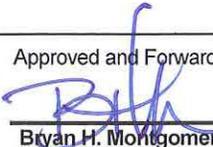




## STAFF REPORT

**Date:** Tuesday, June 28, 2016  
**To:** Bryan H. Montgomery, City Manager  
**From:** Kevin Rohani, P.E. Public Works Director/ City Engineer

Approved and Forwarded to City Council:

  
Bryan H. Montgomery, City Manager

**SUBJECT:** Resolution approving the temporary Use Agreement between the City and Terracare Associates for a portion of property located at 5400 Neroly Road and 1033 Main Street.

### Background and Analysis

The City owns the property located at 5400 Neroly Road and the adjoining property at 1033 Main Street, which is currently being used temporarily by the City Public Works Department to store equipment, fixtures, large trash dumpsters, and supplies. Terracare Associates needs to vacate its current leased space in Oakley by July 1st. Unfortunately, Terracare Associates has not been able to locate a new acceptable location to move operations and is continuing its search. In the interim, Terracare Associates has approached Staff with a proposal to pay for the use of a portion of this property on a temporary basis for its operations in Oakley.

Terracare Associates has proposed to pay \$1,000 per month and pay any utility charges associated with its use. The primary use shall be the parking of employee vehicles by day, parking of company trucks and trailers overnight, placement of two porta-potties, a small portable office, and the storage of some equipment and supplies. All ingress and egress will be through the Neroly Road access.

Since the usage will be similar to the existing City use, and is temporary as Terracare seeks a more permanent location, Staff is supportive of the use and lease payment arrangement.

### Fiscal Impact

The City will receive a monthly lease payment of \$1,000.

### Staff Recommendation

Adopt a resolution approving the Use Agreement between the City and Terracare Associates

### Attachments

1. Resolution
2. Agreement and Exhibit

RESOLUTION NO. \_\_-16

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF OAKLEY  
AUTHORIZING THE CITY MANAGER TO EXECUTE A USE AGREEMENT  
WITH TERRACARE ASSOCIATES FOR A PORTION OF THE PROPERTY  
LOCATED AT 5400 NEROLY ROAD IN OAKLEY, CALIFORNIA**

**BE IT RESOLVED** by the City Council of the City of Oakley hereby approves the Use Agreement between the City and Terracare Associates and authorizes the City Manager to sign the Agreement on behalf of the City.

The foregoing resolution was introduced at a regular meeting of the Oakley City Council held on the 28<sup>th</sup> day of June, 2016, by Councilmember \_\_\_\_\_, who moved its adoption, which motion was duly seconded by Councilmember \_\_\_\_\_, was upon voice vote carried and the resolution adopted by the following vote.

AYES:

NOES:

ABSENT:

ABSTENTIONS:

APPROVED:

\_\_\_\_\_  
Kevin Romick, Mayor

ATTEST:

\_\_\_\_\_  
Libby Vreonis, City Clerk

\_\_\_\_\_  
Date

## USE AGREEMENT

This Use Agreement ("User"), by and between the City of Oakley, a municipal corporation ("City"), and the Terracare Associates, hereinafter collectively designated as ("User"), is made on the following terms and conditions:

### Recitals

- A. City is the owner of that real property located at 5400 Neroly Road and 1033 Main St. (Parcels 037-050-013 & 015) in Oakley, California.
- B. User desires to temporarily use the property for a small portable office, its employee parking, equipment, and storage (local maintenance operations) on a month-to-month basis.

### Agreement

Now, therefore, the parties agree as follows:

1. **DESCRIPTION.** City hereby enters this temporary Use Agreement with User, and User hereby accepts the terms and conditions of this Use Agreement as hereinafter set forth, those certain premises hereinafter referred to as the "Premises" and described as follows:

**Those certain premises located at 5400 Neroly Road and 1033 Main St, Oakley, California, and further described in Exhibit A, which is attached hereto**

2. **TERM.** The term of this Agreement shall be month-to month, commencing on the 1<sup>st</sup> day of July, 2016. City shall have the right to terminate this Agreement prior to expiration of this term upon ninety (90) days written notice to City

2. **RENT.** The rent for the use of premises shall be collected as follows:

ONE THOUSAND DOLLARS AND NO CENTS (\$1,000.00) per month, payable on or before 1<sup>st</sup> of each month. Rent payments shall be mailed or hand-delivered to:

City of Oakley  
Attn: Parks and Landscape Manager  
3231 Main Street  
Oakley, CA 94561

3. **SECURITY DEPOSIT:** City holds a deposit in the amount of FIVE-HUNDRED DOLLARS (\$500), as security for the full and faithful performance by User of all terms, conditions, and covenants of this Agreement.

