FIRST AMENDMENT TO MEMORANDUM OF UNDERSTANDING BETWEEN THE COUNTY OF SAN LUIS OBISPO AND THE NIPOMO COMMUNITY SERVICES DISTRICT REGARDING THE TRANSFER OF OWNERSHIP IN COUNTY-OWNED REAL PROPERTY

WHEREAS, the County of San Luis Obispo, hereinafter referred to as "County" and the Nipomo Community Services District, hereinafter referred to as "District" have entered into a Memorandum of Understanding dated March 24, 2009, hereinafter referred to as "MOU"; and

WHEREAS, the "Property" described in the MOU consists of approximately one (1) acre of vacant land located at the northeast corner of West Tefft and Carrillo Street, APN 090-141-006 along with the adjacent 60-foot-wide strip of land to the west of this parcel, formerly a railroad right-of-way (portion of APN 090-151-008), hereinafter referred to as "Original Site"; and

WHEREAS, testing of soils for contamination on the Original Site showed evidence of hydrocarbon and heavy metals contamination that would require significant remediation to allow development of this site for a proposed park; and

WHEREAS, County also owns certain real property consisting of approximately one (1) acre located on the southeast corner of West Tefft and Carrillo Streets, APN 090-142-007 along with the adjacent 60-foot-wide strip of land to the west of this parcel, formerly a railroad right-of-way (portion of APN 090-151-008), hereinafter referred to as "New Site"; and

WHEREAS, results of soils sampling performed on the New Site do not indicate contamination at actionable levels; and

WHEREAS, the District did conduct a Prop 218 election under the original MOU and the 218 vote failed; and

WHEREAS, the District no longer has the funding sources that were identified at the time of the Prop 218 vote to fund the District's obligations under the MOU; and

WHEREAS, the District has not and cannot apply to LAFCO for activation of Parks powers until a funding plan is in place; and

WHEREAS, the District cannot guarantee at this time that funding sources can be developed to fund this project; and

WHEREAS, County and District agree that the substitution of the proposed park site from the Original Site to the New Site increases the feasibility of a park being constructed for the community of Nipomo; and

WHEREAS, the Olde Towne Nipomo Association ("OTNA"), is a 501(c)-3 nonprofit corporation, working with the District and the County to advance the park plan; and

WHEREAS, sections 11, 12, 13, and 14 of the MOU have been accomplished;

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained, the parties hereto agree that the MOU is hereby amended as follows:

1. Recital C is deleted in full and replaced with the following:

   " The County is the owner of certain real property consisting of approximately (1) acre located at the southeast corner of West Tefft and Carrillo Streets (APN 090-142-007) along with the adjacent 60-foot-wide strip of land to the west of this parcel, formerly a railroad right-of-way (portion of APN 090-151-008), hereinafter referred to as "Property", as depicted in Exhibit 'A-1.'"

2. Paragraph 3 is amended to add the following sentence at the end of the paragraph:

   "The County and District contemplate that the OTNA will develop plans for park improvements on the Property including but not limited to obtaining approval of an Intent to Serve letter for water and sewer service from the District and a Minor Use Permit from the County Planning and Building Department. County hereby authorizes the District to accept, process and issue in the name of Olde Towne Nipomo Association an Intent to Serve letter for water and sewer service to the Property. District shall approve the design of the park improvements prior to submittal for a Minor Use Permit. Said approval shall not obligate County or District to the payment of fees related to said submittal."

3. Paragraph 10 is amended to add the following sentence at the end of the paragraph:

   "The Quitclaim Deed will also reserve to the County an easement along the westerly portion of the Property for a sidewalk and drainage easement to be built by County to serve a future park-and-ride lot that will be constructed in the Carrillo Street right-of-way."

4. Paragraph 15 is amended by replacing "APN 090-142-007" with "APN 090-141-006."

5. New Paragraph 17 is added, as follows:

   "District does not object to County's issuance of the attached Use Permit to the Olde Towne Nipomo Association, in the form attached as Exhibit "B," and agrees that the issuance of said permit is for the purpose of advancing the park plan for the Property until such time ownership of the Property is transferred to the District or the MOU is terminated."

