

Recording Requested by  
and When Recorded Send to:

Shartsis, Friese & Ginsburg LLP  
One Maritime Plaza, 18<sup>th</sup> Floor  
San Francisco, California 94111  
Attn: Adam K. Elsesser, Esq.

---

(Space Above This Line for Recorder's Use)

**AGREEMENT FOR OWNERSHIP AND OPERATION OF  
JOINT LIBRARY BUILDING  
AND  
GRANT OF EASEMENT**

**By and Between**

**CITY OF SAN JOSÉ**

**and**

**THE TRUSTEES OF  
THE CALIFORNIA STATE UNIVERSITY  
On Behalf Of  
SAN JOSÉ STATE UNIVERSITY**

**December 17, 1998**

## TABLE OF CONTENTS

	<b>Page</b>
1. SUBJECT OF AGREEMENT .....	1
1.1 Purpose of this Agreement.....	1
1.2 Mission Statement.....	1
2. DEFINITIONS.....	2
2.1 Specific Definitions .....	2
2.2 Table of Definitions .....	5
3. ORGANIZATION OF LIBRARY .....	6
3.1 Creation.....	6
3.1.1 Parties Creating Joint Library .....	6
3.1.2 Terms of Agreement Control .....	6
3.1.3 No Partnership .....	6
3.2 Library Building.....	6
3.2.1 Ownership Improvements.....	6
3.2.2 Space Designation and Allocation .....	7
3.2.3 Shared Space.....	8
3.2.4 City Allocated Space/University Allocated Space .....	9
3.2.5 Use of the Roof .....	9
3.2.6 Roof Decks and Multi-Purpose Rooms .....	9
3.2.7 Exterior of Library Building.....	10
3.2.8 Hazardous Materials .....	10
3.3 Library Land .....	10
3.3.1 Easement and Right of Occupancy.....	10
3.4 Personal Property .....	11
3.4.1 Jointly-Owned Personal Property .....	11
3.4.2 Identification and Inventory of Personal Property.....	11
3.4.3 Separately Owned Personal Property.....	11
3.4.4 Replacement of Jointly Owned Personal Property .....	12
3.4.5 Standard for Personal Property .....	12
3.5 Name of Library.....	13
3.5.1 Joint Library/Library Building Name .....	13

**TABLE OF CONTENTS**  
**(continued)**

	<b>Page</b>
3.5.2	Names of Allocated Space ..... 13
3.5.3	Names of Shared and Common Space..... 13
3.6	Term of Agreement..... 13
4.	<b>GOVERNANCE OF JOINT LIBRARY ..... 13</b>
4.1	Separate Jurisdiction ..... 13
4.1.1	Selection of Materials ..... 13
4.1.2	Collection Maintenance and Management..... 13
4.1.3	Budget/Funds ..... 14
4.1.4	Programs/Services..... 14
4.1.5	Lending Policies..... 14
4.1.6	Jointly Operated Functions ..... 14
4.2	Shared Jurisdiction..... 14
4.2.1	Co-Managers..... 14
4.2.2	Joint Library Committee ..... 14
4.2.3	Joint Library Subcommittee..... 14
4.3	Dispute Resolution..... 15
4.3.1	Executive Review ..... 15
4.3.2	Mediation ..... 15
4.3.3	Non-Binding Arbitration..... 15
4.3.4	Court Jurisdiction..... 16
5.	<b>LIBRARY OPERATIONS ..... 16</b>
5.1	On-site Use of Library Collections ..... 16
5.1.1	Library Collections ..... 16
5.1.2	Reserve Collections ..... 16
5.1.3	Special Collections..... 16
5.1.4	Electronic Materials ..... 17
5.2	Lending Policies..... 17
5.2.1	General Policy of City ..... 17
5.2.2	General Policy of the University..... 17
5.2.3	Amendment of the General Lending Policy of the University ..... 17

**TABLE OF CONTENTS**  
**(continued)**

	<b>Page</b>
5.2.4 Replacement of Materials .....	18
5.3 Designated Quiet Areas .....	18
5.4 Intellectual Freedom .....	18
5.4.1 Policy .....	18
5.4.2 Change in Policy .....	19
5.4.3 Federal or State Laws.....	19
5.5 City Branch Library Access.....	19
5.6 Hours of Operation .....	19
5.6.1 Initial Hours .....	19
5.6.2 Student Study Room .....	19
5.7 Library Programs .....	20
5.7.1 Separate Library Programs .....	20
5.7.2 Joint Library Programs .....	20
5.7.3 Fee for Service Programs.....	20
5.8 Ancillary Library Services .....	21
5.9 Library Staff.....	21
5.9.1 Collective Bargaining Agreements .....	21
5.9.2 Separate Employees .....	21
5.9.3 Joint Functions .....	21
5.9.4 Staffing Plans .....	21
5.9.5 Excess Use of Joint Library .....	22
5.10 Cooperation and Non-Interference .....	22
6. LIBRARY BUILDING.....	22
6.1 Maintenance of the Library Building and the Library Land.....	22
6.1.1 Base Library Maintenance Obligations .....	22
6.1.2 Funds for Base Library Maintenance Obligations .....	23
6.1.3 Escalators .....	23
6.1.4 Supplemental Library Maintenance Obligations .....	23
6.1.5 Library Trust Account.....	23
6.1.6 Payment.....	24

**TABLE OF CONTENTS**  
**(continued)**

	<b>Page</b>
6.1.7 Accounting.....	24
6.1.8 Review .....	24
6.1.9 University’s Right of Emergency Access .....	24
6.1.10 Failure to Perform.....	25
6.1.11 Waiver.....	25
6.2 Utilities.....	25
6.2.1 University to Provide .....	25
6.2.2 Failure to Provide Library Utilities.....	26
6.2.3 Cost Allocation .....	26
6.2.4 Payment.....	26
6.2.5 Reimbursement of Rebates .....	26
6.2.6 Accounting.....	26
6.2.7 Review .....	27
6.2.8 Computer, Video, Telephone and Data Services .....	27
6.3 Capital Repair .....	27
6.3.1 Capital Repair Program.....	27
6.3.2 Rights to Perform Capital Repairs .....	28
6.3.3 Payment.....	28
6.3.4 Accounting.....	28
6.3.5 Review .....	28
6.4 Alteration of Space .....	29
6.4.1 Alterations of University Allocated Space/City Allocated Space .....	29
6.4.2 Alterations within Shared Space.....	29
6.4.3 Standard for Alterations.....	29
6.4.4 Procedure .....	29
6.5 Americans with Disabilities Act .....	30
6.6 Security .....	30
6.6.1 Library Security Services.....	30
6.6.2 Police Jurisdiction.....	30
6.7 Insurance/Indemnity .....	31

**TABLE OF CONTENTS**  
**(continued)**

	<b>Page</b>
6.7.1 Liability Insurance .....	31
6.7.2 Self-Insurance .....	31
6.7.3 Indemnity .....	31
6.7.3.1 University Indemnity.....	31
6.7.3.2 City Indemnity.....	31
6.7.4 Property Insurance .....	32
6.7.5 Intent of Parties Regarding Insurance.....	32
6.7.6 Waiver of Subrogation.....	32
6.7.7 Consequential Damages.....	33
6.7.8 Vendors .....	33
6.8 Damage and Destruction.....	33
6.8.1 Repair of Damage to Library Building .....	33
6.8.2 Uninsured Risks .....	33
6.9 Eminent Domain .....	34
6.9.1 Definitions.....	34
6.9.2 Permanent Taking .....	35
6.9.2.1 Total Taking .....	35
6.9.2.2 Partial Taking .....	35
6.9.3 Temporary Taking .....	35
7. ANCILLARY LIBRARY FUNCTIONS .....	35
7.1 Retail.....	35
7.1.1 Library Bookstore .....	35
7.1.2 Library Retail Space .....	36
7.2 Advertising/Promotions .....	36
7.3 Library Name/Image.....	36
7.3.1 Jointly Owned .....	36
7.3.2 Consent Required.....	36
7.3.3 Net Funds .....	37
7.4 Use of Library Building for Non-Library Functions .....	37
7.4.1 Parties' Use.....	37

**TABLE OF CONTENTS**  
**(continued)**

	<b>Page</b>
7.4.2 Third Party Use .....	37
7.4.3 Schedule .....	37
7.4.4 Costs.....	37
7.4.5 Rules and Regulations.....	37
7.4.6 Revenue.....	38
7.5 Use of Technology .....	38
7.5.1 Jointly Owned .....	38
7.5.2 Consent Required.....	38
7.5.3 Net Funds .....	38
8. DEFAULTS .....	38
8.1 Monetary Default .....	38
8.2 Non-Monetary Default.....	38
9. REMEDIES.....	39
9.1 Monetary Default .....	39
9.2 Non-Monetary Defaults .....	40
10. RESTRICTIONS ON OWNERSHIP .....	40
10.1 Restriction on Transfer .....	40
10.2 Restriction on Use.....	41
10.3 Restriction on Management .....	41
10.4 Restriction on Mortgage, Pledge, Encumbrance.....	41
10.5 Partition.....	42
11. TERMINATION OF OPERATING AGREEMENT .....	42
11.1 Termination.....	42
11.1.1 Termination of Operation of Joint Library .....	42
11.1.1.1 Withdrawal Right .....	42
11.1.1.2 Exercise of Withdrawal Right .....	42
11.1.1.2.1 Preliminary Notice .....	42
11.1.1.2.2 Withdrawal Resolution .....	43
11.1.1.3 Withdrawal Process .....	43
11.1.1.3.1 Separate Library Operations .....	43

**TABLE OF CONTENTS**  
**(continued)**

	<b>Page</b>
11.1.1.3.2 Allocation of Space.....	44
11.1.1.3.3 Common Space.....	44
11.1.1.4 Withdrawal Costs.....	44
11.1.2 Termination of Operating Agreement.....	45
11.1.2.1 Determination of Obsolescence.....	46
11.1.2.2 Determination of Non-Obsolescence.....	46
11.1.2.3 Termination.....	46
11.2 Quitclaim.....	47
12. MISCELLANEOUS.....	47
12.1 Notices.....	47
12.2 Severability.....	47
12.3 Governing Law.....	47
12.4 Entire Agreement.....	47
12.5 Headings; Gender; Number; References.....	47
12.6 Parties in Interest.....	47
12.7 Amendments.....	48
12.8 Waiver.....	48
12.9 Recordation.....	48
12.10 Construction.....	48
12.11 Appropriations.....	48



**DO NOT DELETE THIS PAGE AND SECTION BREAK**

**AGREEMENT FOR OWNERSHIP AND OPERATION OF JOINT LIBRARY**  
**AND**  
**GRANT OF EASEMENT**

THIS AGREEMENT FOR OWNERSHIP AND OPERATION OF JOINT LIBRARY AND GRANT OF EASEMENT (hereinafter referred to as the “Agreement” or “Operating Agreement”) is entered into as of December 17, 1998, by and between the CITY OF SAN JOSÉ (hereinafter referred to as the “City”) and THE TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY on behalf of SAN JOSÉ STATE UNIVERSITY (which is hereinafter referred to as the “University”). The City and the University hereby agree as follows:

1. **SUBJECT OF AGREEMENT**

1.1 **Purpose of this Agreement.**

1.1.1 The City currently operates a main library located at 180 West San Carlos, San José and seventeen (17) branches within its library system.

1.1.2 The University currently operates its library in two locations on the campus of the University.

1.1.3 The City and the University have mutually determined that it is in the best interest of the Parties to build a new joint library building on the University campus that will serve as the main library for the City and the University.

