



CITY OF MARTINEZ

CITY COUNCIL
September 3, 2014

TO: Mayor and City Council
FROM: Michael Chandler, Senior Management Analyst
SUBJECT: Morello Child Care Lease Agreement
DATE: August 29, 2014

RECOMMENDATION:

Motion authorizing the Interim City Manager to execute a Lease Agreement with Patricia Bayless, d.b.a. Lasting Impressions Child Care Center, for use of City real property located at 244 Morello Park Drive.

BACKGROUND

The City constructed a facility located at 244 Morello Park Drive in 1992 for the purposes of operating a childcare center. The program opened in 1993-94 under the name “Lasting Impressions Childcare Center” and was administered by a City employee for several years. In 2002, Patricia Bayless, one of the teachers in the program, obtained the State licensing necessary to operate her own child care center. The City subsequently transferred operation of the program to her on an independent contractor basis. Ms. Bayless retained the business name of “Lasting Impressions Childcare Center.”

The City’s most recent contract agreement with Ms. Bayless was entered into on November 20, 2007, for provision of California-licensed pre-school child care for children ages 2 through entering first grade at 244 Morello Park Drive. The term of this agreement went to September 21, 2010, and was extended on three separate occasions by Council action. The agreement is presently in a month-to-month status and a new agreement with Ms. Bayless is in order.

For a number of reasons, transitioning to a lease agreement model is more appropriate than a contract for services arrangement. For more than a decade, the City has not been the operator of the child care facility. As such, the City does not manage the program, set the rates for enrollment, or otherwise dictate the specific terms under which the program is run. Additionally, the City remains responsible under the existing contract for services for expenses such as utilities and all maintenance functions at the building. Under the lease agreement, the City will transfer responsibility for utilities and several routine maintenance functions to the tenant.

Key terms of the lease agreement include the following:

- Term to run concurrent with City’s fiscal year (to June 30, 2015), with option to extend one year upon mutual consent of both parties

- Rent to City will be paid as a percentage of gross tuition revenue, with City share set at 27% for the Term through June 30, 2015, and 33% thereafter
- Public liability insurance will be increased from \$1M to the current standard of \$2M per occurrence
- Utilities formerly paid by City will now be assumed by the operator
- Several routine maintenance responsibilities formerly provided by City will now be assumed by the operator (e.g. drywall, paneling, paint, carpet, floor coverings, electrical fixtures, phone systems, interior/exterior lighting systems, graffiti abatement, other health and safety aspects of the building)

FISCAL IMPACT:

Rent is set at 27% of gross tuition revenue for the remainder of FY 14-15, a decrease from the previous contract model of 30% and estimated to be approximately \$8K for the remainder of this fiscal year. This decrease was allowed as an initial consideration of the increased financial responsibilities of the tenant (e.g. utilities, routine maintenance, and expanded insurance coverage). The City will receive some direct financial offset (estimated to be at least \$5K) to the reduction in revenue associated with transfer of utilities and some interior building maintenance responsibilities assumed by the tenant.

Effective July 1, 2015, Rent will increase to 33% of gross tuition revenue.

ACTION:

Motion authorizing the Interim City Manager to execute a Lease Agreement with Patricia Bayless, d.b.a. Lasting Impressions Child Care Center, for use of City real property located at 244 Morello Park Drive.

Attachment:
Lease Agreement

APPROVED BY:



Interim City Manager

LEASE

- Section 1. Premises
- Section 2. Playground Use Area
- Section 3. Term and Termination
- Section 4. Rental Terms
- Section 5. Use
- Section 6. Alterations
- Section 7. Possession
- Section 8. Insurance
- Section 9. Default
- Section 10. Remedies
- Section 11. Maintenance and Repairs
- Section 12. Estoppel Certificate
- Section 13. Severability
- Section 14. Assignment or Subletting
- Section 15. Entry
- Section 16. Signs
- Section 17. Holding Over
- Section 18. Destruction and Condemnation
- Section 19. Indemnity
- Section 20. Security Deposit
- Section 21. Personal Property of Lessor at Premises
- Section 22. Non-Discrimination
- Section 23. Lessor's Right to Perform for Lessee
- Section 24. Notices
- Section 25. Attorney Fees
- Section 26. Legal Effect
- Section 27. Titles
- Section 28. Successors
- Section 29. Waiver
- Section 30. Services and Utilities
- Section 31. Entire Agreement
- Section 32. Taxes
- Section 33. Time of the Essence
- Section 34. Subordination
- Section 35. Governing Law
- Section 36. Sale of Premises by Lessor

This Lease (Lease) dated as of the ___ day of _____, 2014 is entered into by and between the City of Martinez, a Municipal Corporation (Lessor), and Patricia Bayless (Lessee), hereinafter together referred to as the "Parties."

Section 1. Premises.

Lessor leases to Lessee and Lessee leases from Lessor that certain building of approximately 960 square feet in floor area, owned by the City and located at 244 Morello Park Drive, Martinez, California, on a portion of real property commonly referred to as APN # 161-160-009 and owned by the Martinez Unified School District, as more particularly depicted in **Exhibit A**, attached hereto and incorporated by reference (the "Premises").

Section 2. Playground Use Area.

In addition to the Premises, Lessor hereby agrees to permit Lessee use of the playground immediately adjacent to the Premises, as more particularly described in **Exhibit B**, attached hereto and incorporated herein by reference ("Playground"). Said use of the Playground by Lessee will be exclusive to Lessee on Monday through Friday from 7:00 A.M to 6:00 P.M. during the hours of operation as set forth in Section 5 hereof ("Exclusive Use Period"). At all times other than the Exclusive Use Period, said Playground shall be open and available for use by Lessor, it being understood and agreed that Lessor may, in its sole and absolute discretion, make said Playground available to the public generally during any time other than the Exclusive Use Period.

Section 3. Term and Termination.

(a) The Term of this Lease shall consist of the period commencing on the date of execution of this Lease (Commencement Date) and continuing until the earlier of (1) the 30th day of June 2015, or (2) the date of any termination of this Lease in accordance with the provisions hereof.

(b) This Lease shall be terminable by Lessor (i) immediately upon the occurrence of an Event of Default as provided in Section 9 of this Lease or (ii) in the Lessor's sole and absolute discretion upon ninety (90) days' advance written notice to Lessee.

(c) The Term hereof may be extended for a twelve month period, until June 30, 2016, upon the mutual agreement of the Parties.