6. New Paragraph 18 is added, as follows:

   "In the event the Property has not been transferred from the County to the District on or before December 31, 2018, this MOU shall be null and void unless extended by mutual written consent of the parties."

All other provisions of the MOU shall continue in full force and effect.

//////////////////NOTHING FURTHER PAST THIS POINT EXCEPT SIGNATURES//////////////////

IN WITNESS WHEREOF, the parties hereto have executed this Agreement this 9th day of October, 2013.

COUNTY OF SAN LUIS OBISPO

By:

_____

Chairperson of the Board of Supervisors

APPROVED BY THE BOARD OF SUPERVISORS

THIS _____ day of _____, 2013.

ATTEST:

_____

Clerk of the Board of Supervisors

APPROVED AS TO FORM AND LEGAL EFFECT:

RITA L. NEAL
County Counsel

By: _____
Chief Deputy County Counsel

Date: 10/21/13

DISTRICT: Nipomo Community Services District

By: Jim Harrison
Jim Harrison, President

Dated: 10/14/13

ATTEST:

Michael S. LeBrun
Michael S. LeBrun,
District General Manager and Secretary

APPROVED AS TO FORM AND LEGAL EFFECT:

Michael W. Seitz, District Legal Counsel
Nipomo Community Services District

Dated: 10/16/13

EXHIBIT "A-1"

EXHIBIT "B"
SAN LUIS OBISPO COUNTY
USE PERMIT
U0067

THIS PERMIT, is made and entered into by and between the County of San Luis Obispo, a public entity in the State of California (hereinafter "County") and the Olde Towne Nipomo Association, a 501 (c)-3 nonprofit corporation, (hereinafter "Permitee"). County and Permitee hereby agree as follows:

1. **Premises:** County hereby gives permission to Permitee to access and use County-owned property located at the southeast intersection of Tefft Street and Carrillo Street in Nipomo, CA, APN 090-142-007 along with the adjacent 60-foot-wide strip of land to the west of this parcel, formerly a railroad right-of-way (portion of APN 090-151-008), hereinafter referred to as "Premises" and shown on Exhibit "A".

2. **Use:** Permitee is hereby authorized and granted the non-exclusive access and use of the Premises for the purpose of processing improvement plans and to promote funding for a park to be owned and operated in the future by the Nipomo Community Services District ("NCSD"). Approved uses include installation of a sign promoting the development of the park and special events sponsored by Permitee on the Premises, provided that prior approval for such events is obtained in writing from the County Real Property Manager and from the County Planning and Building Department, if necessary. Permitee may make improvements to the Premises provided that they are consistent with Paragraph 8. Permitee may not use the Premises for any other purpose. In the event that another party desires to use the Premises for any purpose, County shall first obtain Permitee's approval in writing and then may issue a County Use Permit.

Permittee acknowledges that the Premises are intended to be transferred to the NCSD in the future and that County and the NCSD have entered into a Memorandum of Understanding, dated 3/24/2009 and in the process of being amended, which defines the steps leading to the transfer of the Premises to the NCSD.

Permittee acknowledges that the sewer lift station on the Premises belongs to the NCSD and Permitee's use of the Premises shall not interfere with the NCSD's access to and use of their sewer lift station.

Permittee acknowledges that the County will be constructing a park-n-ride lot in the Carrillo Street right-of-way along the westerly property line of the Premises and that the project includes a proposed sidewalk and drainage area that will be placed within the westerly 20-foot wide portion of Premises, with an approximate location as shown in Exhibit "B". Permittee shall allow the sidewalk and drainage area to be constructed and maintained on the Premises and Permittee's use of the Premises shall not interfere with the public's access and use of the sidewalk or with the function and of the drainage improvements.

Permittee acknowledges that the County may continue to use the Premises to sponsor Nipomo Clean-Up Day and to park County Public Works vehicles and equipment in the event of emergencies.