1.1.4 In furtherance of that mutual determination, the City, the University and the Redevelopment Agency of the City of San José (“RA”) entered into that certain Development Agreement dated of even date herewith (“Development Agreement”), pursuant to the terms of which the Parties and the RA will demolish the existing buildings on the Library Land and will design and construct the new Library Building.

1.1.5 The City and the University also desire to enter into this Operating Agreement to set forth the terms of ownership, management, maintenance and operation of the Joint Library, the Library Building and the Library Land.

1.2 **Mission Statement.** The purpose of the Joint Library is to provide both the University community and the residents of the City with a high quality library dedicated to providing excellent service to all of its users and providing access to an extensive collection of library materials.

## 2. **DEFINITIONS**

### 2.1 **Specific Definitions.**

- 2.1.1 “Alterations” shall mean any alterations, additions or improvements to the Library Building that either Party elects to perform pursuant to Section 6.4 below. Except for Alterations required by applicable law (which work shall be included within the definition of a “Capital Repair”), Alterations are intended to mean improvements defined as “Major Capital Repair” and “Minor Capital Repair”.
- 2.1.2 “Capital Repair” shall mean the repair, replacement, alteration or improvement of a single component of the Library Building that is required by applicable law or is required to maintain the Library Building in good working order, the cost of which is in excess of \$10,000 (or other amount if agreed to by the Parties). The definition of a Capital Repair is intended by the Parties to equal the definition of “Deferred Maintenance” and Minor and Major Capital Repair required by applicable law.
- 2.1.3 “Property Insurance Policy” shall mean the insurance specified in Section 6.7.5.
- 2.1.4 “Chief Executive” shall mean the “City Manager” for the City and the “President” for the University. The Chief Executives shall have the right to designate another representative, but not the University Librarian or the City Librarian, to act as the “Chief Executive” for purposes of this Agreement.
- 2.1.5 “City Allocated Space” shall mean the space designated as “City Allocated Space” on Exhibit A, which space shall be used by the City for the operation of its portion of the Joint Library.
- 2.1.6 “City Council” shall mean the City Council of the City of San José.
- 2.1.7 “City Librarian” shall mean the person who from time to time holds the position of city librarian for the City of San José.
- 2.1.8 “City Library Collections” shall mean all Library Materials in all formats that are owned or licensed for use by the City.
- 2.1.9 “Co-Managers” shall mean the City Librarian and the University Librarian, or any other representative of a Party designated by the Chief Executive of such Party to serve as a Co-Manager.
- 2.1.10 “Common Space” shall mean all space within the Library Building that the Parties use in common with each other, except for space specifically designated as City Allocated Space, University Allocated Space or Shared Space, including, without limitation, the restrooms, the common corridors,

stairwells, electrical and mechanical closets, lobbies and elevators, as such space is specifically shown on the floor plans attached hereto as Exhibit A.

- 2.1.11 “Deferred Maintenance” shall have the definition set forth in Exhibit B, as such may be amended from time to time by California State University.
- 2.1.12 “Development Agreement” shall mean that certain Development Agreement defined in Section 1.1.4 above.
- 2.1.13 “Emergency” shall mean any immediate serious threat of harm to persons or property.
- 2.1.14 “Interest Rate” shall mean two percent (2%) per annum over the Bank of America (or its successor) “Reference Rate,” as publicly announced from time to time.
- 2.1.15 “Joint Library” shall mean the library operated in the Library Building by the University and the City pursuant to the terms of this Operating Agreement.
- 2.1.16 “Lending Policy” shall mean all policies, rules and regulations promulgated by either Party regarding the off-site use of any materials within such Parties' Library Collections. Such Lending Policy shall include, without limitation, the time period for such off-site use, early return policies, reserve policies, the amount of any late fines, and the number of materials that can be borrowed at one time by a single borrower.
- 2.1.17 “Library Building” shall mean the library building to be built on the Library Land, which shall consist of approximately 474,598 square feet of space.
- 2.1.18 “Library Collections” shall mean the University Library Collections and the City Library Collections.
- 2.1.19 “Library Land” shall mean the land situated at the southeast corner of Fourth and West San Fernando Streets in the City of San José, California, as more particularly described as Parcel B in Exhibit C attached hereto.
- 2.1.20 “Library Maintenance Obligations” shall include the Base Library Maintenance Obligations and the Supplemental Library Maintenance Obligations.
- 2.1.21 “Library Materials” shall mean all materials in all formats that are owned or licensed for use by the City or University.
- 2.1.22 “Major Capital Repair” shall have the definition set forth on Exhibit B, as such may be amended from time to time by California State University.

- 2.1.23 “Members of the General Public” shall mean all users of the City's library system, except for University Users.
- 2.1.24 “Minor Capital Repair” shall have the definition set forth on Exhibit B, as such may be amended from time to time by California State University.
- 2.1.25 “Parties” shall mean the University and the City.
- 2.1.26 “Parties Cost Sharing Percentages” shall mean forty-one percent (41%) for the City and fifty-nine percent (59%) for the University. Such percentages equal each Party’s initial percentage of the total economic investment required to design and construct the Library Building.
- 2.1.27 “Party” shall mean either the University or the City.
- 2.1.28 “Personal Property” shall mean all furniture, fixtures, and equipment in the Library Building, including, without limitation, all desks, chairs, tables, computers, movable furniture systems, shelving, audio visual equipment, demountable millwork, and telephone systems. Personal Property, as defined herein, shall specifically not include any portion of the City Library Collections or the University Library Collections.
- 2.1.29 “Reserve Collections” shall mean any portion of the collection of the University that a member of the University Faculty has requested be placed on reserve for use in a scheduled University class or a University approved examination, if such request is made for a legitimate academic purpose.
- 2.1.30 “Shared Space” shall mean space within the Library Building in which the Parties mutually agree from time to time to share a library function (i.e., circulation, technical services, security office).
- 2.1.31 “Special Collections” shall mean all Library Materials that are in, or added to, those Library Materials in the University’s Special Collections Department, The Center for Steinbeck Studies, and the Ira Brilliant Beethoven Center and the City’s Special Collections Center and any other named collections that either Party may accept or establish from time to time.
- 2.1.32 “Student Study Room” shall mean that room designated as the Student Study Room on the floor plans attached hereto as Exhibit A.
- 2.1.33 “Supplemental Library Maintenance Obligations” shall mean any maintenance of the Library Building that the Parties mutually agree to have performed that is not included in the Base Library Maintenance Obligations.

- 2.1.34 “University Allocated Space” shall mean the space designated as “University Allocated Space” on Exhibit A, which space shall be used by the University for the operation of its portion of the Joint Library.
- 2.1.35 “University Faculty” shall mean all faculty members of the University.
- 2.1.36 “University Library Collections” shall mean all Library Materials in all formats that are owned or licensed for use by the University.
- 2.1.37 “University Staff” shall mean all employees of the University who are not specifically faculty or students.
- 2.1.38 “University Students” shall mean all students then currently enrolled at the University.
- 2.1.39 “University Trustees” shall mean the Trustees of the California State University.
- 2.1.40 “University Users” shall mean collectively University Faculty, University Staff, University Students and alumni, guests, and auxiliary employees.

2.2 **Table of Definitions**

AAA .....	15
All Risk.....	32
Award .....	34
Base Library Maintenance Obligations .....	22
City .....	1
City Library Utility Cost.....	26
City Percentage of Total Library Square Footage .....	7
City’s Base Library Maintenance Funds .....	23
Claims.....	31
Condemnation.....	34
Condemnor .....	34
Date of Taking .....	34
Designated Quiet Areas .....	18
Development Agreement .....	1
Easement Rights .....	10
FTE.....	21
Hazardous Substances .....	10
JAMS .....	15
Joint Functions.....	21
Joint Library Committee.....	14
Joint Library Subcommittee .....	14
Library Bookstore.....	35
Library Retail Space .....	36
Library Trust Account .....	23
Library Utilities .....	25
Minimum Default Amount #1 .....	39
Minimum Default Amount #2 .....	39
Monetary Default.....	22, 38
Multi-Purpose Rooms.....	9
Net Funds.....	20, 37, 38

Non-Monetary Default .....	38
Non-Violation Dispute .....	15
Non-Withdrawing Party .....	42
Operating Agreement .....	1
Preliminary Notice.....	42
RA .....	1
Roof Decks .....	9
Taking.....	34
Termination Agreement.....	46
The Master Floor Plans.....	7
Total City Square Footage .....	7
Total Library Square Footage .....	7
Total University Square Footage .....	7
University .....	1
University Base Library Maintenance Funds .....	23
University Percentage of Total Library Square Footage .....	7
Violation Dispute.....	15
Withdrawal Resolution .....	43
Withdrawal Right .....	42
Withdrawing Party.....	42

### 3. ORGANIZATION OF LIBRARY

#### 3.1 Creation.

- 3.1.1 **Parties Creating Joint Library.** The University, the City and the RA are jointly constructing the Library Building, which when constructed shall operate as the main library for both the University and the City.
- 3.1.2 **Terms of Agreement Control.** The terms of this Operating Agreement shall govern the rights and liabilities of the University and the City with respect to the Joint Library and the Library Building.
- 3.1.3 **No Partnership.** Nothing contained in this Operating Agreement shall be construed as creating or is intended to create a partnership, joint venture, or other association between the parties hereto for any purpose whatsoever.

#### 3.2 Library Building.

- 3.2.1 **Ownership Improvements.** The University and the City shall each own and hold the Library Building as tenants-in-common, subject to the terms of this Operating Agreement; and the University, as sole owner and holder of the fee simple estate in and to the Library Land, hereby agrees and declares that all improvements, betterments and structures comprising the Library Building, including any replacements or reconstructions thereof, whether now situated or hereafter to be constructed on the Library Land, which improvements, betterments and structures are now and shall hereafter remain real property are hereby, and shall be deemed to be severed from the Library Land and shall be owned jointly by the University and City as tenants-in-common.

3.2.2 **Space Designation and Allocation.** The Library Building shall contain approximately 474,598 gross square feet of space (“Total Library Square Footage”). The University shall be allocated 315,608 gross square feet of the Total Library Square Footage (“Total University Square Footage”) or 66.5% of the Total Library Square Footage (“University Percentage of Total Library Square Footage”). The City shall be allocated 158,990 gross square feet of the Total Library Square Footage (“Total City Square Footage”) or 33.5% of the Total Library Square Footage (“City Percentage of Total Library Square Footage”). For operational purposes within the Library Building, the Total Library Square Footage whether allocated as Total University Square Footage or Total City Square Footage shall be designated as either University Allocated Space, City Allocated Space, Common Space, or Shared Space, all as such terms are defined herein. The approximate size and location of the University Allocated Space, City Allocated Space, Common Space and Shared Space is shown on the floor plans and ancillary documents attached hereto as Exhibit A (“The Master Floor Plans”). The University and the City are further allocated specific percentages (but not specific locations) of all Common Space and all Shared Space (as such percentages are shown on The Master Floor Plans) such that the total square footage allocated to either Party of Common Space and Shared Space together with the City Allocated Space and the University Allocated Space, as the case may be, equals the Total University Square Footage and the Total City Square Footage, respectively.

Upon the completion of the Construction Documents (as defined in the Development Agreement), the Parties shall update the designation of space within the Library Building as either City Allocated Space, University Allocated Space, Common Space, and Shared Space and the percentage allocation of space within the space designated as Common Space and Shared Space. Such update of the designation of space shall be consistent with the designation of space shown on the initial floor plans and ancillary documents attached hereto as Exhibit A and such allocation of space shall preserve the University Percentage of Total Library Square Footage and the City Percentage of Total Library Square Footage. Upon such update, which shall be made no later than one hundred and twenty (120) days following completion of the Construction Documents, the Parties shall cause such designations and allocations to be shown on a floor plan of each floor of the Library Building and ancillary documents; and the Parties shall execute and substitute such newly created floor plans and ancillary documents for the initial floor plans as the new Exhibit A of this Operating Agreement. From and after the date the Parties substitute such floor plans and ancillary documents, the new floor plans and ancillary documents showing the space allocation in the Library Building shall be binding upon the Parties. In the event the Parties are unable to mutually agree on such space allocation and designation within such 120-



day period, the Parties shall utilize the dispute resolution method set forth in Section 4.3 below.