Section 4. Rental Terms.

(a) Lessee shall pay to Lessor, monthly as Rent for the Premises during the Term of this Lease, twenty seven percent (27%) of the Gross Tuition Income received by Lessee in the previous month as a result of the Use described in Section 5 hereof as shown in Lessee's monthly Profit and Loss Statement of the preceding monthly period. Said Rent shall be payable

to Lessor by Lessee no later than the eleventh of each month. In the event the Term is extended in accordance with Section 3 (c), Rent shall increase to thirty-three percent (33%), effective July 1, 2015.

(b) "Gross Tuition Income" as used in this Lease shall mean the gross amount received by Lessee from all payments for Tuition for children in the preschool and daycare programs operated at the Premises. "Tuition" includes all income required for a child to be enrolled in the preschool/daycare program(s) located at the Premises except any materials fee charged for consumable materials provided by Lessee to said children.

(c) Lessee shall keep and maintain on the Premises, full, complete and appropriate books and records of all income derived from the use of the Premises for a preschool/daycare operation in accordance with standard accounting practice. These books and records shall at all reasonable times and upon reasonable notice be open for inspection and copying by Lessor, Lessor's auditors, or any other authorized representative of Lessor. Lessee shall provide to Lessor a monthly Financial Statement, including but not limited to, an enrollment ledger, a payment and accounts receivable ledger and a Profit and Loss Statement for Lessee's operations at the Premises, within ten days of the end of each month of the Term of this Lease. Lessor, in the sole discretion of the City Manager, or his/her designee, may require a financial audit of Lessee's operations once every year at the sole expense of Lessee. Lessee shall retain all books and records for a period of one year following the end of each fiscal year of operation at the Premises.

(d) The installments of Rent specified herein shall be paid, without deduction or offset, and without prior notice or demand to Lessor, at the address identified in this Lease, or such other address as Lessor may from time to time designate by written notice to Lessee. All amounts of money payable by Lessee to Lessor hereunder, if not paid within thirty (30) days of the date due shall be subject to a late charge of ten percent (10%) of the amount due which late charge shall be paid as additional rent by Lessee plus interest at ten percent (10%) per annum on the delinquent amount. Lessee further agrees to pay Twenty-Five Dollars (\$25.00) for each dishonored check.

(e) Acceptance of monthly Rent payments shall not be an admission of the accuracy of those payments, but Lessor shall be entitled at any time within one year after the end of the Fiscal Year in which said payment is made to question the sufficiency of the amount or the accuracy of the statements furnished by Lessee to Lessor to justify the payments.

Section 5. Use.

The Premises are to be used for the operation of a licensed Pre-School Day Care facility as specifically set forth a license issued by the State of California Department of Social Services for no more than 24 children ("Permitted Use") and no part of the Premises shall be used for any different purpose at any time except as expressly permitted by advance written permission of Lessor. Lessee shall not do or permit any act to be done that will increase the existing rate or cause cancellation of insurance on the Premises. Lessee shall not use the Premises or permit anything to be done in or about the Premises which will in any way conflict with any statutes,

law, ordinances, regulations and rules now in force or which may hereafter be promulgated. Lessee shall at its sole cost and expense promptly comply with all statutes, laws, ordinances, regulations, rules and other requirements of all governmental entities that pertain to the occupancy or use of the Premises, and shall at all times maintain the Premises in a good order with all due care for the safety and cleanliness of the Premises. Lessee shall not use the Premises for the conduct of the Permitted Use or any other occupation of the Premises without the proper licenses issued by the State of California Department of Social Services and shall immediately cease use of the premises in the event such license is suspended or revoked for any reason.

Section 6. Alterations.

(a) Lessee shall not make or suffer to be made any alterations, additions, or improvements, including the installation of fixtures, equipment, or signs in, upon or with respect to the Premises, without the advance written consent of Lessor, which consent may be withheld for any reason or no reason whatsoever in the sole judgment of Lessor. Any alteration to the Premises without the advance written consent of Lessor shall be a breach of this Lease and, at the option of Lessor, shall cause a termination of this Lease. Lessee shall keep the Premises and any improvements located thereon free and clear from any and all liens and claims arising out of any work performed, materials furnished or obligations incurred by or for the account of Lessee.

(b) In the event any alteration to the Premises is approved by Lessor, all alterations, additions, and improvements, including the installation of fixtures, equipment, or signs in, upon or with respect to the Premises, shall be at the sole cost and expense of Lessee, including all design, construction, engineering, permitting, inspection and other costs and fees associated therewith. Unless Lessor shall indicate otherwise, in writing, at any time during the term of this Lease, any alterations, additions or improvements made or suffered to be made by Lessee with respect to the Premises shall on the termination of the Lease become a part of the Premises and the property of Lessor. Upon written notice to Lessee, Lessee shall at its sole cost and expense forthwith and with all due diligence remove any alterations, additions or improvements made by or on behalf of Lessee which improvements were not approved by Lessor in accordance with Section 6(a) above. Upon removal of any alterations, addition, improvements, including the installation of fixtures, equipment, or signs in, upon or with respect to the Premises removed by Lessee pursuant to the terms hereof, Lessee shall forthwith and with all due diligence and at its sole cost and expense repair any damage to the Premises caused by such removal and restore the Premises to a broom clean and tenant ready condition.

(c) Any and all work to be performed by or through Lessee relating to the Premises shall be performed in accordance with the requirements set forth below:

- i. All work shall be performed in a good and workmanlike manner, by persons licensed to perform such work in the state of California and shall substantially comply with plans and specifications submitted to and approved by Lessor as required by this Lease, and shall comply with all applicable governmental permits, laws, ordinances and regulations.