3. **Term:** The term of this Permit shall be for one (1) year from the effective date of the First Amendment to Memorandum of Understanding Between the County of San Luis Obispo and the Nipomo Community Services District Regarding Transfer of Ownership in County-Owned Real Property. This term may be extended for two (2) one-year periods upon Permitee's written notice to County and upon County's approval. This Permit may be terminated at any time and for any reason deemed necessary by either party upon 60 days written notice to the other party. This Permit will immediately terminate upon transfer of ownership of the Premises from County to NCSD.

4. **Permit Fee:** County waives the Permit Fee for this Use Permit.

5. **Insurance:** Permitee shall obtain and maintain for the entire term of the Permit and Permitee shall not perform any work under this Permit until after Permitee has obtained insurance complying with the provisions of this paragraph, and delivered a copy of the insurance certificate for each insurance policy to the County. Said policies shall be issued by companies authorized to do business in the State of California. Permitee shall maintain said insurance in force at all times. The following coverage with the following features shall be provided:

a. **Commercial Liability Insurance:** Permitee shall maintain in full force and effect for the period covered by this Permit, commercial liability insurance. This insurance shall include, but shall not be limited to, comprehensive general and automobile liability insurance providing protection against claims arising from bodily and personal injury, including death resulting therefrom, and damage to Premises resulting from any act or occurrence arising out of Permitee's operations in the performance of this Permit, including, without limitation, acts involving vehicles. The policy shall provide not less than single limit coverage applying to bodily and personal injury, including death resulting therefrom, and property damage in the total amount of One Million Dollars ($1,000,000). The following endorsements must be attached to the policy:

(1) If the insurance policy covers on an "accident" basis, it must be changed to "occurrence".

(2) The policy must cover personal injury as well as bodily injury.

(3) Blanket contractual liability must be afforded and the policy must contain a cross liability or severability of interest endorsement.

b. **Workers' Compensation Insurance:** In accordance with the provisions of sections 3700 et seq., of the California Labor Code, if Permitee has any employees, Permitee is required to be insured against liability for workers' compensation or to undertake self insurance. Permitee agrees to comply with such provisions before commencing the performance of this Permit.

c. **Additional Insureds to be Covered:** The commercial general liability policies shall name the "County of San Luis Obispo, its officers, employees, and agents" as additional insureds. The policy shall provide that the Permitee's insurance will operate as primary insurance and that no other insurance maintained by the County, or additional insureds will be called upon to contribute to a loss hereunder.

d. **Certification of Coverage:** Prior to commencing work under this Permit, Permitee shall furnish County with the following for each insurance policy required to be maintained by this Permit:

(1) A copy of the Certificate of Insurance shall be provided. The certificate of insurance must include a certification that the policy will not be canceled or reduced in coverage or changed in any other material aspect without thirty (30) days prior written notice to the County.

(2) A Workers' Compensation certificate of insurance must be provided.

(3) Upon written request by the County, the Permitee shall provide a complete insurance policy.

(4) Approval of Insurance by County shall not relieve or decrease the extent to which the Permitee may be held responsible for payment of damages resulting from Permitee's services or operations pursuant to this Permit. Further, County's act of acceptance of an insurance policy does not waive or relieve Permitee's obligations to provide the insurance coverage required by the specific written provisions of this Permit.

e. **Effect of Failure or Refusal:** If Permitee fails or refuses to procure or maintain the insurance required by this Permit, or fails or refuses to furnish County with the certifications required by subparagraph (d) above, County shall have the right, at its option, to forthwith terminate the Permit for cause.

6. **Indemnification:** Permitee shall defend, indemnify and hold harmless the County, its officers and employees from any and all claims and demands, costs, expenses, judgments, attorney fees or liabilities that may be asserted by any person or entity that arise out of or in connection with the acts or omissions relating to the performance of any obligation or duty provided for or relating (directly or indirectly) to this Use Permit, the tenancy created under this Use Permit, or the Premises hereunder. The obligation to indemnify shall be effective and shall extend to all such claims and losses, in their entirety, even when such claims or losses arise from the comparative negligence of the County, its officers and employees. However, this indemnity will not extend to any claims or losses arising out of the sole negligence or willful misconduct of the County, its officers and employees.