No later than the date the Parties open the Library Building to the public, the Parties shall further update the designation of space within the Library Building as either City Allocated Space, University Allocated Space, Common Space, and Shared Space and the percentage allocation of space within the space designated as Common Space and Shared Space. Such further update of designations and allocations shall be consistent with the designation of space shown on the floor plans and ancillary documents created by the Parties following completion of the Construction Documents and such allocation of space shall preserve the University Percentage of Total Library Square Footage and the City Percentage of Total Library Square Footage. Upon such further update, which shall be made no later than the date the Parties open the Library Building to the public, the Parties shall cause such designations and allocations to be shown on ancillary documents and a floor plan of each floor of the Library Building that accurately reflects the Library Building that was actually constructed; and the Parties shall execute and substitute such newly created floor plans for the floor plans that were created following completion of the Construction Documents as the new Master Floor Plan. From and after the date the Parties substitute such floor plans, the new floor plans showing the allocation and designation of space in the Library Building shall be final and binding upon the Parties. In the event the Parties are unable to mutually agree on such allocation and designation of space by the date the Parties open the Library Building to the public, the Parties shall utilize the dispute resolution method set forth in Section 4.3 below. Notwithstanding anything to the contrary, in no event shall either Party be allocated total square footage less than the University Percentage of Total Library Square Footage and the City Percentage of Total Library Square Footage.

- 3.2.3 **Shared Space.** The Parties shall share the use of any space within the Library Building designated as Shared Space; and the Parties shall determine from time to time the specific nature of any shared use of the Shared Space. In the event that one or both of the Parties determine that it no longer desires to share the use of any of the Shared Space, such Shared Space or portion thereof that one or both of the Parties has determined it no longer desires to share shall be re-designated as University Allocated Space and City Allocated Space in the percentages provided within each portion of Shared Space as shown on the Master Floor Plan. Any such re-designation shall be made in writing and the Parties shall cause a new floor plan and ancillary documents with such re-designation to be created and substituted for the existing floor plan then attached as the Master Floor Plan. Any changes to the improvements that are required to facilitate the separate use of such space shall be agreed to by the parties together with the cost allocation of such improvements, provided,

however, if the Parties are unable to agree on the cost allocation of such improvements, the Party requesting that the Shared Space no longer be shared shall be responsible for the cost of such improvements.

- 3.2.4 **City Allocated Space/University Allocated Space.** The Party to which space is allocated as either City Allocated Space or University Allocated Space shall have the right to use such space for the City Library Collection or the University Library Collection, as the case may be, or its respective programs, services, or administration, as such Party determines from time to time; provided, such use shall not unreasonably interfere with the use of the Library Building by the other Party and such other Parties' users.
- 3.2.5 **Use of the Roof.** The University and the City shall both have the right to use the roof of the Library Building for its own use (as opposed to the lease or licensing of such space to a third party), at no charge, to place and maintain telecommunications antennas, microwave or satellite dishes and other communications equipment. Such use of the roof shall be subject to receipt of all required government approvals, at the sole cost and expense of the Party whose equipment is being used. The placements of any such antennas or satellite dishes or other communications equipment on the roofs, the modifications of the roof to accommodate such equipment, and the installation of any such equipment shall be subject to the other Party's reasonable prior approval of the plans and methods therefore (which approval rights shall include any aesthetic, structural, safety or technological concerns). Such use of the roof shall not restrict, impair or negate any warranty relating to the roof and the Party installing such equipment shall be responsible for any and all damage, leakage or extraordinary wear and tear to the roof occurring as a result of such use of the roof. Installation of such equipment shall be performed through the University and performed in a first class workmanlike manner.
- 3.2.6 **Roof Decks and Multi-Purpose Rooms.** The Library Building is being designed to include several roof decks on the fourth floor ("Roof Decks") as well as two Multi-Purpose Rooms on the second floor ("Multi-Purpose Rooms"). Each Party shall have the non-exclusive right to use the Roof Decks and Multi-Purpose Rooms for gatherings and other related uses in compliance with all applicable laws so long as such use in no way interferes with the ability of the other Party to use or have access to the Library Building. Any use of the Roof Decks and the Multi-Purpose Rooms shall be scheduled and used in accordance with the rules regarding scheduling and use promulgated by the Parties from time to time; provided, however, neither Party or third party groups claiming a right to use the Roof Decks or the Multi-Purpose Rooms through such Party shall use the Roof Decks or Multi-Purpose Rooms more than half of the available time per year for use of such facilities without the prior written consent of the other Party.

- 3.2.7 **Exterior of Library Building.** Neither Party shall have the right to make any changes to the landscaping on the Library Land (except that the University shall have the right to make any normal changes (i.e., pruning, replacement of plants) in performing its routine maintenance of the Library Land) or the exterior of the Library Building (which shall include the display of any signs or banners) without the prior written consent of the other Party. In the event the other Party provides its consent to such changes, all such work shall be completed as an Alteration in accordance with the terms of Section 6.4 below.
- 3.2.8 **Hazardous Materials.** Neither Party shall use or store or cause to be created any Hazardous Substances in, on or near the Library Building or the Library Land, with the sole exception of reasonably necessary substances that are kept in reasonably necessary quantities for normal library operations, provided that their use and storage are in accordance with applicable laws. “Hazardous Substances” shall mean any hazardous substances, sewage, petroleum products, hazardous materials, toxic substances or any pollutants or substances defined as hazardous or toxic in accordance with federal or state laws and regulations.

### 3.3 **Library Land.**

- 3.3.1 **Easement and Right of Occupancy.** The University, as sole owner and holder of the fee simple estate in and to the Library Land, hereby GRANTS and CONVEYS to the City and the University, as tenants-in-common, and their respective successors and assigns as permitted hereunder, an exclusive easement in, over and upon the entirety of the Library Land for access to and subjacent support of the Library Building together with the exclusive right to enter upon, use and occupy the entirety of the Library Land for the purpose of constructing, keeping and maintaining the Library Building thereon, including any replacements or reconstructions thereof, which right shall include the right to excavate and displace dirt and other material from, bore into and otherwise utilize the Library Land for the purpose of constructing, keeping and maintaining the Library Building thereon (collectively, the “Easement Rights”). Such Easement Rights shall be a burden and encumbrance upon the Library Land and the right, title, interest and fee simple estate of the University therein and shall be a benefit and appurtenance to the Library Building and the right, title, interest and fee simple estate of the City and the University, as tenants in common, therein. The grant of such Easement Rights shall be irrevocable and shall remain in full force and effect throughout the entire term of this Operating Agreement and shall be coextensive with the term of this Operating Agreement and shall be extinguished at such time as the Operating Agreement is terminated. The University hereby acknowledges and agrees that during the term of this Operating Agreement and for so long as this Operating Agreement remains in effect, the University shall have no right or ability whatsoever to use or utilize the

Library Land for any purpose other than the construction, maintenance and operation of the Library Building thereon; provided, however, that the University hereby reserves the right to, and the City and the University acknowledge and agree that the University may, install, maintain, repair and replace from time to time such utility lines, conduits, ducts and cables within the Library Land as the University may reasonably require to some other portions of the University campus, so long as the same do not interfere with the construction, maintenance and operation of the Library Building on the Library Land.

### 3.4 **Personal Property.**

3.4.1 **Jointly-Owned Personal Property.** The University and the City will each own and hold an undivided interest as tenants-in-common in all the Personal Property acquired as part of the development of the Library Building pursuant to the terms of the Development Agreement, subject to the terms of this Operating Agreement. Any Personal Property subsequently acquired through joint contribution of the Parties shall also be owned and held as tenants-in-common.

3.4.2 **Identification and Inventory of Personal Property.** The Parties shall label and inventory all Personal Property located in the Library Building. Any decisions regarding replacement, repair or redeployment of Personal Property that is jointly owned shall be made mutually. Any proceeds obtained from the disposition of jointly owned Personal Property shall be shared as follows: 59% to the University and 41% to the City.

3.4.3 **Separately Owned Personal Property.** Each Party shall retain the right to purchase Personal Property for the Library Building with its own funds, and any Personal Property purchased with a Party's own funds shall be separately owned by such Party. Any Party purchasing Personal Property with its separate funds shall consult with the other Party regarding such purchase and if such Personal Property has a material effect on the Library Building or the library operations of the other Party, the Party purchasing the Personal Property shall obtain the prior written consent of the other Party, such consent not to be unreasonably withheld. The Parties hereby agree that the following represent some of the type of situations in which new Personal Property would have an effect on the Joint Library or the Library Building:

3.4.3.1 New computers are incompatible with existing computers; and

3.4.3.2 New furniture is incompatible with the color or design of the existing furniture;

This list is intended to be illustrative only and in no way is intended to be an exhaustive list of such situations.

3.4.4 **Replacement of Jointly Owned Personal Property.** The Co-Managers shall be responsible for a program of purchasing new Personal Property to replace or upgrade any jointly owned Personal Property for the Library Building, to the extent such replacements or upgrades are necessary for the continued operation of the Joint Library at the same level of service as was in existence prior to such need arising for such replacement Personal Property. The Co-Managers shall develop on an annual basis a schedule of such new Personal Property (together with an estimated cost therefore) that are anticipated to be needed in the upcoming year. Such schedule shall specify the priority for each item of Personal Property together with a recommendation as to which Personal Property should be purchased during the upcoming year. Such schedule of Personal Property shall be submitted by the Co-Managers to the University and the City and the Parties shall mutually agree as to which items shall be jointly purchased. The Parties shall be obligated to agree to purchase such replacement Personal Property or upgrades to existing Personal Property necessary for the continued operation of the Joint Library at the same levels or service as was in existence prior to such need arising for such replacement Personal Property or upgrades to existing Personal Property. The University and the City shall each be obligated to pay for all items of Personal Property agreed to be purchased in accordance with the Parties Cost Sharing Percentages.

After the third full year of operation of the Joint Library, the Parties shall be obligated to meet and confer, in good faith, to determine if there is a more appropriate alternative cost sharing basis based on the Parties respective users' usage of such jointly owned Personal Property as opposed to the Parties Cost Sharing Percentages for allocating between the Parties the cost of replacement or upgrades for Personal Property. If the Parties determine there is not a more appropriate alternative or cannot, after meeting and conferring, agree as to an alternative, the Parties shall continue to use the Parties Cost Sharing Percentages; provided, however, either Party may elect to utilize the dispute resolution mechanism set forth in Section 4.3.1 for Non-Violation Disputes to attempt to resolve any differences related to such cost sharing basis. Once every five (5) years following the initial meeting after the first three years that the Joint Library is in operation, the Parties shall meet to re-determine whether such current method for allocating cost is appropriate and if the Parties are unable after any such meeting to, in good faith, agree on an alternative method, the Parties shall resort to using the Parties Cost Sharing Percentages.

3.4.5 **Standard for Personal Property.** Any Personal Property purchased either separately by one Party or jointly by both Parties for the Library Building shall be comparable or better than the quality of the then current Personal Property being used within the Library Building.

### 3.5 **Name of Library**

3.5.1 **Joint Library/Library Building Name.** The University and the City shall, in good faith, mutually agree on the name of the Joint Library/Library Building. Any name of the Joint Library/Library Building shall be subject to the approval and guidelines of the California State University Trustees and the City Council of the City of San José.