- ii. Before any repair, alteration, or work of construction is commenced on the Premises, and before any building materials have been delivered to the Premises by Lessee or under Lessee's authority, Lessee shall have complied with all the following conditions or procure Lessor's written waiver of the condition or conditions specified in the waiver:
1. Deliver to Lessor for Lessor's approval two (2) sets of preliminary construction plans and specifications prepared by an architect or engineer licensed to practice as such in the State of California, all sufficient to enable potential contractors and subcontractors to make reasonably accurate bid estimates and to enable Lessor to make an informed judgment about the design and quality of construction and about any effect on the Premises or any other agreements which Lessor may have entered into relating to the Premises or the Property of which the Premises are a part. All works of improvement shall be performed only by contractors and sub-contractors licensed to perform said work in the state of California.
 2. All improvements shall be constructed within Premises, except that required work beyond the Premises on utilities or access does not violate this provision. Lessee shall deliver to Lessor, along with the plans and specifications, the certificate of the person or persons who prepared the plans and specifications certifying that Lessee has fully paid for them or waiving payment and waiving any right to a lien for preparing them.
 3. Lessor shall communicate its approval or disapproval of the plans and specifications in the manner provided herein for notices. Lessee shall not deliver working drawings to any governmental body for a building permit until preliminary plans are approved as in this paragraph.
 4. Lessee shall deliver to Lessor the written approval of the plans and specifications by the financial institution that shall have made the commitment for financing the construction, if any.
 5. Lessee shall prepare final working plans and specifications and deliver one (1) complete set, together with a list of all changes from the preliminary plans previously approved by Lessor, to Lessor for its approval. Lessor shall communicate its approval or disapproval of the plans and specifications in the manner provided herein for notices.
 6. Lessee shall notify Lessor of Lessee's intention to commence a work of improvement on the Premises at least thirty (30) days before commencement of any such work or delivery of any materials. The

notice shall specify the approximate location and nature of the intended improvements. Lessor shall have the right to post and maintain on the Premises any notices of non-responsibility provided for under applicable law, and to inspect the Premises in relation to the construction at all reasonable times.

7. Lessee shall furnish Lessor with a true copy of Lessee's contract with the general contractor together with evidence of the general contractor's financial condition for Lessor's approval. Said contract shall specifically name Lessor as a third-party beneficiary and shall give Lessor the right, but not the obligation, to assume Lessee's obligations and rights under the contract if Lessee should default.
8. Lessor may disapprove of the contractor and/or the contract by notice given within ten (10) days following delivery of the copy of the contract.
9. Lessee shall deliver to Lessor true copies of all documents to evidence the commitment of financing for any construction. "Financing" includes both the construction (or interim) financing and the take-out (also called permanent or long-term) loan. Lessor may require by notice that no construction commence until the take-out financing is firmly committed, but may disapprove the financing only if the terms violate an express provision of this Lease. No financing shall be secured by an interest in the Premises.
10. Lessee shall furnish Lessor labor and materials and performance bonds naming Lessor as beneficiary. Said bonds shall be issued by a responsible surety company, licensed to do business in California, and approved by Lessor, and shall be in an amount not less than 100% of the estimated cost of the improvement and shall remain in effect until the entire cost of the work shall have been paid in full and the new improvements shall have been accepted by Lessor and insured as provided in this Lease.
11. Lessor shall have the right to approve of the method of disbursing the construction loan funds during the period of construction, if applicable.
12. Lessee shall deliver to Lessor certificates and endorsements of insurance as set forth below with insurers with a Best rating of no less than A:XI:
 - A. Workers' Compensation Insurance to cover the employees of contractor and all subcontractors as required by the Labor Code of the State of California for all of the

contractor/subcontractors' employees. Each Workers' Compensation policy shall be endorsed with the provision that it will not be canceled or altered without first giving thirty (30) days prior notice to Lessor.

Said Worker's Compensation policy shall have the following endorsement:

"All rights of subrogation are hereby waived against the City of Martinez, its officers and employees when acting within the scope of their appointment or employment".

B. Commercial General Liability Insurance including personal injury and property damage insurance for all activities of the Lessee, the contractor and subcontractors arising out of or in connection with the Premises, written on a commercial general liability form including, but not limited to, Broad Form Property Damage, blanket contractual, products liability and completed operations, X,C,U hazards, vehicle coverage and non- owned auto liability coverage in an amount no less than \$2 million dollars combined single limit personal injury and property damage for each occurrence.

Each such policy shall be endorsed with the following specific language:

(i) The City of Martinez is named as additional insured for all liability arising out of the work performed by or on behalf of the named insured, and this policy protects the additional insured, its officers, agents, and employees against liability for personal and bodily injuries, deaths or property damage or destruction arising in any respect, directly, or indirectly, in the performance of the contract.

(ii) The inclusion of more than one insured shall not operate to impair the rights of one insured against another insured, and the coverages afforded shall apply as though separate policies had been issued to each insured.

(iii) The insurance provided is primary and no insurance held or owned by the City shall be called upon to contribute to a loss.

(iv) The coverage provided by this policy shall not be canceled without thirty (30) days' prior written notice given to the City.

C. Certificates of insurance evidencing coverage for "builder's all risk."

D. Any deductible or self-insured retentions must be declared to and approved by the City in writing. At the option of City, insurer shall reduce or eliminate such deductible or self-insured retention as respects City, its officers and employees or Lessee and contractor shall procure a bond guaranteeing payment of losses and related investigation, claims, administration and defense expenses.

E. Lessee shall maintain, keep in force, and pay all premiums required to maintain and keep in force all insurance above at all times during which such work is in progress.

(d) Lessee acknowledges that any alterations to the Premises which may be performed by Lessee may be considered a Public Work pursuant to Chapter 1 of Part 7 of Division 2 of the California Labor Code, commencing with Section 1720 and Title 8, California Code of Regulations, Chapter 8, Subchapter 3, commencing with Section 16000 and therefore subject to the payment of prevailing wages to all workers engaged to perform said work. Lessee shall comply with all applicable laws with regard to same and shall defend, indemnify, hold harmless and defend (with counsel reasonably acceptable to Lessor) the Lessor against any claim for damages, compensation, fines, penalties or other amounts arising out of any failure or alleged failure of any person or entity (including the Lessee) to pay prevailing wages or comply with any applicable provisions of the Labor Code and implementing regulations. Without limiting the generality of the indemnification set forth in Section 19 below, the Lessee's obligation to indemnify under this Section shall be interpreted broadly to apply to any legal or administrative proceeding, arbitration, or enforcement action. Lessor may, in its sole and absolute discretion, request a written prevailing wage compliance plan prior to Lessee's undertaking any work of improvement to the Premises and require Lessee to use a third-party recordkeeping/compliance firm for the purpose of establishing prevailing wage compliance. Said third party firm shall be at Lessee's sole cost and expense.

Section 7. Possession.

Lessee shall take possession of the Premises on the Commencement Date. Any delay in delivery of possession of the Premises to the Lessee shall postpone the commencement of Rent accordingly, but shall not otherwise affect this Lease.

