_\_ TITLE(S)
- PARTNER(S)       LIMITED
- GENERAL
- ATTORNEY-IN-FACT
- TRUSTEE(S)
- GUARDIAN/CONSERVATOR
- OTHER: \_\_\_\_\_

DESCRIPTION OF ATTACHED DOCUMENT

\_\_\_\_\_ TITLE OR TYPE OF DOCUMENT

\_\_\_\_\_ NUMBER OF PAGES

\_\_\_\_\_ DATE OF DOCUMENT

\_\_\_\_\_ SIGNER(S) OTHER THAN NAMED ABOVE

SIGNER IS REPRESENTING:  
NAME OF PERSON(S) OR ENTITY(IES)  
\_\_\_\_\_  
\_\_\_\_\_

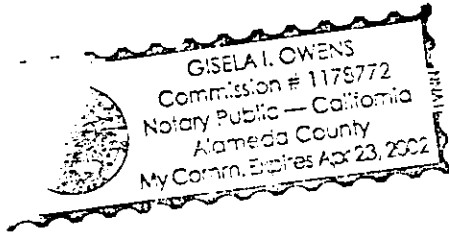
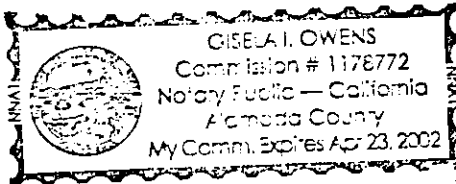
State of California

County of Alameda

On March 2, 2001 before me, Gisela I Owens  
DATE NAME, TITLE OF OFFICER - E.G., "JANE DOE, NOTARY PUBLIC"

personally appeared Loretta K Borenweg  
NAME(S) OF SIGNER(S)

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



WITNESS my hand and official seal

[Signature]  
SIGNATURE OF NOTARY

**OPTIONAL**

Though the data below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent reattachment of this form.

**CAPACITY CLAIMED BY SIGNER**

- INDIVIDUAL
- CORPORATE OFFICER

\_\_\_\_\_  
TITLE(S)

- PARTNER(S)       LIMITED
- ATTORNEY-IN-FACT       GENERAL
- TRUSTEE(S)
- GUARDIAN/CONSERVATOR
- OTHER: \_\_\_\_\_

**SIGNER IS REPRESENTING:**  
NAME OF PERSON(S) OR ENTITY(IES)

\_\_\_\_\_  
\_\_\_\_\_

**DESCRIPTION OF ATTACHED DOCUMENT**

\_\_\_\_\_  
TITLE OR TYPE OF DOCUMENT

\_\_\_\_\_  
NUMBER OF PAGES

\_\_\_\_\_  
DATE OF DOCUMENT

\_\_\_\_\_  
SIGNER(S) OTHER THAN NAMED ABOVE