Upon termination of this Agreement, the City may use any portion of the security deposit as may be reasonably necessary to remedy User's defaults of the provisions of this Use Agreement, including, but not limited to, payment of unpaid rent due under paragraph 3 of this Agreement, cleaning of the Premises, repair of damage, or for storage of personal property which has been abandoned by User. Any remaining portion of the security deposit after such deduction shall be mailed to User at User's last known address.

5. **USE:** The premises are leased to User for the purpose of: Maintenance office, employee parking, and storage, and for no other purpose without the written consent of the City. User shall conduct and carry on only the type of business specifically set forth herein, and in the areas outlined in Exhibit A. No maintenance or construction equipment shall be visible from Main Street.

6. **COMMON AREAS:** The City reserves the right to regulate the use of ingress and egress, and for parking, whether within or without the area of the premises described above. No part of any parking area adjoining the premises is leased hereunder, but City agrees that a parking area shall be available to be used by User as designated by City. User, its employees and agents shall park their automobiles in such a place or places as shall be designated by City.

7. **UTILITIES COST.** User agrees to pay for garbage service directly to the garbage provider and for water and electrical usage directly metered to the space.

8. **ALTERATIONS AND REPAIRS.** User shall make no alterations of or additions to said premises without the written consent of City. Any such additions to or alterations of the premises shall be made at the expense of the User, and any such alterations of or additions to the premises, including any locks, bolts or security grating and hardware, shall become at once a part of the realty and belong to City. User, at User's sole cost, is responsible for all repairs and maintenance of the Premises and shall keep and maintain said premises in good condition and repair, making replacements as necessary. User hereby waives all right to make repairs at the expense of City as provided in Section 1942 of the Civil

Code of the State of California, and all rights provided for by Section 1941 of said Civil Code. If, during the term of this Use Agreement, in the judgment of City, the User shall fail to keep and maintain the premises in any respect required by this paragraph, City may do anything necessary to correct the problem by restoring the good and sanitary order and condition, or make the repair, provided that the User shall have failed to correct such problem or make such repair within fifteen (15) days after receipt of notice from City. Any amounts expended by City to correct such problem or make such repair shall be deemed to be additional rental and is payable as such on the next day upon which rent becomes due.

By entry hereunder, User accepts the premises in their present order, condition and repair and agrees on the last day of said term or sooner termination of this Use Agreement, to surrender unto City said premises in the same condition as when received, reasonable use and wear thereof excepted. User understands that City makes no representations or warranties as to the physical or mechanical qualities of the premises. Any costs at the outset necessary to make the Premises tenantable shall be borne by the User.

9. **FIXTURES.** Subject to the provisions of this Agreement, User at User's expense may install in or on the Premises such fixtures, equipment, and property as it may consider advisable for the conduct of its business, provided that any such installation shall not cause any material damage to the improvements on the Premises. User shall remove all fixtures and equipment installed on the premises by User and the same shall be removed by User at or before the expiration or termination of this Agreement, or any renewal term hereof, and if damage is caused by such removal, User agrees to repair such damage at its own cost forthwith.

10. **FREE FROM LIENS.** User shall keep the Premises and the property in which the leased premises are situated free from any liens arising out of any work performed, materials furnished, or obligations incurred by or for User.

11. **COMPLIANCE WITH GOVERNMENTAL REGULATIONS.** User shall, at its sole cost and expense, comply with all of the requirements of all County, Municipal, State and Federal authorities now in force, or which may hereafter be in force, pertaining to the premises, and shall faithfully observe in the use of the premises all County, Municipal, State and Federal laws now in force or which may hereafter be in force. The judgment of any court of competent jurisdiction, or the

admission of User in any action or proceeding against User, whether City be party thereto or not, that User has violated any such laws in the use of the premises, shall be conclusive of that fact as between City and User.

**12. ASSIGNMENT OR SUBLETTING.** User shall not assign this Agreement, nor any right hereunder, nor sublet the premises.

**13. TAXES AND ASSESSMENTS.**

**13.1 PERSONAL PROPERTY AND FIXTURES.** User shall be liable for all taxes and assessments levied against personal property and fixtures or improvements placed by or for User in, on or about the leased premises.

**14. ADVERTISEMENTS AND SIGNS.** User shall not place or permit to be placed any sign, marquee, lettering, decoration, advertising, light or awning on the outside of the leased premises or on the inside of the said premises if the same be visible from the outside of the leased premises, without the written consent of City. User shall comply with all sign requirements as set forth in the Oakley Municipal Code.