Section 8. Insurance.

(a) Lessee agrees to and shall at its own cost and expense procure and maintain during the entire Lease Term the following insurance:

- (i) **Commercial General Liability (CGL)** including personal injury and property damage insurance for all activities of the Lessee arising out of the or in connection with the Premises, written on a commercial general liability form including, but not limited to, Broad Form Property Damage, bodily injury, personal injury, blanket contractual, products liability and completed operations, X,C,U hazards, advertising injury, vehicle coverage and non-owned auto liability coverage in an amount no less than **\$2,000,000** combined single limit for each occurrence. If a general aggregate limit applies, wither the general aggregate limit shall apply separately to the location or the general aggregate limit shall be twice the required occurrence limit. Said Coverage shall be at least as broad as Insurance Services Office (ISO) Form CG 00 01 covering CGL on an “occurrence” basis.
- (ii) **Workers’ Compensation** insurance as required by the State of California, with Statutory Limits, and Employer’s Liability Insurance with limits of no less than **\$1,000,000** per accident for bodily injury or disease. Said Worker's Compensation policy shall have the following endorsement:

"All rights of subrogation are hereby waived against the City of Martinez, its officers and employees when acting within the scope of their appointment or employment".

- (iii) **Property insurance** against all risks of loss to any tenant improvements or betterments to the Premises, and any tenant contents, at full replacement cost with no coinsurance penalty provision.

If the Lessee maintains higher limits than the minimums shown above, Lessor shall be entitled to coverage for the higher limits maintained. Any available insurance proceeds in excess of the specified minimum limits of insurance and coverage shall be available to the City.

(b) Such insurance coverages are to contain, or be endorsed to contain, the following provisions:

- (i) For Commercial General Liability only, Lessor, its officers, officials, employees, agents and volunteers are to be **covered as additional insureds** with respect to liability arising out of work performed by or on behalf of the Lessee including materials, parts, or equipment furnished in connection with such work or operations, maintenance, and use of the Premises. General liability coverage can be provided in the form of an endorsement to the Lessee’s insurance at least as broad as ISC Form CG 20 11.
- (ii) A waiver of all **rights of subrogation** against Lessor.
- (iii) A provision that coverage shall not be canceled except after thirty (30) days’ prior written notice (10 days for non-payment) has been given to the Lessor.

(iv) For Property insurance only, the policy shall **name the Lessor as Loss Payee** as its interests may appear.

(c) The Lessee's insurance coverage shall be **primary insurance** as respects the Lessor, its officers, officials, employees, agents and volunteers. Any insurance or self-insurance maintained by the Lessor, its officers, officials, employees, or volunteers shall be excess of the Lessee's insurance and shall not contribute with it.

Acceptability of Insurers

Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A: VII, unless otherwise approved by Lessor, in writing.

Deductibles and Self-Insured Retentions

Any deductibles or self-insured retentions must be declared to and approved by Lessor, in writing. At the option of Lessor, either: the Lessee shall obtain coverage to reduce or eliminate such deductibles or self-insured retentions as respects the Lessor, its officers, officials, employees, and volunteers; or the Lessee shall provide a financial guarantee satisfactory to the Lessor guaranteeing payment of losses and related investigations, claim administration, and defense expenses.

Verification of Coverage

Lessee shall furnish the Lessor with original certificates and amendatory endorsements or copies of the applicable policy language providing the insurance coverage required above. Failure to obtain the required documents prior to the date(s) required herein shall not waive the Lessee's obligation to provide them. The Lessor reserves the right to require complete, certified copies of all required insurance policies, including endorsements, at any time.

Waiver of Subrogation

Lessee hereby grants to Lessor a waiver of any right to subrogation which any insurer of said Lessee may acquire against the Lessor by virtue of the payment of any loss under such insurance. This provision applies regardless of whether or not the Lessor has received a waiver of subrogation endorsement from the insurer.

Special Risks or Circumstances

Lessor reserves the right to modify these requirements at any time, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other special circumstances relating to additional activities which Lessee may wish to undertake at the Premises.

Without limiting the generality of the indemnification set forth in Section 19 below, Lessee shall release, defend and indemnify Lessor, its officials, employees, representatives and agents, from

any claims for damage to any person or to the Premises, or to the Lessee's personal property contained therein caused by, or that result from, risks insured against under any insurance policies carried by Lessor and in force at the time of any such damage. Lessor shall not be liable to Lessee for any damage caused or any of the risks insured against under any insurance policy required by this Section.

Section 9. Default.

Each of the following shall be an Event of Default under this Lease:

- (a) If Lessee fails to make any payment required by the provisions of this Lease, when due;
- (b) If Lessee fails within thirty (30) days after written notice to correct any breach or default of the other covenants, terms, or conditions of this Lease;
- (c) If the City's Building Official has determined the building on the Premises does not meet the Health and Safety Standards of the City;
- (d) If Lessee vacates, abandons, or surrenders the Premises prior to the end of the Term; and
- (e) If all or substantially all of Lessee's assets are placed in the hands of a receiver or trustee, and that receivership or trusteeship continues for a period of thirty (30) days, or if Lessee makes an assignment for the benefit of creditors or is adjudicated a bankrupt, or if Lessee institutes any proceedings under any state or federal bankruptcy act by which Lessee seeks to be adjudicated a bankrupt or seeks to be discharged of debts, or if any voluntary proceeding is filed against Lessee under any bankruptcy laws, and Lessee consents or acquiesces by pleading or default.

Section 10. Remedies.

Upon the occurrence of an Event of Default under this Lease by Lessee, Lessor is entitled at Lessor's option to the following:

- (a) to reenter and take exclusive possession of the Premises;
- (b) to collect immediately the present value of the unpaid Rent reserved for the entire term, or to collect each installment of Rent as it becomes due;
- (c) to continue this Lease in force or to terminate it at any time;
- (d) to relet the Premises for any period on Lessee's account and at Lessee's expense, including real estate commissions actually paid, and to apply the proceeds received during the balance of Term to Lessee's continuing obligations under this Lease;

(e) to take custody of all personal property on the Premises and to dispose of the personal property and to apply the proceeds from any sale of that property to Lessee's obligations under this Lease;

(f) to recover from Lessee the damages described in Civil Code § 1951.2(a)(1), 1951.2(a)(2), 1951.2(a)(3), and 1951.2(a)(4), the provisions of which are expressly made a part of this Lease;

(g) to alter the Premises to make the Premises suitable for re-letting, all at Lessee's expense; and

(h) to enforce by suit or otherwise all obligations of Lessee under this Lease and to recover from Lessee all remedies now or later allowed by law.