The preceding paragraph applies to any theory of recovery relating to said act or omission by the Permitee, or its agents, employees or other independent contractors directly responsible to Permitee, including, but not limited to, the following:

a. Violation of statute, ordinance, or regulation.
b. Professional malpractice.
c. Willful, intentional or other wrongful acts, or failures to act.
d. Negligence or recklessness.
e. Furnishing of defective or dangerous products.
f. Premises liability.
g. Strict liability.
h. Inverse Condemnation.
i. Violation of civil rights.
j. Violation of any federal or state statute, regulation, or ruling resulting in a determination by the Internal Revenue Service, California Franchise Tax Board or any other California public entity responsible for collecting payroll taxes, when the Permitee is not an independent contractor.

It is the intent of the parties to provide the County the fullest indemnification, defense, and hold harmless rights allowed under the law. If any word(s) contained herein are deemed by a court to be in contravention of applicable law, said word(s) shall be severed from this Permit and the remaining language shall be given full force and effect.

7. **Maintenance:** Permitee hereby agrees and is required to maintain the Premises in good order and repair at all times, including trash collection and annual weed abatement, during the term of this Permit. Upon termination of this Permit, Permitee shall restore the Premises to original condition, reasonable wear and tear excepted.

8. **Design and Construction of Improvements:** Permitee accepts the Premises in an "AS IS" condition, without any representations, express or implied, as to the condition, suitability, usefulness, merchantability, fitness for particular purpose, or otherwise, of the Premises. Permitee shall have the right to construct improvements on the Premises at Permitee 's sole cost and expense provided that such improvements are consistent with the park design approved by the NCSD and the County of San Luis Obispo Department of Planning and Building. No facility, sign, except where a sign is exempted from permit requirements by Section

23.04.306(2) of the San Luis Obispo County Code, or improvement of any type shall be constructed or located on the Premises unless and until the design, location, and the type of any and all proposed construction materials have been expressly approved in writing by the General Services Agency Director ("Director") or designee. Each party shall cooperate with the other if field conditions require minor changes to the Development Plan. Permitee shall be responsible for the monitoring of all activity during Permitee's use of the Premises, and shall comply with all such rules and regulations necessary to protect the health, safety, and welfare of the public therein.

In the design and construction of the improvements to the Premises, the following shall apply:

A. Permitee's use of said Premises is subject to all statutes, ordinances and regulations, including, without limitation, those relating to land use and zoning now or hereafter applicable to the Premises, and to all covenants, easements, reservations and restrictions of record applicable to the Premises. Permitee, agent or contractor will be solely responsible for securing all permits, adherence to regulations and dealings with the County of San Luis Obispo Planning and Building Department, or other appropriate agencies, for construction on the Premises.

B. Permitee shall be responsible for installing and maintaining any landscaping and sprinkler systems that Permitee installs on the Premises including, without limitation, spraying, trimming, watering, and replanting trees and shrubs.

C. All utilities to the Premises shall be maintained or improved at Permitee's sole cost and expense.

D. Permitee shall comply with the Americans with Disabilities Act and all applicable laws at Permitee's sole cost and expense. All improvements shall be maintained and repaired by Permitee at Permitee's sole cost and expense.

E. Permitee shall be responsible for obtaining any required environmental determinations for Permitee's improvements from the appropriate agency(s). If an EIR or other environmental review is needed, Permitee shall comply at Permitee 's sole cost and expense. Permitee shall be responsible for any and all environmental mitigation at Permitee 's sole cost and expense.

F. Permitee shall construct any proposed improvements at Permitee's sole cost and expense. Permitee shall seek and obtain its own legal advice with regard to the possible applicability of State or Federal wage regulations and other labor laws, or other laws.

9. **Ownership of Improvements:** The ownership of all approved improvements constructed by the Permitee during the term of this Use Permit shall remain in Permitee until expiration of the term of this Use Permit.