**15. USER'S INSURANCE.** During the term of this Lease, User at its own cost and expense, shall procure from reliable insurance satisfactory to City, and keep in full force and effect at all times during this Lease term, a public liability and property damage insurance policy in amounts of not less than the following: Bodily injury liability - \$1,000,000 each person, \$1,000,000 each occurrence; property damage liability - \$500,000 each occurrence. Said policy shall cover injuries to and/or death of all persons and loss of or damage to property (including loss of use) occasioned by or arising from or out of the acts or omissions of User, its agents and/or employees and/or the condition of the premises. Such insurance shall expressly inure to the benefit of City, its agent or employees, for liability arising or alleged to have arisen from such acts or omission on the leased premises or the operations of User or anyone directly or indirectly employed by User. Said insurance policy shall name both City and User as insureds, with a copy of said policy being furnished directly to City.

User is to obtain a written obligation on the part of the insurance carriers to notify City in writing at least ten (10) days prior to any cancellation or expiration without renewal thereof, and User agrees if it does not keep said insurance in full force

and effect the City may take out the necessary insurance and pay the premium, and the repayment thereof shall be deemed to be a part of the rental and is payable as such on the next day upon which rent becomes due.

The User shall, at its sole cost and expense, comply with any and all recommendations and requirements pertaining to the leased premises of any insurance organization or company in connection with the maintenance of fire and public liability insurance covering the leased premises and the shopping center.

16. **WASTE.** The User shall not commit, or suffer to be committed, any waste upon the leased premises or any public or private nuisance.

17. **PROHIBITED USES.** User shall not use the Premises for, or carry on or permit upon said leased premises, any offensive, unlawful, noisy or dangerous trade, business, manufacture or occupation, or any nuisance or anything against the public policy. User shall not conduct or permit any auction sale, sidewalk sale or parking lot sale to be held in or about the Premises, solicit business, distribute handbills, or erect any signs on any sidewalk. No maintenance or construction equipment shall be visible from Main Street.

18. **ENTRY BY CITY.** User shall permit the City and its designees to enter into and upon the leased premises after reasonable (24 hours) notice is given to User. In instances of emergency, entry by City, its designees or its invitees, User waives any claim to damages.

19. **INDEMNIFICATION OF CITY.** User, as a material part of the consideration to be rendered to City, hereby waives all claims against City for damages to goods or property of User in, upon or about said premises and for injuries to persons in or about said premises, from any cause arising at any time, and User will hold City exempt and harmless from any damage or injury to any person, or to the goods or property of any person, occurring in, upon or about the leased premises, sidewalks or parking areas adjacent thereto, from any cause arising at any time during the term of this Lease or any extension hereof. User agrees that if City is involuntarily made a party defendant to any litigation concerning this Lease or the demised leased premises, for any reason other than because of any act or omission of City, then User shall hold City harmless from all liability by reason thereof, including reasonable attorney's fees incurred by City in such litigation and all taxable court costs.

20. **INSOLVENCY.** The following shall constitute a breach of this Lease by User: (a) the insolvency of the User; (b) the commencement of any bankruptcy proceedings whether begun by or against the User; (c) the appointment of a receiver to take possession of all or substantially all of the assets of User; (d) an assignment by User for the benefit of creditors.

21. **NOTICES.** Any notice, demand or communication under or in connection with this Lease may be served by either party upon the other by personal service, or by mailing the same by registered mail in the United States Post Office, postage thereon fully prepaid, and directed to City at 3231 Main Street, Oakley, California 94561 and may, likewise, be served on User by personal service, or by mailing the same, addressed to User at 921 Arnold Drive, Martinez, CA 94553 whether or not User has departed from, abandoned or vacated said leased premises. Either City or User may change its address by notifying the other party in writing as to such new address as may be desired used and which same shall continue as the address until further written notice.

22. **TIME IS OF THE ESSENCE.** Time is hereby expressly declared to be of the essence of this Lease and of all the covenants, agreements, conditions and obligations herein contained.

23. **NON-WAIVER OF BREACH.** The waiver by City of any breach of any term, covenant or condition herein contained shall not be deemed to be a waiver of such terms, covenants or conditions or any subsequent breach of the same or any other term, covenant or condition herein contained. The subsequent acceptance of rent hereunder by City shall not be deemed to be a waiver of any preceding breach by User of any term, covenant or condition of this Lease, regardless of City's knowledge of such preceding breach at the time of acceptance of such rent.