3.5.2 **Names of Allocated Space.** The University and City shall each retain the right to name spaces within the University Allocated Space and the City Allocated Space, respectively, subject to the reasonable approval of the other Party.

3.5.3 **Names of Shared and Common Space.** Either Party shall have the right to propose to the other Party names for any Shared Space or Common Space within the Library Building. Such proposed names shall be submitted by the Party proposing such name to the other Party, and the Parties, each using their respective guidelines and procedures, shall decide whether or not to approve of such names. In the event the Parties do not agree as to any such proposed name, such Shared Space or Common Space shall not be named.

3.6 **Term of Agreement.** The term of this Agreement, commenced on the date first written above, shall be perpetual and shall continue until the Joint Library is obsolete pursuant to the terms set forth in Section 11.

## 4. **GOVERNANCE OF JOINT LIBRARY**

4.1 **Separate Jurisdiction.** The University and the City shall each retain separate and distinct jurisdiction and control over their respective libraries operating within the Joint Library, which shall include, but not limited to, the following areas:

4.1.1 **Selection of Materials.** The University and the City shall each retain the right to select all materials to be held within the University Library Collections and the City Library Collections, respectively. The Parties agree that they shall cooperate and coordinate such selection process with each other so as to avoid unnecessary duplication, however, this obligation to cooperate shall in no way require one Party or the other to purchase any particular material or refrain from purchasing any particular material, it being the express intent of this Agreement that each Party shall have the right to select for its own purchase whatever material it desires.

4.1.2 **Collection Maintenance and Management.** The University and the City shall each retain the right to maintain and manage the University Library Collections and the City Library Collections, respectively, as it deems appropriate in its sole discretion. The decisions retained by each Party under this Section, include, without limitation, the decision to discontinue any periodicals, reduce the collection, repair books, discontinue lending



certain types of material (videos etc.), and reclassify or catalog any materials with the City Collections or University Collections.

- 4.1.3 **Budget/Funds.** Each Party shall be responsible for obtaining, managing, budgeting and expending its own funds to operate its portion of the Joint Library together with its obligations under this Agreement.
- 4.1.4 **Programs/Services.** Each Party shall retain the right to provide its own programs and services within the Joint Library, subject to the terms set forth below.
- 4.1.5 **Lending Policies.** Each Party shall retain the right to set its own lending policies for all materials within such Parties collection, subject to the terms of Section 5.2 below.
- 4.1.6 **Jointly Operated Functions.** The Parties intend to jointly operate certain functions within the Joint Library. As of the date of entering into this Operating Agreement, the Parties intend to jointly operate technical services, circulation, security and periodical services. Each Party, however, retains the right from time to time to elect not to jointly operate any particular function.

#### 4.2 **Shared Jurisdiction.**

- 4.2.1 **Co-Managers.** The City Librarian and the University Librarian shall each retain their respective authority and jurisdiction as provided above in Section 4.1. The Co-Managers shall be jointly responsible for conducting the ordinary and usual business and affairs of the Joint Library to the extent such business and affairs are related to any areas in which the Parties have elected to operate in a joint manner.
- 4.2.2 **Joint Library Committee.** The City of San José Library Commission and the San José State University Academic Senate Library Committee shall each, if authorized by their respective enabling bodies, have the right to meet with each other at least one time per year as the “Joint Library Committee” for purposes of sharing information regarding the Joint Library.
- 4.2.3 **Joint Library Subcommittee.** The City of San José Library Commission and the San José State Academic Senate Library Committee shall each have the right to appoint members of their respective bodies to a “Joint Library Subcommittee”, which shall consist of six persons, three of which will be appointed by the San José State University Academic Senate Library Committee, and three of which will be appointed by the City of San José Library Commission. Each Subcommittee member shall serve staggered two year terms. Subject to any limitations imposed by this Agreement, the Joint Library Subcommittee shall advise the Co-Managers on policy issues related to joint affairs of the Joint Library, but shall not

review or advise the Co-Managers with respect to any issues for which either Party has retained its separate jurisdiction.

#### 4.3 **Dispute Resolution.**

4.3.1 **Executive Review.** Either Party shall have the right, at any time after good faith efforts have failed to resolve (i) a dispute of the Co-Managers over a matter affecting the operation of the Joint Library or the Library Building (“Non-Violation Dispute”), or (ii) a dispute relating to or in connection with any obligation of either Party under the terms of this Agreement (“Violation Dispute”) to request a review of such matter by the Chief Executives. Either the University or the City shall exercise its right to request such a review by providing written notice to the other Party. The Chief Executives, or their respective designates, as the case may be, shall meet within thirty (30) days of the day such notice is delivered to the other Party, and shall either decide to mediate such dispute pursuant to the terms of Section 4.3.2 or to engage in other good faith efforts to resolve the deadlock. Within forty-five (45) days of such meeting, the Chief Executives shall either resolve such dispute or shall engage in non-binding arbitration pursuant to Section 4.3.3 below; provided, however, the Chief Executives may elect, by mutual decision, to engage in binding arbitration pursuant to the terms of Section 4.3.3 below. Any such decision resolving a dispute shall be binding on the Parties, subject to the approval of the City Council and/or the University Trustees, if required. The Parties by mutual agreement of the Chief Executives shall have the right to extend the time periods set forth in Section 4.3.

4.3.2 **Mediation.** In the event that the Chief Executives elect to utilize mediation to resolve a dispute, the Parties shall submit the disagreement to mediation in accordance with the rules of the Judicial Arbitration and Medication Society (“JAMS”) or if JAMS is no longer in business to a mutually agreeable organization. Such mediator shall not have the authority to impose a settlement upon the Parties, but will attempt to help them reach a satisfactory resolution of the disagreement. The mediator shall end the mediation whenever, in his or her judgment, further efforts at mediation would not contribute to a resolution of the submitted disagreement or within forty-five (45) days of the Chief Executives initial meeting, whichever is earlier.

4.3.3 **Non-Binding Arbitration.** The Parties agree that any unresolved Violation Dispute initially submitted to the Chief Executives shall be further submitted to arbitration to be conducted in San José, California in accordance with the rules of the American Arbitration Association (“AAA”) applying the laws of California. The Parties agree that such arbitration shall be conducted by an arbitrator who is experienced in the subject area which is in dispute, that discovery shall not be permitted except as required by the rules of AAA, that the arbitration award shall not



include factual findings or conclusions of law, and that no punitive damages shall be awarded. Any award rendered by the arbitrator shall be advisory and shall not be final or binding on the Parties, unless both Parties agree to be bound by such determination.

- 4.3.4 **Court Jurisdiction.** Except as provided otherwise in this Agreement, neither party may initiate a judicial proceeding or action until the parties have exhausted the dispute resolution procedures in section 4.3 of this Agreement. If, following the rendering of the non-binding decision specified in section 4.3.3 above, either Party does not agree to be bound by such opinion, either Party may elect to initiate a proceeding or action to resolve such dispute. Any such judicial proceedings or actions must be brought in Santa Clara County Superior Court and are subject to any limitations on remedies set forth in this Agreement.

## 5. **LIBRARY OPERATIONS**

### 5.1 **On-site Use of Library Collections.**

- 5.1.1 **Library Collections.** The Members of the General Public and the University Users shall have the right to the on-site use of the Library Collections. The University and City shall each retain the right to promulgate rules and regulations regarding the on-site use of its own portion of the Library Collections; provided, however, such rules and regulations must apply uniformly to both the Members of the General Public and the University Users and the Party promulgating such rules and regulations must enforce such rules and regulations in the same manner for both the Members of the General Public and the University Users.
- 5.1.2 **Reserve Collections.** The University shall have the right to place any Library Material within the University Library Collections on the Reserve Collection, subject to the limitations set forth in Section 2.1.29. The University shall retain the right to determine from time to time the rules and regulations that govern any particular material placed in the Reserve Collection, including the time period allowed for such Library Material to be used; provided, however, such rules and regulations must apply uniformly to both Members of the General Public and the University Users and the University must enforce such rules and regulations in the same manner for both the Members of the General Public and the University Users.
- 5.1.3 **Special Collections.** Each Party shall retain control over its own Special Collections, which decisions shall include acquisitions, dispositions, on-site use, lending policies, if any, and hours of access if such Special Collections are located separate from the Special Collections of the other Party. If such Special Collections are not separately located, the hours of

operation of the Special Collections shall be determined jointly by the Co-Managers.

5.1.4 **Electronic Materials.** The University and the City shall each attempt to negotiate licenses or other use agreements for the use by both the Members of the General Public and University Users of the respective electronic material and databases in the Joint Library if such use by the Members of the General Public or the University Users does not require the expenditure of additional funds for such licenses or other use agreements compared to the use by only the Members of the General Public or the University Users, as the case may be. If such use were to require the expenditure of additional funds for such licenses or other use agreements, either Party shall have the right to restrict access to such electronic material or databases so as not to violate any agreements either Party has entered into regarding the use thereof.

## 5.2 **Lending Policies.**

5.2.1 **General Policy of City.** The City shall have the right, from time to time, to determine the Lending Policy for the City Library Collection. Such Lending Policy must apply uniformly to both Members of the General Public and University Users.

5.2.2 **General Policy of the University.** The University shall have the right, from time to time, to determine the Lending Policy of the University Library Collection. Such Lending Policy must apply uniformly to both Members of the General Public and University Users, subject to the following exceptions: (i) University Users shall retain the right to recall any borrowed Library Material from the University Library Collections, provided the time period in which such Library Material must be returned back to the Joint Library shall be the same for both Members of the General Public and University Users who are then using such Library Material, and (ii) University Faculty and University Staff shall have the right to extended borrowing privileges to the University Collection, as such extended borrowing privileges are determined from time to time by the University.

5.2.3 **Amendment of the General Lending Policy of the University.** The University shall retain the right to monitor the borrowing of the University Library Collection by Members of the General Public. If the University determines, in its sole discretion, that Members of the General Public are borrowing materials within the University Library Collection at such a rate or in such a manner so as to result in University Students or University Faculties having inadequate access to or use of such material for legitimate academic use, the City and the University shall be obligated, in good faith, to agree promptly on a solution that alleviates the problem of University Students and University Faculty not having adequate access to

such materials. Such solutions may include, but are not limited to: (i) the purchase of additional copies of titles that are in high demand; (ii) the purchase of additional materials in subjects in which the then current materials are in high demand; (iii) restricting the number of materials within the University Library Collection that can be borrowed at one time by the Members of the General Public and the University Users; and (iv) reduction of the time period for borrowing materials within the University Library Collection. In the event these or other appropriate solutions are implemented and do not alleviate the problem that the University identified, the University shall have the right to amend the University Lending Policy so as to limit the borrowing privileges of Members of the General Public for those materials within the University Library Collection that University Users are unable to have adequate access to for legitimate academic use.

5.2.4 **Replacement of Materials.** In the event any item within the City Library Collections is lost or damaged beyond repair while being borrowed by a University User or any item within the University Library Collections is lost or damaged beyond repair while being borrowed by a Member of the General Public, such borrower shall be responsible for paying any fine or cost imposed by such Party whose item was lost or damaged. In the event either Party experiences repeated instances in which a borrower of the other Party fails to pay the foregoing fine or cost imposed by such Party whose item was lost or damaged and such failure causes undue loss from the collections of the affected Party, the Parties shall seek a mutually acceptable procedure in which the Party whose borrower lost or damaged such item shall pay to the other Party the fine or cost imposed.

5.3 **Designated Quiet Areas.** The Parties agree that the University can designate any portion of the University Allocated Space and the City can designate any portion of the City Allocated Space as quiet areas for the purpose of quiet reading and academic study (“Designated Quiet Areas”). The University and the City shall each retain the right to promulgate specific rules and regulations on users of the Joint Library within their respective Designated Quiet Areas of the Library Building for the purpose of preserving the nature of the Designated Quiet Areas. In the event either Party promulgates such rules and regulations, the Parties shall both use their reasonable efforts to enforce such rules and regulations with respect to both Members of the General Public and the University Users.