Any act that Lessor is entitled to do in exercise of Lessor's rights upon an Event of Default may be done at a time and in a manner deemed reasonable by Lessor in Lessor's sole discretion, and Lessee irrevocably authorizes Lessor to act in all things done on Lessee's account.

Section 11. Maintenance and Repairs.

Lessee acknowledges and accepts the Premises and the Playground in their respective “as is” condition as of the Commencement Date and agrees and acknowledges that Lessor makes no representations or warranties, either express or implied, as to the condition of the Premises, the Playground, the absence or presence of Hazardous Materials located thereon, compliance with accessibility standards or the fitness of the Premises or Playground for any particular purpose. Neither the Premises nor the Playground has undergone inspection by a Certified Access Specialist. Lessee agrees to maintain the Premises, and all portions thereof, in good and safe condition, as set forth in **Exhibit C**, including, but not limited to, maintenance and repair/replacement of building interior improvements, including, but not limited to: all interior surfaces, walls, and flooring; electrical fixtures; phone, cable, or other wiring systems and all lighting systems and fixtures; all exterior lighting systems; and all other items of maintenance not specifically assumed by Lessor pursuant to the terms of this Lease. Lessee promises to surrender the Premises and Playground at termination of this Lease in at least the same condition as the Commencement Date, except for normal wear and tear and except for changes authorized by Lessor and not required to be removed pursuant to the terms of this Lease.

Lessor and Lessee agree that Lessor shall have no responsibility whatsoever for the maintenance and repair of the Premises unless specifically assumed by Lessor pursuant to the terms of this Lease, and that notwithstanding the terms hereof, all such maintenance and repairs to the Premises or Playground shall be at the sole, unfettered discretion of Lessor. Lessee specifically waives the right to make, or cause to be made, any repairs or maintenance at Lessor's expense under any law, statute or ordinance now or hereafter in effect.

Lessee shall not cause, maintain or permit any nuisance in, on or about the Premises or the Playground or commit or suffer to be committed any waste in or upon the Premises or the Playground. Lessee shall not permit garbage or other refuse to accumulate or to gather in or

about the Premises except in suitable covered garbage receptacles. All parts, equipment, garbage, refuse and other debris shall be stored or discarded in such a manner so as not to be visible by persons located off the Premises.

Section 12. Estoppel Certificate.

At any time within ten (10) days after written request by Lessor, Lessee shall execute, acknowledge, and deliver to Lessor, without charge, a written statement certifying that this Lease is unmodified and in full force or, if there have been modifications, that this Lease is in full force as modified. That statement shall also contain the date of commencement of this Lease, the dates to which the Rent and any other charges have been paid in advance, and any other information Lessor reasonably requests. It is acknowledged by Lessee that any statement may be delivered by Lessor to, and relied upon by, prospective purchasers, mortgagees, deed of trust beneficiaries, and assignees.

Section 13. Severability.

The invalidity of any portion of this Lease shall not affect the remainder, and any invalid portion shall be deemed rewritten to make it valid so as to carry out as near as possible the expressed intention of the parties.

Section 14. Assignment or Subletting.

(a) Lessee shall not assign the Lease or any interest hereunder, and shall not sublet the Premises or any part thereof, or any right or privilege appurtenant thereto, or suffer any person other than the agents and employees of Lessee to occupy the Premises, or any portion thereof, without the prior written consent of the Lessor, which consent may be withheld for any reason or no reason whatsoever.

(b) Lessee shall notify Lessor in writing of its request to assign or to sublease any portion of the Premises and Lessor shall have thirty (30) business days to grant or withhold its consent to such assignment or sublease. Lessor shall have the right to review and approve any assignment document or sublease relating to the Premises, or any portion thereof, and no notice of intent to assign or to sublease shall be considered delivered to Lessor in accordance with this Section unless said notice contains a full and complete copy of any assignment document or sublease. In the event that Lessor has not, on or before the thirty-first (31st) day after Lessor's receipt of Lessee's notice of intent to assign or to sublease, provided to Lessee written notice of its consent, such consent to assign or to sublease shall be presumed to be denied.

(c) Lessee will reimburse Lessor for any legal fees or for any other expense incurred as a consequence of any such assignment or sublease. Consent to one assignment or sublease shall not be deemed to be consent to any subsequent assignment or sublease. Any such assignment or sublease without Lessor's consent shall be void and shall, at the option of Lessor, be deemed to be an Event of Default under the provisions of this Lease. Notwithstanding any

provision hereof to the contrary, neither this Lease nor any interest herein shall be assignable as to the interest of Lessee by operation of law, without the prior written consent of Lessor.

(d) Without limiting those instances in which Lessor may withhold consent to an assignment or subletting, Lessor and Lessee acknowledge that Lessor may in its absolute discretion withhold consent in the following instances:

- (i) if at the time consent is requested or at any time prior to the granting of consent, an Event of Default has occurred under this Lease;
- (ii) if, in the Lessor's sole and absolute discretion, the use of the Premises by the proposed assignee or sublessee would not be compatible with or comparable to the uses by Lessee as set forth herein or would entail alterations that would materially lessen the value of the leasehold improvements in the Premises;
- (iii) if, in the Lessor's sole and absolute discretion, it determines that circumstances warrant a consideration of the financial worth of a proposed assignee and the financial worth, in Lessor's absolute and sole discretion, does not meet the credit standards applied by Lessor for other Lessees under leases with comparable terms; or
- (iv) if, in the Lessor's sole and absolute discretion, it determines that under the circumstances of the proposed assignment or sublease, Lessee will be unjustly enriched by the financial terms of the sublease in a manner to the detriment of Lessor in light of the below market rate Rent set forth herein.

(e) Irrespective of Lessor's consent, no subletting or assignment shall release Lessee of Lessee's obligation, or alter the primary liability of Lessee, to pay the Rent and to perform all other obligations to be performed by Lessee hereunder. The acceptance of Rent by Lessor from any other person shall not be deemed to be a waiver by Lessor of any provision hereof. In the event of default by an assignee of Lessee or any successor of Lessee in the performance of any of the terms hereof, Lessor may proceed directly against Lessee without the necessity of exhausting remedies against such assignee or successor.