24. **EFFECT OF EXERCISE OF PRIVILEGE BY CITY.** The exercise of any right or option or privilege hereunder by City shall not exclude City from exercising any and all other rights, privileges, and options hereunder and City's failure to exercise any right, option or privilege nor shall it relieve User from User's part to be performed hereunder nor from damage or other remedy for failure to perform or meet the obligations of this Lease.

25. **VACATING OR ABANDONMENT OF PREMISES.** User shall not vacate or abandon the leased premises any time during the lease term; and if User shall abandon, vacate or surrender said leased premises, or be dispossessed by process of law, or otherwise, any personal property belonging to the User and left on the leased premises shall be deemed to be abandoned, at the option of the City, except such property as may be mortgaged to the City, if any.

26. **SURRENDER OF USE NOT MERGER.** The voluntary or other surrender of this Agreement by the User, or a mutual cancellation thereof, shall not work a merger.

27. **DESTRUCTION OF PREMISES.** In the event of destruction from fire or other catastrophe, User shall fully repair or replace its own structures and improvements, fixtures, equipment, and other installations installed by User at its expense.

28. **REMEDIES OF CITY OR DEFAULT.** This Lease is made upon the express condition that if default be made in the payment of the rent above reserved, or any part thereof, or if User falls or neglects to perform, meet or observe any of User's obligations hereunder, or if User shall abandon or vacate said leased premises, City or the legal representative of City, at any time thereafter, without notice or demand, may lawfully declare said term ended, and re-enter the said demised premises, or any part thereof, either with or without process of law, and expel, remove and put out User or any person or persons occupying said leased premises and may remove all personal property therefrom, and store the same in a public warehouse at the cost of and on account of User, using such force as may be necessary to again repossess and enjoy said leased premises as before this demise, without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant or condition, and without liability to any person for damages sustained by reason of such removal.

29. **SUBORDINATION.** User covenants that this Agreement is an shall be at all times subject and subordinate to the liens of any mortgage or mortgages, deed of trust or deeds of trust now existing or which City, or any subsequent owner of the demised premises shall make hereafter covering said premises, and to any and all advances made or to be made thereunder, and to the interest thereon and to any and all renewals thereof. User covenants to execute,

acknowledge, and deliver upon request, all documents demanded by City to subordinate this Lease to any such indebtedness as herein provided.

30. **WAIVER OF RELOCATION BENEFITS:** User acknowledges that the term of this Agreement is month-to-month and City reserves the right to terminate this Lease for any reason with sixty (60) days notice to User.

User warrants and represents to City that User does not have nor shall User claim any right to relocation benefits under any provision of any State of California or federal law and User knowingly waives the right to make any claim against the City for relocation benefits in the event City elects to terminate this Agreement for any reason or at the expiration of the Lease term.

31. **BINDING ON SUCCESSORS.** The covenants and conditions herein contained shall, subject to the provisions as to assignment and subletting, apply to and bind the heirs, successors, executors, administrators and assigns of all the parties hereto.

32. **DEFINED TERMS.** The words "City" and "User" as used herein shall include the plural as well as the singular. Words used in masculine gender include the feminine and neuter. If there be more than one City or User the obligations hereunder imposed upon City or User shall be joint and several. The marginal heading or titles to the paragraphs of this Lease are not a part of this Lease and shall have no effect upon the construction or interpretation of any part hereof.

33. **COSTS OF SUIT.** In the event that it becomes necessary or advisable for either party hereto to file suit against the other party to enforce any rights hereunder, the successful party in such lawsuit shall be entitled to a reasonable attorney's fee, to be taxed as costs in such suit or to be fixed by the Court in any such suit.

34. **WAIVER OF SUBROGATION.** As long as their respective insurers so permit, City and User mutually waive for themselves and their respective insurers, their respective rights of recovery against each other for any loss insured by fire, extended coverage and other property insurance policies, existing for the benefit of the respective parties, but solely to the extent of the amount of insurance proceeds received by the insured party. Each party shall obtain any available endorsements to evidence compliance with the above waiver.

IN WITNESS WHEREOF, the parties hereunto set their hands in duplicate, the day and year first hereinabove written.

**CITY**

*City of Oakley, a municipal corporation*

**USER**

*Terracare Associates*

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

Bryan H. Montgomery  
City Manager

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

Ty Wilson  
Vice-President

**ATTEST:**

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

Libby Vreonis  
City Clerk

**APPROVED AS TO FORM**

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

William R. Galstan  
Special Counsel

# EXHIBIT A

A portion of 5400 Neroly Rd. and 1033 Main St. — “the Premises”