5.4 **Intellectual Freedom.**

5.4.1 **Policy.** It is the intent of the University and the City to continue to honor the current policy of both the University and City to provide for unrestricted access to all Library Material within the Library Collections and services within the Joint Library for all Members of the General Public and the University Users.

- 5.4.2 **Change in Policy.** In the event that City ordinances are passed or rules, policies or regulations are imposed by the City that restrict access for certain groups of users to Library Material within the City Library Collection or restrict use for certain groups of users of City sponsored services or programs, the City hereby agrees that it shall not restrict access to any Library Material within the University Library Collection or restrict use of any University services or programs. It is the intent of the City not to restrict University Users access to Library Collections. In addition, the University shall not be required to enforce, through its employees, any such ordinances, rules, regulations or policies imposed by the City.
- 5.4.3 **Federal or State Laws.** In the event that federal and/or state laws are passed that restrict access for certain groups of users to Library Materials within the City Library Collection, but not Library Material within the University Library Collection, it is the intent of the Parties not to subject the University and the University Library Collection to such federal and/or state laws.
- 5.5 **City Branch Library Access.** The City shall have the right to create and administer from time to time, at its sole cost and expense, an internal loan program allowing Members of the General Public and University Users to request that Library Material within the Library Collection that is otherwise available to be borrowed, be transferred to City branch libraries for borrowing, subject to both Parties respective Lending Policies.
- 5.6 **Hours of Operation.**
- 5.6.1 **Initial Hours.** The hours of operation of the Joint Library shall be mutually determined by the Parties; provided, however, that the hours of operation of the Joint Library when the Joint Library first opens shall not be less than 81 hours per week during the University's semesters and 67 hours per week during the remainder of the year. The Parties shall have the right to change the hours of operation of the Joint Library upon mutual agreement.
- 5.6.2 **Student Study Room.** The Library Building has been designed to include a room designated as the Student Study Room. The Student Study Room shall be open to the Members of the General Public and University Users during all hours in which the Joint Library is open. The Student Study Room shall only be open to University Students with a valid student identification from the University during hours in which the Joint Library is not open. The University shall determine such hours of operation of the Student Study Room. The University shall pay the cost, including security, of operating the Student Study Room during the hours in which the Joint Library is not open. In the event the City desires to provide access to students with a valid student identification who are not University Students, the City shall pay an equitable share of the cost of

operating the Student Study Room during the hours in which the Joint Library is not open.

## 5.7 **Library Programs.**

- 5.7.1 **Separate Library Programs.** The University and the City shall each retain the right to create, sponsor and operate separate library programs within the Library Building. Each Party shall be solely responsible for funding its separate programs. The Parties agree to cooperate in good faith with each other in facilitating all the library programs operated within the Library Building; provided, however, neither Party shall have the right to sponsor a library program that imposes an unreasonable burden on shared costs of the Parties in maintaining the Library Building or utilizes Shared Space or Common Space in such a manner as to disrupt the normal library functions of the Joint Library.
- 5.7.2 **Joint Library Programs.** The University and the City shall have the right to create, sponsor and operate joint library programs within the Library Building. The creation of any such joint library programs shall be a mutual decision of the Parties and neither the University nor the City shall have any obligation to enter into any program proposed by the other Party.
- 5.7.3 **Fee for Service Programs.** The Parties may from time to time mutually determine that it is in the best interest of the Joint Library to operate a fee for service program utilizing the Library Collections and/or the facilities within the Library Building (i.e., a program charging users a fee for the service of researching and obtaining materials). In the event either Party desires to operate such a program and the other Party elects not to participate with its funds or employees in operating such fee for service program, the Party desiring to operate such fee for service program shall have the right to operate such fee for service program, at such Parties own cost and expense; provided, however, such Party operating such fee for service program shall have the right to use the entire Library Collections unless such use imposes an unreasonable burden on the Party's Library Collections. Any such fee for service program operated by one Party or both Parties shall comply with all applicable laws, rules and regulations. If the Parties agree to mutually operate such fee for service program, the Parties shall also agree on the administration costs, and any revenue sharing arrangements for such program. If the Parties elect not to operate such fee for service program together, the Party operating such program shall pay on an annual basis, twenty-five percent (25%) of all Net Funds to the other Party, as consideration for use of such Parties portion of the Library Collections. For purposes of this Section, "Net Funds" shall mean all revenue actually received by the Party operating such fee for service program minus all actual and direct expenses incurred to operate such fee

for service program, except for any charge or allocation for use of the Library Building.

5.8 **Ancillary Library Services.** The Parties shall have the right to provide separate services to their respective users that are ancillary to the core library services that each Party provides to its respective users. These ancillary library services include, but are not limited to, the operation of copy machines, computers, computer printers, and other vending services. The Parties, by mutual agreement, shall also have the right to operate jointly any such ancillary library services.

5.9 **Library Staff.**

5.9.1 **Collective Bargaining Agreements.** During the term of this Operating Agreement, the University and the City shall each honor their respective then current, if any, collective bargaining agreements governing the employees that will be assigned work in the Joint Library.

5.9.2 **Separate Employees.** The University and the City shall each retain full authority and responsibility for their own employees that work in the Joint Library. Each employee shall work for one or the other of the two Parties and shall be responsible to such Party as its employer. Each Party shall retain the right to set its work hours and compensation as well as all other terms of employment for its own employees.

5.9.3 **Joint Functions.** Certain functions performed by employees within the Joint Library may from time to time be functions that the Co-Managers determine shall be the shared responsibility of the University and the City. These shared functions, may include, but are not limited to, staffing the circulation desk, technical services and security. All such shared functions shall be referred to herein as “Joint Functions”.

5.9.4 **Staffing Plans.** Immediately following adoption of the annual budget for the Joint Library, The Co-Managers shall each prepare a schedule setting forth the staffing plan they intend to employ for all library programs and functions in the upcoming fiscal year. Such staffing plans shall specify the Full Time Equivalency (“FTE”) positions by classification to be assigned to Separate Programs and Separate Functions and to Joint Programs and Joint Functions for all hours of operation of the Joint Library. The Co-Managers shall periodically update their staffing plans to reflect the changes in position assignments between and within programs and functions during the year, and shall ensure that the work schedules of employees in all positions are maintained on a current basis and provided to the appropriate employees and supervisors as necessary. It is the intent of the Parties to each staff and operate the Joint Library with services and programs to provide the Members of the General Public and the University Users with a fully operational Joint Library. The Parties, however, recognize that budget limitations might require from time to



time that one or both Party reduce its staffing within the Joint Library. In the event one Party reduces its staff for Joint Functions, the other Party retains the right to elect to separately provide any service within a Joint Function to its respective users and not to the other Party's users. The Parties, however, shall be obligated under the terms of this Operating Agreement to provide their equitable share of employees at all times to keep the Joint Library open at a minimum level of service. The Parties failure to provide its share of employees as required above shall constitute a "Monetary Default", which monetary amount shall equal the cost to the non-defaulting Party to provide such minimal staffing. In the event that the Co-Managers are unable to agree on an employee work schedule for Joint Functions thirty (30) days following the adoption of both Parties' annual budgets, the Co-Managers shall submit such matter to the Chief Executives in accordance with the terms of Section 4.3.1 above. In the event that the Chief Executives are unable to reach agreement on an employee work schedule for Joint Functions within twenty (20) days after receiving written notice of such dispute from the Co-Managers, either Party shall have the right to require the other Party to submit such dispute to non-binding arbitration as provided in Section 4.3.2 above.

5.9.5 **Excess Use of Joint Library.** In the event that either Party or such Party's users are using the Joint Library to such a level or in such a manner as to require materially greater staff hours than was required prior to such Party's or its users increased use, either Party shall retain the right to request that such Party increase the number of staff hours it provides to the Joint Library for so long as such need continues. Such Party of which such request is made shall have the right to challenge such request. If the Co-Managers are unable to agree on such increased staff hours, the Parties shall pursue the dispute resolution mechanism set forth in Section 4.3.

5.10 **Cooperation and Non-Interference.** The University and the City both anticipate operating the Joint Library in an efficient and cost effective manner while at the same time providing the highest service to the Members of the General Public and the University Users. Neither the University nor the City shall take any action or shall fail to take any action that it should reasonably have taken that materially interferes with the other Party's proper use of the Joint Library and Library Building or materially increases the cost of operating the Joint Library or maintaining the Library Building and the Library Land.

## 6. **LIBRARY BUILDING**

### 6.1 **Maintenance of the Library Building and the Library Land.**

6.1.1 **Base Library Maintenance Obligations.** The University shall arrange for the performance of the "Base Library Maintenance Obligations", which shall mean the work specified on Exhibit D attached hereto. The Base Library Maintenance Obligations shall exclude maintenance of any

program specific systems or equipment (i.e., special humidity control units for Special Collections), maintenance of any escalators, and maintenance of any interior plants. In the event that the University is unable to cause the performance of the Base Library Maintenance Obligations for the aggregate of the City's Base Library Maintenance Funds and the University Base Library Maintenance Funds, the Parties shall meet and confer to determine whether to increase the funds for maintenance or reduce the scope of the Base Library Maintenance Obligations. The Parties hereby agree that the specific standards set forth in Exhibit D may be amended from time to time by mutual agreement of the Parties. Any such amendment shall be reflected in writing between the Parties.

- 6.1.2 **Funds for Base Library Maintenance Obligations.** The City shall pay to the University an amount equal to the same per square foot rate that the University receives for maintenance of the Library Building from the California State University multiplied by the Total City Square Footage per year (the "City's Base Library Maintenance Funds"). The University shall be obligated to spend the City's Base Library Maintenance Funds and the per square foot rate it receives from the California State University ("University Base Library Maintenance Funds") for maintenance of the Base Library Building on the Library Maintenance Obligations or Supplemental Library Maintenance Obligations.
- 6.1.3 **Escalators.** The University shall be responsible for maintaining the escalators in the Library Building; and the cost therefore shall be shared evenly between the Parties.
- 6.1.4 **Supplemental Library Maintenance Obligations.** The Parties shall have the right from time to time to mutually agree to have the University perform Supplemental Library Maintenance Obligations. Any such mutually agreed upon Supplemental Maintenance Obligations shall be funded either by the Parties or from funds in the Library Trust Account, both by mutual agreement. In addition, either Party may elect to have Supplemental Library Maintenance Obligations performed if such electing Party desires to pay for such Supplemental Library Maintenance Obligations, and such work does not unreasonably interfere with the other Party's proper use of the Joint Library and the Library Building or materially increases the cost of operating the Joint Library or maintaining the Library Building and the Library Land.
- 6.1.5 **Library Trust Account.** The University shall establish a separate interest bearing account ("Library Trust Account") in which to hold the City's Base Library Maintenance Funds and the University's Base Library Maintenance Funds together with any other funds deposited by either Party for the maintenance and Capital Repair of the Library Building and the Library Land. In the event that any portion of such funds are not expended during the University fiscal year in which such funds were



deposited, such funds shall remain in the Library Trust Account and either Party may elect to use their portion of such excess funds toward the City Base Library Maintenance Funds or the University Base Library Maintenance Funds, as the case may be for the following fiscal year. In the event either Party does not elect to use such excess funds as provided in the foregoing sentence, then such excess funds shall remain in the Library Trust Account until such time as the Parties mutually agree as to how to utilize such funds; provided, however, such funds and any interest accrued thereon may only be used for Base Library Maintenance Obligations, Supplemental Library Maintenance Obligations, or Capital Repairs.