Section 15. Right of Entry.

Lessor shall have the right of access to the Premises at all reasonable times (without notice) to inspect the Premises or to carry out any building management or business purpose in or about the building, without any abatement of rent. The Lessee acknowledges that Lessor is under no obligation to supervise or to inspect the Premises or Lessee's operations and management of the Premises, and the Lessee shall not rely upon Lessor therefor.

Section 16. Signs.

Lessee shall not place or permit to be placed in, upon, about, or outside the Premises any sign, notice, banner, or display of any kind, without the prior written consent of Lessor, which may be withheld for any or no reason whatsoever.

Section 17. Holding Over.

This Lease shall terminate without further notice at the expiration of the Term. Any holding over shall not constitute a renewal or extension. If Lessee remains in possession of the Premises or any part thereof after the termination of the Term of this Lease without the express written consent of the Lessor: (1) such occupancy shall be deemed a tenancy from month-to-month with rent payable at the rate set forth in Section 4 hereof, plus One Thousand Dollars (\$1,000) per month; and (2) Lessee shall defend, hold harmless and indemnify Lessor from all liability and expense resulting from the delay or failure to surrender, including without limitation, claims made by any succeeding lessee or occupant founded on or resulting from Lessee's surrender.

Section 18. Destruction and Condemnation.

(a) If the Premises are damaged to an extent that cannot be lawfully repaired within sixty (60) days after the date of damage, this Lease may be terminated by written notice of either party. If the Premises are capable of being repaired within said sixty (60) day period, or if this Lease is not terminated in accordance with this provision, Lessor shall proceed with repairs as necessary, subject to a proportionate reduction in the Rent, based on the extent to which the damage and repairs shall interfere with the business of Lessee on the Premises. In case of damage to one-third (1/3) or more of the building on the Premises, Lessor may elect to terminate this Lease, regardless of whether the Premises may be repaired within said sixty (60) day period. Lessee waives the benefits of Civil Code §§ 1932(2) and 1933(4).

(b) If all or any portion of the Premises are condemned or are transferred in lieu of condemnation, Lessor or Lessee may, upon written notice given within sixty (60) days after the taking or transfer, terminate this Lease. Lessee shall not be entitled to share in any portion of the award, and Lessee expressly waives any right or claim to any part of the award. Lessee shall, however, have the right to claim and recover, from the condemning authority only, but not from Lessor, any amounts necessary to reimburse Lessee for the cost of removing the personal property of Lessee.

Section 19. Indemnity.

(a) Lessee shall indemnify, defend and hold Lessor harmless from and against any and all claims arising from Lessee's use of the Premises, the Playground and the Personal Property, including use by any of her, officers, agents, employees, contractors, guests or invitees, and from any activity, work, or other thing done, permitted or suffered by the Lessee or her officers, agents, employees, contractors, guests or invitees in or about the Premises or the Playground or the Personal Property. Lessee shall further indemnify and hold Lessor harmless

from and against any and all claims arising from any breach or default in the performance of any obligation on Lessee's part to be performed under the terms of this Lease, or arising from any act or negligence of the Lessee or of any of its officers, agents, employees, contractors, guests, or invitees, and from and against all costs, attorney's fees, expenses and liabilities incurred in or about any such claim or any action or proceeding brought thereon, and, in any case, any action or proceeding brought against Lessor by reason of any such claim, Lessee, upon notice from Lessor, shall defend the same at Lessee's expense by counsel reasonably satisfactory to Lessor. Lessor or its agents shall not be liable for any damage to property entrusted to Lessee's employees, nor for loss or damage to any property by theft or otherwise, nor for any injury to or damage to persons or property resulting from Lessee's use of the Premises.

(b) Lessee agrees that it will not use, generate, store or dispose of any Hazardous Material on, under, about or within the Premises or Playground in violation of any law or regulation and Lessee shall indemnify and hold harmless Lessor, its officers, agents and employees from and against any and all losses, liabilities, claims and/or costs and expenses (including, without limitation, any fines, penalties, judgments, litigation costs, attorneys' fees, and consulting, engineering and construction costs) arising from or as a result of a breach of this warranty and representation or as a result of the, disposal, storage, generation or release on the Premises at any time during the term of this Lease of any Hazardous Materials, except to the extent caused by the gross negligence or willful misconduct of Lessor or any Lessor indemnitee regardless of whether such liability, cost or expense arises during or after the Lease Term. Should any discharge, leakage, spillage, emission, or pollution of any type occur upon or from the Premises due to Lessee's use and occupancy thereof, Lessee, at Lessee's expense, shall clean all property affected thereby to the satisfaction of Lessor and any governmental body having jurisdiction thereover.

As used in this paragraph, "Hazardous Material" shall mean any substance, chemical or waste that is identified as hazardous material, hazardous substance, hazardous waste or toxic substance in any federal, state or local law or regulation. Lessee acknowledges that Lessee is not looking to or relying upon Lessor to disclose any matters which Lessor might be required to disclose under California Health and Safety Code Section 25359.7 and that all such matters have been investigated by Lessee to Lessee's satisfaction. In this regard, Lessee specifically waives any and all rights it may have pursuant to the provisions of California Health and Safety Code Section 25359.7.

(c) The indemnifications provided pursuant to this Section 19 shall survive the termination of this Lease.

Section 20. Security Deposit.

Lessee shall pay to Lessor a Security Deposit in the amount of five hundred dollars (\$500.00), which shall be held in a separate fund by Lessor. Said Security Deposit shall not bear interest in favor of Lessee. Said Security Deposit shall be replenished in full by Lessee within thirty (30) days of any drawdown of the Security Deposit by Lessor due to Lessee's failure to perform any obligation for which an expenditure is required hereunder. Said Security Deposit shall be

returned to Lessee upon the expiration or termination of Lease, less any amounts due to Lessor at that time.

Section 21. Personal Property of Lessor at Premises.

Lessee and Lessor acknowledge that there exists certain personal property of Lessor at the Premises which may be used by Lessee for the operation of the daycare/preschool at the Premises. Said Personal Property is more particularly described in **Exhibit D**, attached hereto and incorporated herein by reference. Lessee acknowledges and accepts said Personal Property is in its "as is" condition as of the Commencement Date and agrees and acknowledges that Lessor makes no representations or warranties, either express or implied, as to the condition same or its fitness for any particular purpose. Lessee agrees to maintain the Personal Property, and all portions thereof, in good and safe condition, and cease use thereof, if same is not in a safe or useable condition. Lessee promises to surrender the Personal Property at termination of this Lease in at least the same condition as the Commencement Date, except for normal wear and tear.