At the expiration or earlier termination of this Use Permit, all permanent structures, alterations, modifications, or improvements upon the Premises made by Permitee shall, absent any agreement between the County and Permitee to the contrary, or unless County otherwise elects, which election shall be made by giving a notice in writing not less than ninety (90) days prior to the expiration or other termination of this Use Permit, become County property free and clear of all claims to or against the improvements by Permitee or any third person, and Permitee shall defend and indemnify the County against all liability and loss arising from such claims or from the County's exercise of the rights conferred by this paragraph, and County shall be responsible for the removal of said improvements.

In the event County elects not to take ownership of the permanent improvements, County shall notify Permitee to remove any or all of the permanent structures, alterations, modifications, or improvements, and Permitee shall do so, at Permitee's sole cost and expense, and shall promptly repair any damage caused by such removal in a first class manner. Removal is to be completed no later than three (3) months from the date of said notice or at such further time as County may agree to in writing. In the event Permitee fails to remove any or all of the permanent structures, alterations, modifications, or improvements as required by County, County may remove same and charge Permitee for the cost of such removals and Permitee hereby agrees to pay any and all such costs upon demand.

10. Environmental Matters/Covenants Regarding Hazardous Materials: Permitee shall at all times and in all respects comply with all federal, state and local laws, ordinances and regulations ("Hazardous Materials Laws") relating to industrial hygiene, environmental protection, or the use, analysis, generation, manufacture, storage, disposal or transportation of any oil, flammable explosives, asbestos, UREA formaldehyde, radioactive materials or waste, or other hazardous, toxic, contaminated or polluting materials, substances or wastes, including, without limitation, any "hazardous substances," "hazardous wastes," "hazardous materials" or "TOXIC SUBSTANCES" under such laws, ordinance or regulations (collectively, "Hazardous Materials").

Permitee shall, except in the event of County's sole negligence, indemnify, defend, protect, and hold County, each of County's officers, directors, employees, agents, attorneys, successors and assigns, free and harmless from and against any and all claims, liabilities, penalties, forfeitures, losses or expenses or death of or injury to any person or damage to any property whatsoever, arising from or caused in whole or in part, directly or indirectly, by:

a. The presence in, on, under or about the Premises or discharge in or from the Premises of any Hazardous Materials or Permitee's use, analysis, storage, transportation, disposal, release, threatened release, discharge or generation of Hazardous Materials, to, in, on, under, about or from the Premises; or,

b. Permitee's failure to comply with any Hazardous Materials Law. Permitee's obligations hereunder shall include, without limitation, and whether foreseeable or unforeseeable, all costs of any required or necessary repair, cleanup or detoxification or decontamination of the Premises, and the preparation and implementation of any closure, remedial action or other required plans in connection therewith caused by Permitee and shall survive the expiration or earlier termination of the term of the Permit. For purposes of the release and indemnity provisions hereof, any acts or omissions of County, or by employees, agents, assignees, Contractors or Subcontractors of County or others acting for or on behalf of County (whether or not they are negligent, intentional, willful or unlawful) shall be strictly attributable to County.

11. Assignment Prohibition: The rights and privileges granted to Permitee hereunder are not assignable, and any assignment or attempted assignment is void without prior written consent by the Director first had and obtained.

12. Notice: All notices, demands, or communication in connection with this Permit may be served upon County or Permitee by personal service or by mailing the same in the United States Mail, postage prepaid, and directed as follows:

County at:
County of San Luis Obispo
General Services Agency
Attn: Real Property Manager
1087 Santa Rosa Street
San Luis Obispo, CA 93408
(805) 781-5200

Permitee at:
Olde Towne Nipomo Association
Attn: President
PO Box 1171
Nipomo, CA 93444

13. Compliance: Permitee agrees and promises that it will comply with and observe any and all statutes, ordinances, rules and regulations of the Federal, State, Municipal, County or other public authority, and as amended. Director reserves the right at any time to make such reasonable regulations as in its judgment may from time to time be necessary for the safety, care, and cleanliness of the Premises, and for the preservation of good order therein, and Permitee hereby agrees to strictly comply therewith.