- 6.1.6 **Payment.** The University shall submit to the City, on a quarterly basis, an invoice for the City's Base Library Maintenance Funds. The City shall pay such amount within thirty (30) days following receipt of such invoice.
- 6.1.7 **Accounting.** The University shall keep an accounting of all the costs incurred for the Library Maintenance Obligations on the fiscal year of the University.
- 6.1.8 **Review.** The University shall maintain at all times during the term of this Operating Agreement, complete and accurate books of account and records prepared in accordance with generally accepted accounting principles with respect to the cost of the Library Maintenance Obligation for the current fiscal year and the prior two (2) years and shall retain such books and records, as well as contracts, bills, vouchers, and checks, and such other documents as are reasonably necessary to properly audit the cost of the Library Maintenance Obligations. Upon reasonable notice from the City, the University shall make available for the City's inspection at the University's offices, during normal business hours, the University's books and records relating to the cost of the Library Maintenance Obligations for the current year and the immediately prior two (2) years. If an audit, review or inspection by the City alleges an overbilling, the City may submit a claim for the overbilled amount to the University, detailing the nature of the overbilling, and the University shall have thirty (30) days to credit such amount to the Library Trust Account or contest the claim by giving notice thereof to the City, detailing the nature of the University's contest of the City's claims.
- 6.1.9 **University's Right of Emergency Access.** The University shall at all times have and retain a key with which to unlock all doors in the Library Building, including any doors within City Allocated Space that is specifically designated by the City for its own use. The University shall have the right to use any and all means which the University may deem proper to open said doors in an Emergency in order to obtain entry to particular space within the Library Building.

6.1.10 **Failure to Perform.** If the University shall fail to perform the Library Maintenance Obligations, and upon the continuance of such failure on the University's part for fifteen (15) days (or immediately, in the event of an Emergency) after the delivery to the University of written notice of such default from the City (or, in the case of any such failure which cannot reasonably be cured within fifteen (15) days, or within such additional period, if any, as may be reasonably required by the University to cure such failure, provided the University has promptly commenced such cure and thereafter continuously prosecutes such cure with all due diligence), then the City may (but is under no obligation to) perform such obligation and all sums actually paid or incurred by the City that are properly allocated to the University in performing such obligation (such cost not to exceed the per square foot rate the University receives from the State of California for maintaining the Library Building multiplied by the Total University Square Footage), shall be paid by the University to the City within thirty (30) days after demand from the City; provided, however, that if the University notifies the City within thirty (30) days after receipt of the City's notice of the University's alleged failure that the University disputes the failure alleged by the City, the City shall not be allowed to perform such obligation unless and until it has been determined by the dispute resolution mechanism set forth in Section 4.3 above that such failure alleged by the City was in fact an obligation of the University (and the Parties agree to pursue such dispute resolution proceedings to completion as promptly as possible).

6.1.11 **Waiver.** The City hereby waives any claim for damages for any injury or inconvenience to or interference with the City's business within the Library Building, any loss of occupancy or quiet enjoyment of the Library Building, and any other loss in, upon and about the Library Building due to the University's performance of the Library Maintenance Obligations or the University's failure to perform the Library Maintenance Obligations. The University or its agents shall not be liable for (i) any damage to any property entrusted to employees of the University in connection with the Library Maintenance Obligations, (ii) loss or damage to any property by theft or otherwise in connection with the Library Maintenance Obligations, (iii) any injury or damage to persons or property resulting from fire, explosion, falling plaster, steam, gas, electricity, water or rain which may leak from any part of the Library Building or from the pipes, appliances or plumbing work therein or from the roof, street or sub-surface or from any other place or resulting from dampness or any other cause whatsoever. The University or its agents shall not be liable for interference with light or other incorporeal hereditaments.

## 6.2 **Utilities.**

6.2.1 **University to Provide.** The University shall arrange for and cause to be provided to the Library Building, the Library Utilities. "Library Utilities"

shall mean electricity, natural gas, domestic water, chilled water, sewer, refuse removal, and steam, and shall specifically exclude all computer, telephone, data and video services.

- 6.2.2 **Failure to Provide Library Utilities.** In the event any of the Library Utilities are interrupted for any reason, the University shall diligently attempt to reinstate such Library Utilities. The University's failure to furnish any of the Library Utilities when such failure is caused by (i) accident, breakage or repairs; (ii) strikes, lockouts or other labor disturbance or labor dispute of any character; (iii) governmental regulation, moratorium or other governmental action; (iv) inability despite the exercise of reasonable diligence to obtain electricity, water, fuel, telephone or data services; or by (v) any other cause except the University's gross negligence or willful misconduct, shall not result in any liability whatsoever to the University. The City hereby waives any claim for damages against the University for any injury or inconvenience to or interference with the City's business within the Joint Library, any loss of occupancy or quiet enjoyment of the Library Building, and any other loss in, upon and about the Library Building due to a failure to provide the Library Utilities.
- 6.2.3 **Cost Allocation.** The City shall pay to the University an amount equal to the City Percentage of Total Library Square Footage of the total cost of the Library Utilities per year ("City Library Utility Cost"), which amount represents the City's share of the total cost of the Library Utilities based on the total square footage of the Library Building allocated to the City.
- 6.2.4 **Payment.** The University shall submit to the City, on a quarterly basis, an invoice for the City Library Utility Cost. The City shall pay such amount within thirty (30) days following receipt of such invoice.
- 6.2.5 **Reimbursement of Rebates.** The City shall receive as a credit an equitable share of any rebate received by the University for utilities provided to the Library Building. Such equitable share shall be determined based upon the University's reasonable determination of the portion of the rebate attributable to the Library Building and further on the fact that the City pays the City Percentage of Total Library Square Footage of the total cost of the Library Utilities.
- 6.2.6 **Accounting.** The University shall keep an accounting of all the costs incurred for the Library Utilities on a fiscal year of the University. Within ninety (90) following the end of each fiscal year of the University, the University shall deliver a statement to the City showing such accounting of the prior years the Library Utility Cost. If the City's payments of the City Library Utility Cost exceed the actual City Library Utility Cost, the University shall credit the excess to the City's portion of the Library Trust Account at the time the University furnishes such statement to the City.

6.2.7 **Review.** The University shall maintain at all times during the term of this Agreement, complete and accurate books of account and records prepared in accordance with generally accepted accounting principles with respect to the cost of the Library Utilities and shall retain such books and records, as well as contracts, bills, vouchers, and checks, and such other documents as are reasonably necessary to properly audit the cost of the Library Utilities. Upon reasonable notice from the City, the University shall make available for the City's inspection at the University's offices, during normal business hours, the University's books and records relating to the cost of the Library Utilities for the current year and the immediately prior year. If an audit, review or inspection by the City alleges an overbilling, the City may submit a claim for the overbilled amount to the University, detailing the nature of the overbilling, and the University shall have thirty (30) days to pay such amount or contest the claim by giving notice thereof to the City, detailing the nature of the University's contest of the City's claims.

6.2.8 **Computer, Video, Telephone and Data Services.** The City and University both acknowledge that as of the date this Operating Agreement is being entered into, it is premature to determine the nature of and arrangements regarding computer, video, telephone and data services for the Library Building. The City and the University shall agree as to whether or not to share computer, video, telephone and data services in the Library Building. If the Parties agree to share computer, video, telephone and data services, the Parties shall enter into a written agreement that will become an addendum to this Operating Agreement specifying such arrangement and each Parties responsibilities and obligations therefore.

### 6.3 **Capital Repair.**

6.3.1 **Capital Repair Program.** The University shall be responsible for managing a program of Capital Repairs for the Library Building and Library Land; provided, however, both the University and the City shall each be obligated to pay the Parties Cost Sharing Percentages of the cost of all Capital Repairs for any given year that are necessary to keep the Library Building and Library Land open and operational for the Members of the General Public and the University Users. The University shall submit to the City on an annual basis a list of Capital Repairs (together with an estimated cost therefore) that are anticipated to be needed to be performed in the upcoming year. Such list shall specify the priority for each Capital Repair together with a recommendation as to which repairs should be performed during the upcoming year. In addition, to the Capital Repairs that the University specifies on its annual list of recommended Capital Repairs, the City shall have the right to propose Capital Repairs that the University has not recommended. Following the City's review of the list of recommended Capital Repairs and the submission of any proposed Capital Repairs of its own, the Parties shall, in good faith,

attempt to agree on those Capital Repairs that will be necessary to keep the Library Building and the Library Land open and operational for the Members of the General Public and the University Users. In the event the Parties are unable to agree on a list of Capital Repairs to be performed in the upcoming year within such thirty (30) days following the submission by the University to the City of the University's proposed list of recommended Capital Repairs, the procedure for review by the Chief Executives set forth in Section 4.3.1 above and non-binding arbitration pursuant to Section 4.3.3 above shall be implemented. In the event that the procedure for executive review by the Chief Executives set forth in Section 4.3.1 above and non-binding arbitration pursuant to Section 4.3.3 above does not result in an agreement, the Parties shall arbitrate which Capital Repairs shall be performed in the upcoming year pursuant to the terms set forth below.

- 6.3.2 **Rights to Perform Capital Repairs.** In the event that a Party desired to have Capital Repairs performed and did not prevail in the non-binding arbitration as provided for above or the Parties desired not to pursue the review by Chief Executives and non-binding arbitration, such Party shall have the right to cause such Capital Repairs to be completed, at its sole cost and expense, provided such Capital Repairs do not interfere with the other Party's use of the Joint Library or the Library Building or materially increases the cost of operating the Joint Library or maintaining the Library Building and the Library Land. Any such Capital Repairs shall then be performed in accordance with the terms of Section 6.4.
- 6.3.3 **Payment.** The City shall pay its share of agreed upon Capital Repairs as such repairs are being performed and upon receipt of an invoice from the University.
- 6.3.4 **Accounting.** The University shall keep an accounting of all the costs incurred for Capital Repairs. Within ninety (90) days following the completion of any Capital Repairs, the University shall deliver a statement to the City showing such accounting of the Capital Repairs.
- 6.3.5 **Review.** The University shall maintain at all times during the term of this Agreement, complete and accurate books of account and records prepared in accordance with generally accepted accounting principles with respect to the cost of Capital Repairs and shall retain such books and records, as well as contracts, bills, vouchers, and checks, and such other documents as are reasonably necessary to properly audit the cost of the Capital Repairs for a period of one year following the completion of each Capital Repairs. Upon reasonable notice from the City, the University shall make available for the City's inspection at the University's offices, during normal business hours, the University's books and records relating to the cost of such Capital Repairs as were performed within the prior twelve month period. If an audit, review or inspection by the City alleges an overbilling, the

City may submit a claim for the overbilled amount to the University, detailing the nature of the overbilling, and the University shall have thirty (30) days to pay such amount or contest the claim by giving notice thereof to the City, detailing the nature of the University's contest of the City's claims.