Lessor and Lessee agree that Lessor shall have no obligation to replace or repair the Personal Property at any time during the Term of this Lease, it being understood that Lessee shall have no remedy relating to the non-availability of use of said Personal Property.

Section 22. Non-Discrimination.

Lessee shall, at all times, comply with all Federal, State and local non-discrimination and civil rights laws and with all equal opportunity requirements. Lessee covenants by and for itself and any successors in interest that there shall be no discrimination against or segregation of any person or group of persons on account of race, color, creed, religion, sex, sexual preference, source of income, age, marital status, sexual orientation, source of income, physical or mental handicap, medical condition, national origin or ancestry in the lease, sublease, use, occupancy, tenure or enjoyment of the Premises, or in Lessee's daycare/preschool or any other programs or uses conducted at or in the Premises nor shall Lessee itself or any person claiming under or through it establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees, vendees or participants in Lessee's daycare/preschool or any other programs or uses conducted at or in the Premises.

Section 23. Lessor's Right to Perform for Lessee.

If Lessee fails to perform any obligation under this Lease, Lessor shall be entitled to make reasonable expenditures to cause proper performance on Lessee's behalf and at Lessee's expense, against which the Security Deposit will be charged. Lessee promises to reimburse Lessor for any expenditures not fully satisfied by the Security Deposit within ten (10) days after written notice from Lessor requesting reimbursement, and failure of Lessee to make the reimbursement shall be deemed to be a default the same as a failure to pay an installment of Rent when due. All obligations of Lessee to pay money are payable without abatement, deduction, or offset of any kind.

Section 24. Notices.

All notices, payments, or other communications by either party to the other under this Lease shall be deemed to have been given on the date of service if served personally or on the fifth business day after mailing if mailed to the party to whom notice is to be given by first class mail, registered or certified, return receipt requested, postage prepaid and properly addressed as follows:

To Lessor: City of Martinez
525 Henrietta Street
Martinez, CA 94553
ATTN: City Manager

To Lessee: Patricia Bayless
951 Palisade Drive
Martinez, CA 94553

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

Section 25. Attorney Fees.

In any action or proceeding by either party to enforce this Lease or any provision of this Lease, the prevailing party shall be entitled to recover reasonable attorney fees and all other costs incurred.

Section 26. Legal Effect.

All obligations of Lessee are expressly made conditions of this Lease, any breach of which shall, at the option of Lessor, terminate this Lease. The parties agree that nothing in this Agreement is intended or shall be construed to create or reflect any form of partnership or joint venture between the Parties. Lessee shall at no time represent itself as an agent, employee, or representative of Lessor.

Section 27. Titles.

The titles or headings to paragraphs shall have no effect on interpretation of provisions.

Section 28. Successors.

The provisions of this Lease shall apply to and bind the heirs, successors, and assigns of the parties.

Section 29. Waiver.

Any waiver given hereunder by Lessor must be in writing and shall not be deemed a waiver of any subsequent breach of the same or any other term, covenant or condition herein waived. The subsequent acceptance of Rent hereunder by Lessor shall not be deemed to be a

waiver of any preceding breach by Lessee of any term, covenant or condition of this Lease, other than the failure of Lessee to pay the particular rent so accepted, irrespective of Lessor's knowledge of such preceding breach at the time of the acceptance of such Rent. The failure of Lessor to enforce a provision of this Lease shall not be deemed a waiver for any purpose.

Section 30. Services and Utilities.

Lessee shall provide gas, electricity, heating, water, telephone, cable, garbage and janitorial services to the Premises at Lessee's sole cost and expense. Lessor shall not be liable for, and Lessee not be entitled to any reduction of rent by reason of the unavailability of any utility service to the Premises.

Section 31. Entire Agreement.

This Lease, together with each attached exhibits, shall constitute the entire agreement of the parties, and may be modified only by a writing signed by the parties.

Section 32. Taxes.

Lessee shall pay all personal property taxes assessed against the Lessee's property located on the Premises. Notice is hereby given pursuant to California Revenue and Taxation Code Section 107.6 that the interest granted to Lessee pursuant to this Lease to occupy the Premises may create a possessory interest in Lessee subject to property taxation and Lessee may be subject to the payment of property taxes levied on such interest.

Section 33. Time of the Essence.

Time is of the essence in the performance of Lessee's obligations under this Lease.

Section 34. Subordination.

This Lease, at Lessor's option, shall be subordinate to the lien of any first deed of trust or first mortgage subsequently placed upon the real property of which the Premises are a part by Lessor, and to any advances made on the security of the Premises, and to all renewals, modifications, consolidations, replacements, and extensions; provided, however, that as to the lien of any deed of trust or mortgage, Lessee's right to quiet possession of the Premises shall not be disturbed if Lessee is not in default and so long as Lessee pays the Rent and observes and performs all of the provisions of this Lease, unless this Lease is otherwise terminated pursuant to its terms. If any mortgagee, trustee, or ground Lessor elects this Lease to be in senior priority to the lien of a mortgage, deed of trust, or ground lease, and gives written notice to Lessee, this Lease shall be deemed senior to that mortgage, deed of trust, or ground lease, whether this Lease is dated prior or subsequent to the date of that mortgage, deed of trust, or ground lease or the date of recording.

Section 35. Governing Law.

This Lease shall be governed by and construed in accordance with California law. Venue shall be in the County of Contra Costa.

Section 36. Sale of Premises by Lessor.

In the event of any sale of the Premises, Lessor shall be and is hereby entirely freed and relieved of all liability under any and all of its covenants and obligations contained in or derived from this Lease arising out of any act, occurrence or omission occurring after the consummation of such sale; and the purchaser, at such sale or any subsequent sale of the Premises shall be deemed, without any further agreement between the parties and their successors in interest or between the parties and any such purchaser, to have assumed and agreed to carry out any and all of the covenants and obligations of Lessor under this Lease.

The parties have executed this Lease on the date first written above.