14. **Possessory Interest:** Permitee recognizes and understands that this Permit may create a possessory interest subject to property taxation and that Permitee will be subject to payment of taxes levied on such interest.

15. **Status:** Permitee shall during the entire term of the Permit, be construed to be an independent Contractor, and shall in no event be construed to be an employee of County.

16. **Waiver:** Permitee hereby waives any and all claims for damages that may be caused by County in re-entering and taking possession of the Premises as herein provided, and all claims for damages that may result from the destruction of or injury to the Premises thereby, and all claims for damages to or loss of such property belonging to the Permitee as may be in or upon the Premises at the time of such re-entering. Permitee hereby also waives any and all claims against the County for loss or damages to any property of Permitee from any cause arising at any time.

17. **Closure:** At any time should an occurrence necessitate the closing of the Premises, Permitee shall have no recourse by law to County for losses incurred.

18. **Employees of Permitee:** All employees, agents and assignees of Permitee shall be licensed when required by law. All such employees, agents, and assignees shall be employees, agents, or assignees of Permitee only and shall not in any instance be, or construed to be, employees, agents or assignees of County.

19. **Venue:** This Permit has been executed and delivered in the State of California and the validity, enforceability and interpretation of any of the clauses of this Permit, shall be determined and governed by the laws of the State of California. The duties and obligations of the parties created hereunder are performable in San Luis Obispo County and such County shall be the venue for any action or proceeding that may be brought or arise out of, in connection with or by reason of this Agreement.

20. **Severability:** The invalidity of any provision of this Permit shall not affect the validity, enforceability or any other provision of this Permit.

21. **Entire Agreement and Modifications**: This Permit supersedes all previous Permits and constitutes the entire understanding of the parties hereto. Permitee shall be entitled to no other benefits than those specified herein. County makes no other promises or covenants beyond the scope of this Permit. No changes, amendments. or modifications shall be effective unless in writing and signed, in advance of the effective date of the change, amendment or modification, by both parties. Permitee specifically acknowledges that in entering into this Permit, Permitee relies solely upon the provisions contained in the Permit and no other Permit or oral discussions prior to entering this Permit.

IN WITNESS WHEREOF, County and Permittee agree to all of the terms and conditions hereinabove set forth.

County of San Luis Obispo:	Olde Towne Nipomo Association
By: Janette D. Pell Janette D. Pell General Services Agency Director	By: Kathy Kubiak Kathy Kubiak, President
Date: 8.30, 2013	Date: AUG. 29, , 2013

Exhibit "A"