#### 6.4 **Alteration of Space.**

- 6.4.1 **Alterations of University Allocated Space/City Allocated Space.** Pursuant to the terms set forth in this Section, the University or the City, at its sole cost and expense, shall have the right to cause Alterations to be constructed or performed in or to any portion of the University Allocated Space or the City Allocated Space, as the case may be, with the consent of the other Party, such consent not to be unreasonably withheld. It shall be reasonable to withhold such consent if such proposed Alterations materially adversely impact the other Party's use of the Joint Library or the Library Building or materially increase the cost of operating the Joint Library or maintaining the Library Building and Library Land from the cost incurred by the Parties in operating the Joint Library or maintaining the Library Building and Library Land prior to such Alterations.
- 6.4.2 **Alterations within Shared Space.** Either the University or the City may propose Alterations to any Shared Space. In the event the non-proposing Party agrees with such proposed Alterations, the Parties shall cause such Alterations to be performed in accordance with the terms of this Section and shall share the cost of such Alterations in an agreed upon manner. In the event the non-proposing Party does not desire to have the Alterations performed but does not object to the proposing Party to having them performed, the Party proposing such Alterations shall have the right to have such Alterations performed in accordance with the terms of this Section, and such proposing Party shall be responsible for all the costs for such Alterations. In the event the non-proposing Party reasonably objects to having the Alterations performed, the Party proposing such Alterations shall not have the right to perform such Alterations.
- 6.4.3 **Standard for Alterations.** Any Alterations performed within the Library Building shall be comparable or better than the quality of the then current finishes and standards of construction within the Library Building.
- 6.4.4 **Procedure.** Any Alterations performed in the Library Building shall be coordinated and managed by the University. In the event the City has the right to perform Alterations with the Library Building, the City shall submit to the University plans and specifications for any proposed Alterations to the Library Building, and the University shall arrange to have such Alterations constructed in accordance with the plans and specifications submitted to the University, provided such plans and specifications comply with then current state rules and regulations that are



applicable to the University. The University covenants and agrees that all work done shall be performed in full compliance with all applicable state rules and regulations. The University covenants and agrees that it shall manage and coordinate the performance of all Alterations in an efficient and competent manner. In the event the University fails to manage and coordinate the City's proposed Alterations in an efficient and competent manner, and such failure continues for thirty (30) days after the delivery to the University of written notice of such default from the City (or, in the case of any such failure that cannot reasonably be cured within thirty (30) days, or within such additional period, if any, as may be reasonably required by the University to cure such failure, provided the University has promptly commenced such cure and thereafter continuously prosecutes such cure with all due diligence), then the City may (but is under no obligation to) manage and coordinate itself its proposed Alterations. All Alterations within the Library Building shall be owned jointly as tenants-in-common by the University and the City regardless of which Party originally paid for such Alterations. The University shall charge the City its then standard administrative fee (i.e., the fee charged to auxiliaries on the University campus) for reviewing and managing such Alterations, the cost of which the City is responsible.

6.5 **Americans with Disabilities Act.** The City and the University shall each be responsible for the Parties Cost Sharing Percentages of the cost of correcting any violations of the Americans with Disabilities Act in the Library Building; provided, however, the City shall be responsible for the entire cost of correcting any violations of the Americans with Disabilities Act with respect to any Alterations requested by the City and the University shall be responsible for the entire cost of correcting any violations of the Americans with Disabilities Act with respect to any Alterations requested by the University. Notwithstanding the foregoing, either Party shall have the right to contest any alleged violation in good faith, including, without limitation, the right to apply for and obtain a waiver of deferment of compliance, the right to assert any and all defenses allowed by law and the right to appeal any decisions, judgments or rulings to the fullest extent permitted by law.

6.6 **Security.**

6.6.1 **Library Security Services.** The University and the City shall from time to time mutually agree on a security plan to be implemented within the Library Building and shall include such staffing of such security plan within each Parties respective staffing plans created pursuant to the terms of Section 5.9 above.

6.6.2 **Police Jurisdiction.** The University Police Department shall be the police department that has primary jurisdiction for any police matter within the Library Building.

## 6.7 **Insurance/Indemnity.**

6.7.1 **Liability Insurance.** The University and the City shall each procure and maintain throughout the term of this Agreement, at the sole cost of each Party, comprehensive public liability and property damage insurance with minimum liability limits of \$25,000,000 per occurrence, aggregate bodily injury and property damage; or \$25,000,000 combined single limit. Such policy shall name the other Party as an additional insured, shall contain cross-liability endorsements, and shall provide that it is primary and noncontributing with any insurance in force or on behalf of the other Party. Each Party shall provide the other Party with a certificate of such insurance. The liability insurance policy shall be issued by a firm reasonably satisfactory to both Parties and shall contain endorsements requiring thirty (30) days notice to the other Parties prior to any cancellation or any reduction in amount of the coverage.

6.7.2 **Self-Insurance.** Each Party shall have the right to maintain a program of self-insure for the insurance it is obligated to maintain pursuant to Section 6.7.1 above. Any such self-insurance program shall be subject to the same requirements as the insurance required above and shall also be subject to the reasonable approval of the other Party. Each Party hereby approves the current self-insurance programs of the other Party.

### 6.7.3 **Indemnity.**

6.7.3.1 **University Indemnity.** The University hereby agrees to defend, indemnify, and hold harmless the City against any and all claims, costs, damages and liabilities (“Claims”) (i) of any kind arising from or caused by any act or omission of the University or any of the University's agents, contractors, or employees with respect to the Library Building or the Library Land, (ii) from the University's breach of any term of this Operating Agreement, or (iii) for bodily injury or property damage arising from or caused by the maintenance of the Library Building; provided, however, that the obligation to defend, indemnify and hold harmless set forth in this paragraph shall not apply to any Claims arising from or caused by the active negligence or willful misconduct of the City. The provisions of this Section shall survive the expiration or termination of this Operating Agreement with respect to any events occurring prior to such expiration or termination.

6.7.3.2 **City Indemnity.** The City hereby agrees to defend, indemnify, and hold harmless the University against any and all Claims of any kind (i) arising from or caused by any act or omission of the City or any of the City's agents, contractors, or employees with respect to the Library Building or the Library Land, or (ii)



from the City's breach of any term of this Operating Agreement; provided, however, that the obligation to defend, indemnify and hold harmless set forth in this paragraph shall not apply to any Claims arising from or caused by active negligence or willful misconduct of the University. The provisions of this Section shall survive the expiration or termination of this Operating Agreement with respect to any events occurring prior to such expiration or termination.

- 6.7.4 **Property Insurance.** The University shall procure and maintain throughout the term of this Operating Agreement, insurance providing protection against any peril included within the classification “All Risk” inclusive of standard fire and extended coverage insurance for the Library Building and all improvements therein together with all Personal Property jointly owned by the Parties, including endorsements against vandalism, malicious mischief and other perils, and, if the Parties mutually determine in good faith from time to time that the cost is commercially reasonable, an endorsement against earthquake and flood damage, all in amounts not less than one hundred percent (100%) of their full replacement cost. The Property Insurance Policy shall contain (i) an “extended coverage” endorsement, (ii) a “building laws” and/or “law and ordinance” coverage endorsement (which endorsement may, notwithstanding the foregoing provisions of this Section, contain a commercially reasonable sublimit) that covers “costs of demolition,” “increased costs of construction” due to changes in building codes and “contingent liability” with respect to undamaged portions of the Library Building. The Parties shall pay the Parties Cost Sharing Percentages of the cost of such Property Insurance Policy; and the City shall reimburse the University for its share of such premium on an annual basis, within thirty (30) days following receipt of an invoice from the University. In the event of a claim under such policy, the Parties shall pay the Parties Cost Sharing Percentages of the cost of the deductible.
- 6.7.5 **Intent of Parties Regarding Insurance.** Notwithstanding any other provision of this Operating Agreement to the contrary, because the Parties are required to maintain insurance on the Library Building and because of the existence of the mutual waivers of subrogation set forth below, both Parties hereby agree to share the cost of any damage to the Library Building in accordance with the Parties Cost Sharing Percentages even if resulting from the negligent acts, omissions, or willful misconduct of one but not both of the Parties or those of its agents, contractors, servants, employees or licensees.
- 6.7.6 **Waiver of Subrogation.** Notwithstanding anything in this Operating Agreement to the contrary, The University and the City each waives its entire right of recovery, claims, actions, or causes of action against the other for loss or damage to the Library Building, or any personal property

of such party therein that is caused by or incident to the perils covered by the Property Insurance specified above and in force at the time of damage or loss.

6.7.7 **Consequential Damages.** The University or any trustee, officer, agent or employee of the University shall not be liable for consequential damages arising out of any loss of the use of the Library Building of any equipment or facilities therein by the City or any person claiming through or under the City. The City or any official, officer, agent or employee of the City shall not be liable for consequential damages arising out of any loss of the use of the Library Building of any equipment or facilities therein by the University or any person claiming through or under the University.

6.7.8 **Vendors.** In the event any third party vendors are engaged by either Party to provide services of any type to either or both Parties in connection with the Joint Library, the Party engaging such vendor will use its reasonable efforts to attempt to ensure that such vendor has adequate liability insurance covering the performance of its services in the Joint Library.

## 6.8 **Damage and Destruction.**

6.8.1 **Repair of Damage to Library Building.** If the Library Building or any portion thereof shall be damaged by fire or other casualty, the Parties shall promptly and diligently, subject to reasonable delays for insurance adjustment or other matters beyond the Parties reasonable control, and subject to all other terms of this Section 6.8, restore the Library Building on the Library Land to substantially the same condition of the Library Building prior to the casualty, except for modifications required by applicable zoning and building codes and other laws, to which the Library Building might be subject.

6.8.2 **Uninsured Risks.** If the Library Building is damaged as a result of any casualty not covered by the Casualty Insurance Policy required to be maintained pursuant to Section 6.7.1 above, and if the cost to the Parties of repair would exceed twenty percent (20%) of the replacement cost of the Library Building, the Parties shall meet and confer and shall mutually agree within ninety (90) days following the date of such damage whether or not to repair, reconstruct or restore the Library Building and if so the responsibility of each Party to fund the cost of repairing, reconstructing or restoring the Library Building. If the Parties determine to repair, restore or reconstruct the Library Building, this Operating Agreement shall continue in full force and effect and the Parties shall commence repair, reconstruction or restoration of the Library Building and prosecute the same diligently to completion. In the event the cost to the Parties of repair, reconstruction and restoration of the Library Building exceeds twenty percent (20%) of the replacement cost of the Library Building, and one Party desires to pay for the entire cost to repair, reconstruct and

restore the Library Building so that this Operating Agreement shall not terminate, such Party shall have the right to pay for such repair, restoration and reconstruction of the Library Building in excess of twenty percent (20%) of the replacement cost of the Library Building so damaged, in which event this Operating Agreement shall continue in full force and effect. If the cost to the Parties of repair would not exceed twenty percent (20%) of the replacement cost of the Library Building, the Parties shall be obligated to repair such damage as soon as reasonably possible and the Parties shall each be obligated to pay the Parties Cost Sharing Percentages of the cost of repair of the Library Building. If the Library Building is damaged as a result of any casualty not covered by the Casualty Insurance Policy required to be maintained pursuant to Section 6.7.1 above, and if the cost to the Parties of repair, reconstruction and restoration would exceed twenty percent (20%) of the replacement cost of the Library Building, and the Parties elect not to repair, reconstruct or restore the Library Building, this Operating Agreement shall terminate and the Parties shall be released thereby without further obligations to the other Party with respect to this Agreement and the Library Building, the Library Land and the Joint Library. Each Party shall be responsible for promptly removing its separately owned Personal Property from the Library Building. The Parties shall each pay the Parties Cost Sharing Percentages of the cost of demolishing the Library Building and such demolition shall occur as soon as practically possible. All jointly owned Personal Property shall be sold to one or the other Party or a third party with the proceeds shared in the ratio of 59% for the University and 41% for the City for Personal Property purchased as part of the initial development of the Library Building and in the ratio of the Parties' contribution for subsequently purchased Personal Property.

## 6.9 **Eminent Domain.**

- 6.9.1 **Definitions.** The following terms shall have the indicated definitions as used herein: (a) "Condemnation" or "Taking" means (i) a permanent or temporary taking pursuant to the exercise by a Condemnor of the power of condemnation or eminent domain, whether by legal proceedings or otherwise, and/or (ii) a voluntary sale or transfer by the Parties to any Condemnor, either under threat of eminent domain or while legal proceedings for eminent domain are pending; (b) "Date of Taking" means the date the Condemnor has the right to possession of the property being condemned; (c) "Award" means all compensation, sums, or anything of value awarded, paid, or received on a total or partial Condemnation; and (d) "Condemnor" means any public or quasi-public authority, or private corporation or individual, having the power of condemnation or eminent domain over the Library Building or Library Land.