Lessee:

Patricia Bayless

Lessor:

City of Martinez, a Municipal Corporation

Attest:

By: _____
Jim Jakel, Interim City Manager

Mercy Cabral, Deputy City Clerk

EXHIBIT A
Depiction of Premises

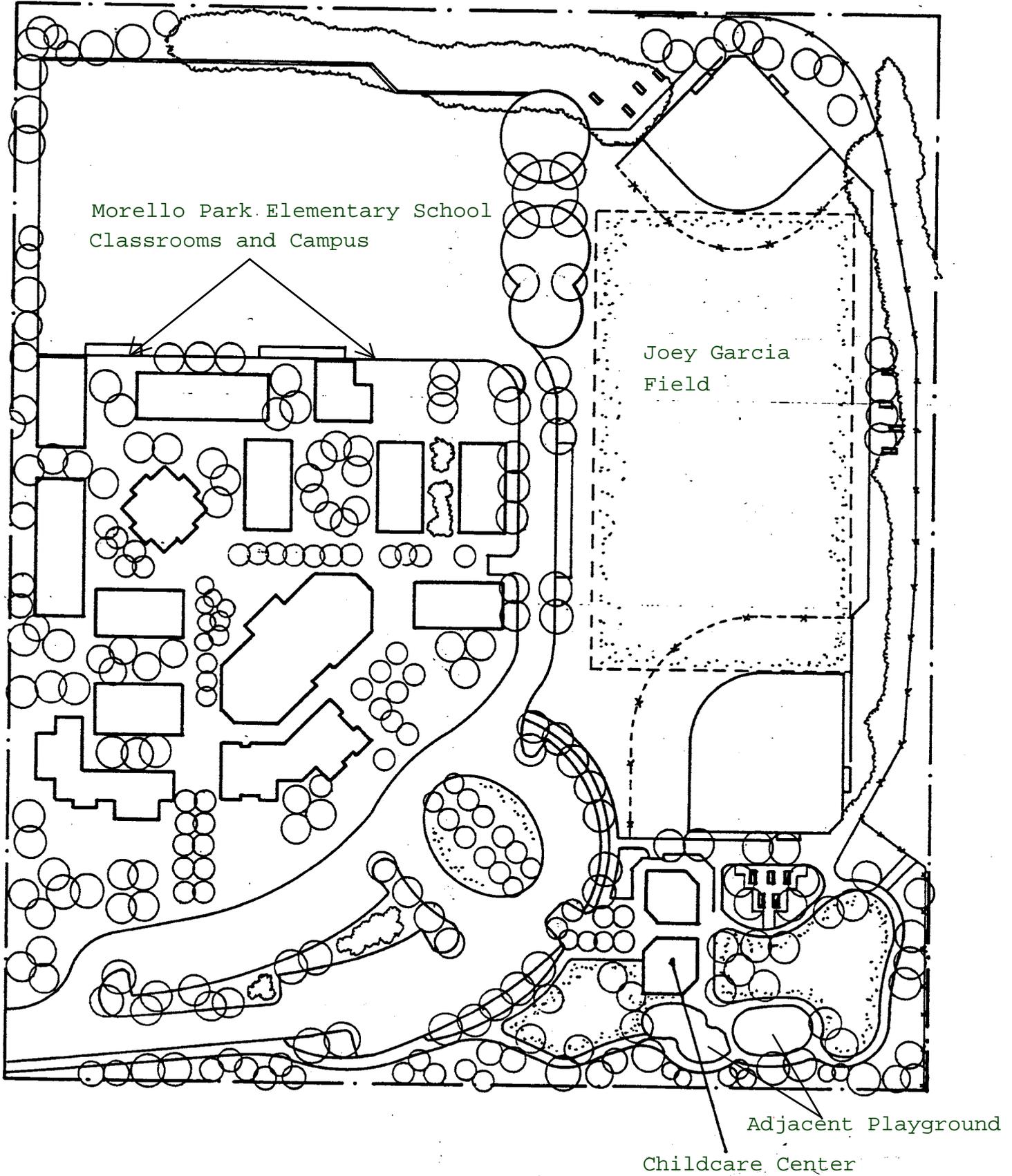


EXHIBIT B
Description of the Playground

“Playground” refers to the enclosed/fenced playground of approximately 3,800 square feet located directly adjacent to the Childcare Center/Premises consisting of various playground equipment and a sand lot.

EXHIBIT C
Maintenance Responsibilities of Lessor and Lessee

Lessor Responsibilities

Maintenance of electrical and water/plumbing services (including fire main) from the public street to the meter.

Maintenance and repair of all electrical, gas, and water systems from the meters into the building.

Installation, maintenance, and repair of all fire sprinkler systems, including monitoring and County Fire inspection fee.

All necessary general structural repairs to the building on the Premises.

Maintenance and structural repair of building exterior, including roof, windows and doors, and painting of exterior of structure to insure weather tightness and aesthetics; repair and maintenance of all roofing material and roof structural members; and all interior and exterior accessibility improvements.

Maintenance and repair of all plumbing and drain, waste and vent piping within the building, including all fixtures.

Installation, maintenance, and repair of all trash and recycling collection receptacles and services.

Installation, maintenance, and repair of all landscape improvements, including watering systems and the mowing of all lawns, trimming of all bushes and plant materials, and replacement of planting materials.

Maintenance and repair and/or replacements of all Heating, Ventilating and Air Conditioning supply unit(s), any ducting, electrical, or other Heating, Ventilating and Air Conditioning system components.

Maintenance of the structures located in the outdoor fenced Playground area, including the fence, paved walkways and play structures.

Lessee Responsibilities

Maintenance, repair, and/or replacement of all of the building's interior including, but not limited to, drywall, paneling, paint, carpet, floor coverings, and all electrical fixtures.

Installation, maintenance, and repair of all phone, cable or other wiring systems within the building.

Provision and maintenance of all fire extinguishers as required by State Fire Code.

Lessee shall provide all janitorial-related services.

Maintenance and repair and/or replacement of all interior and exterior lighting systems on the Premises.

Lessee shall remove or paint over all graffiti which may be placed on the Premises during the Term of this Lease within 48 hours of the application of said Graffiti.

Any additional services required to maintain the health and safety of the users on or about the Premises, and the associated costs thereof, will be the sole responsibility of the Lessee.

All other terms of maintenance not specifically delegated to Lessor under this Lease.

EXHIBIT D
Personal Property of Lessor

- 1) 4 small tables
- 2) 21 small chairs
- 3) Microwave and stovetop
- 4) Built in refrigerator (inoperable)
- 5) Water table
- 6) Miscellaneous children's books and VHS videos