PREMISES
CARRILLO STREET
OLD PACIFIC COAST RAILROAD
CARRILLO STREET
TERRY STREET

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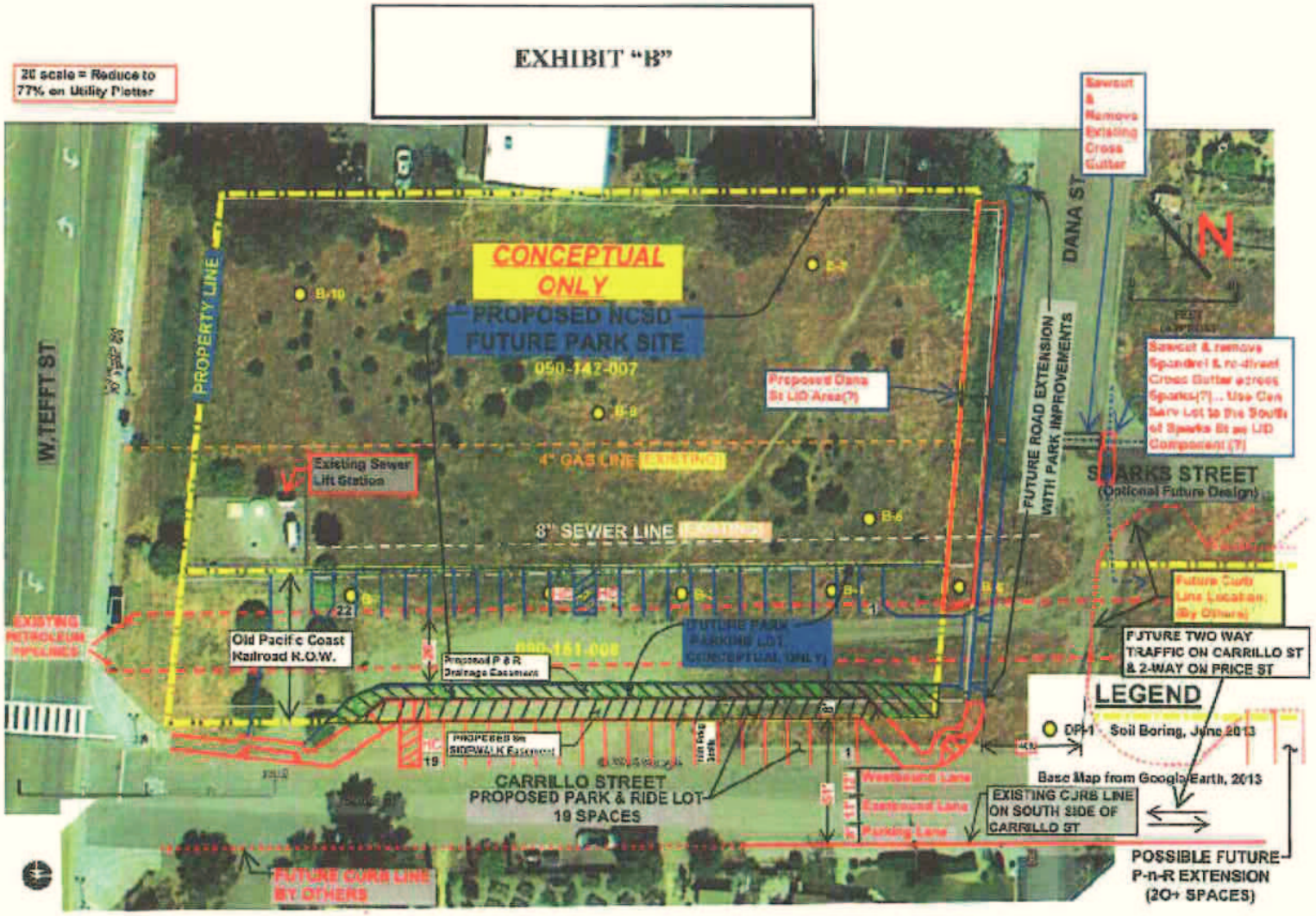
EXHIBIT "B"
20 scale = Reduce to 77% on Utility Plotter
CONCEPTUAL ONLY
PROPOSED NCSD FUTURE PARK SITE
050-142-007
PROPERTY LINE
W.TEFFT ST
DANA ST
Sawcut & Remove Existing Cross Gutter
Sawcut & remove Spandrel & re-divert Cross Gutter across Sparks(?)... Use Gov Serv Lot to the South of Sparks St as LID Component (?)
SPARKS STREET
(Optional Future Design)
FUTURE ROAD EXTENSION WITH PARK IMPROVEMENTS
Proposed Dana St LID Area(?)
4" GAS LINE
Existing Sewer Lift Station
8" SEWER LINE
Future Curb Line Location (By Others)
EXISTING PETROLEUM PIPELINES
Old Pacific Coast Railroad R.O.W.
Proposed P & R Drainage Easement
FUTURE PARK PARKING LOT CONCEPTUAL ONLY
FUTURE TWO WAY TRAFFIC ON CARRILLO ST & 2-WAY ON PRICE ST
LEGEND
DP-1 Soil Boring, June 2013
Base Map from Google Earth, 2013
PROPOSED 5ft SIDEWALK Easement
CARRILLO STREET
PROPOSED PARK & RIDE LOT
19 SPACES
Westbound Lane
Eastbound Lane
Parking Lane
EXISTING CURB LINE ON SOUTH SIDE OF CARRILLO ST
FUTURE CURB LINE BY OTHERS
POSSIBLE FUTURE P-n-R EXTENSION (20+ SPACES)