## 6.9.2 **Permanent Taking.**

6.9.2.1 **Total Taking.** If the Library Building and/or the Library Land are totally taken by Condemnation, this Agreement shall terminate on the Date of Taking. The University shall be entitled to receive 59% of the Award in connection with any such Taking and the City shall be entitled to receive 41% of the Award in connection with any such Taking.

6.9.2.2 **Partial Taking.** If any portion of the Library Building or the Library Land is taken by Condemnation, the Parties shall mutually agree whether or not the Joint Library can continue to function as the main library for the City and the principal library for the University. If the Parties agree that the Joint Library can still function as the main library for the City and the principal library for the University, this Agreement shall remain in effect, and the Parties using the Award paid to the Parties by the Condemnor shall accomplish all necessary restoration so that the balance of the Library Building is returned as near as practical to its condition immediately prior to the Date of Taking. If the Parties agree that the Joint Library can no longer function as the main library for the City and the principal library for the University, then this Agreement shall terminate and the terms governing termination set forth in Section 6.8.2 shall apply.

6.9.3 **Temporary Taking.** No temporary taking of the Library Building or the Library Land shall terminate this Agreement. The University shall be entitled to receive 59% of any Award made in connection with a temporary taking and the City shall be entitled to receive 41% of any Award made in connection with a temporary taking.

## 7. **ANCILLARY LIBRARY FUNCTIONS**

### 7.1 **Retail.**

7.1.1 **Library Bookstore.** The Library Building has been designed to accommodate a bookstore on the ground floor adjacent to the entrance to the Library Building facing the University, as more particularly designated as the "Library Bookstore" on the ground floor plan attached hereto as Exhibit A. The Parties intend to initially allow the Friends of the Library and the University Library's Donations and Sales Unit to operate the Library Bookstore pursuant to a license or use agreement. The terms of any such license or use agreement for the Library Bookstore shall be mutually agreed to by the Parties. Each Party shall reserve the right to select another similar or successor organization or group to operate the Library Bookstore. The person or entities operating within the Library

Bookstore shall be responsible for operating in compliance with all applicable laws, rules and regulations. The Parties shall be responsible for ensuring that the sales methods employed in the Library Bookstore as well as all other elements of merchandising, display and advertising, will be dignified and in conformity with the standards of practice prevailing among other first class stores in the downtown San José area. In the event the Parties cease operating the Library Bookstore as a bookstore, the use of the space allocated to the Library Bookstore shall be determined by mutual agreement of the Parties.

7.1.2 **Library Retail Space.** The Library Building has been designed to have a general retail component on the ground floor of approximately 1,500 square feet (“Library Retail Space”), as more particularly designated as the “Library Retail Space” on the ground floor plan attached hereto as Exhibit A. The selection of the operator and the terms of any such lease shall be mutually agreed to by the Parties. The Parties shall ensure that any lease entered into for the Library Retail Space shall obligate the tenant to be responsible for ensuring that the sales methods employed in the Library Retail Space as well as all other elements of merchandising, display and advertising, will be dignified and in conformity with the standards of practice prevailing among other first class stores in the downtown San José area. All revenue paid by the operator of the store in the Library Retail Space shall be deposited into the Library Trust Account.

7.2 **Advertising/Promotions.** Except for routine announcements regarding programs and services, no form of publicity, advertising, or promotion concerning the Joint Library shall be issued by any Party without the prior written consent of the other Party, except as such release or announcement may be required by law, in which case the Party required to make the release or announcement shall to the extent possible, allow the other Party reasonable time to comment on such release or announcement in advance of such issuance.

7.3 **Library Name/Image.**

7.3.1 **Jointly Owned.** The name of the Joint Library and the Library Building and any ancillary names thereto together with the image of the Library Building and any logos created for the Joint Library shall be jointly owned by the University and the City.

7.3.2 **Consent Required.** Neither Party shall use the name of the Joint Library and Library Building or any other name associated with the Joint Library or the image or logo of the Joint Library and Library Building in any manner without the prior consent of the other Party, except, however, both Parties shall have the right to use the name of the Joint Library and Library Building or any other name associated with the Joint Library or the image or logo of the Joint Library and Library Building in the ordinary course of business without obtaining such consent each time (for example,

sending letters on letterhead with such name, but not producing articles of clothing with such name).

7.3.3 **Net Funds.** All “Net Funds” earned through the use of the name of the Joint Library and Library Building or any other name associated with the Joint Library or the image or logo of the Joint Library and Library Building shall be deposited into the Library Trust Account. For purposes of this Section, “Net Funds” shall mean all revenue actually received by such Party as a result of the use of the name of the Joint Library and Library Building and/or any other name associated with the Joint Library or the image or logo of the Joint Library and Library Building minus all actual and direct expenses incurred to generate such revenue, except for any charge or allocation of cost for use of the Library Building.

7.4 **Use of Library Building for Non-Library Functions.**

7.4.1 **Parties' Use.** Both Parties shall have the right to use the public spaces within the Library Building for non-library events directly associated with such Party; provided, however, each such event must follow the rules set forth in this Section regarding such events and neither Party shall have the right to waive these rules regarding its use under any circumstances.

7.4.2 **Third Party Use.** The Parties shall mutually agree as to whether or not public spaces within the Library Building shall be made available to third parties for use for events unrelated to the Joint Library. If the Parties determine that the Library Building may be used for events sponsored by third parties, the Parties shall follow the rules regarding events set forth in this Section.

7.4.3 **Schedule.** The Co-Managers shall designate one employee of either Party to schedule all non-library events within the Library Building. All non-library related events held within the Library Building shall be held during hours and in such a manner so as not to interfere with the operations of the Joint Library.

7.4.4 **Costs.** Each non-Party user of the Library Building for non-library events shall pay a use fee for the space within the Library Building, which use fee shall be determined based on a schedule of fees set forth by the Co-Managers on an annual basis. Each user of the Library Building for non-library events, whether or not such user is also a Party, shall also be responsible for all other costs incurred by the Parties in connection with using the Library Building (i.e., security, utilities, clean-up).

7.4.5 **Rules and Regulations.** The Co-Managers shall have the right to promulgate any such rules and regulations as the Co-Managers may from time to time mutually agree with respect to non-library events within the Library Building.



7.4.6 **Revenue.** All revenue generated by such use for non-library events shall be deposited into the Library Trust Account.

7.5 **Use of Technology.**

7.5.1 **Jointly Owned.** All technology developed and funded jointly by the Parties for use in the Joint Library shall be jointly owned by the University and the City.

7.5.2 **Consent Required.** Neither Party shall use any such technology outside the Library Building in any manner without the prior consent of the other party, except, both Parties shall have the right to use such technology for the City's branches and the other California State University campuses without the prior consent of the other Party.

7.5.3 **Net Funds.** All "Net Funds" earned through the use of such technology shall be deposited into the Library Trust Account. For purposes of this Section, "Net Funds" shall mean all revenue actually received by such Party as a result of the use of the technology minus all actual and direct expenses incurred to generate such revenue, except for any charge or allocation of cost for use of the Library Building.

8. **DEFAULTS**

8.1 **Monetary Default.** The failure by a Party to make any payment required hereunder within twenty (20) days following written notice from the other Party that the same is past due shall constitute a material monetary default and breach of this Agreement ("Monetary Default"); provided, however, that if the defaulting Party has notified the non-defaulting Party within fifteen (15) days after receipt of the default notice from the non-defaulting Party that the defaulting Party disputes such alleged Monetary Default, the defaulting Party shall not be obligated to make such payment to the non-defaulting Party unless and until it was finally determined using the dispute resolution methods set forth in Sections 4.3.1-4.3.4 that such failure alleged by the non-defaulting Party was in fact an obligation of the defaulting Party under the terms of this Operating Agreement. Any monetary obligation of one Party to another Party that constitutes a Monetary Default shall accrue interest at the Interest Rate from the date such amount was initially owed by one Party to the other Party, whether or not, the non-defaulting Party paid such amount on behalf of the defaulting Party.

8.2 **Non-Monetary Default.** Failure by a Party to observe or perform any of the covenants, conditions, or provisions of this Agreement, other than the making of any payment ("Non-Monetary Default"), where such failure shall continue for a period of thirty (30) days after written notice from the other Party; provided, that if the nature of such obligation is such that more than thirty (30) days is required for performance, such Party shall not be in default if such Party commences performance within thirty (30) days of written notice and thereafter diligently

completes performance within a period of not less than ninety (90) days, and further provided, that if the defaulting Party has notified the non-defaulting Party within fifteen (15) days after receipt of the default notice from the non-defaulting Party that the defaulting Party disputes such alleged Non-Monetary Default, the defaulting Party shall not be obligated to make such payment to the non-defaulting Party unless and until it was finally determined using the dispute resolution methods set forth in Sections 4.3.1-4.3.4 that such failure alleged by the non-defaulting Party was in fact an obligation of the defaulting Party under the terms of this Operating Agreement.

## 9. **REMEDIES**

- 9.1 **Monetary Default.** If either Party is in a Monetary Default as finally determined pursuant to the terms of Sections 8.1 above, the non-defaulting Party shall have the right, but not the obligation, to require that a portion of the defaulting Party's Allocated Space, Shared Space and Common Space be redesignated as the non-defaulting Party's Allocated Space in the ratio of 10,000 gross square feet for every \$950,000 ("Minimum Default Amount #1") that remains unpaid by the defaulting Party, including all accrued interest thereon.

Notwithstanding the foregoing, the non-defaulting Party shall have the right, but not the obligation, to advance any such amount owed by the defaulting Party. If the non-defaulting Party has elected to advance any amount owed by the defaulting Party, the non-defaulting Party shall have the right, but not the obligation, to require that a portion of the defaulting Party's Allocated Space, Shared Space and Common Space be redesignated as the non-defaulting Party's Allocated Space in the ratio of 10,000 gross square feet for every \$625,000 ("Minimum Default Amount #2") that remains unpaid, including all accrued interest thereon.

The non-defaulting Party shall only have the right to redesignate space of the defaulting in increments of 10,000 gross square feet. The square footage reallocated pursuant to either ratio above shall first be taken from the Party's Allocated Space, then from the portion of Shared Space allocated to the defaulting Party and finally from the portion of Common Space allocated to the defaulting Party. The defaulting Party shall have the right to reasonably designate such space that is to be reallocated to the non-defaulting Party; provided, however, such space that is to be redesignated must either be contiguous to other space used by the non-defaulting Party or if not contiguous then at least reasonably usable by the non-defaulting Party.

The non-defaulting Party shall have the right to elect to require that the defaulting Party's Allocated Space, Shared Space and Common Space be redesignated as the non-defaulting Party's Allocated Space in accordance with either applicable ratio at any time that the defaulting Party has any Monetary Default outstanding.



The Minimum Default Amount #1 and the Minimum Default Amount #2 shall be adjusted on each anniversary of the date the Library Building first opens to the general public (the "Adjustment Date"). Such adjustment shall be based upon the percentage increase of the Consumer Price Index For All Urban Consumers, San Francisco-Oakland-San Jose, All Items (1982-1984=100) as published by the U.S. Bureau of Labor Statistics (the "Index"), over the respective year. The Index published most immediately following the date that is one year following the date the Library Building first opens to the general public (the "Beginning Index") and the Index published most immediately preceding the Adjustment Date in question (the "Adjustment Index") are to be used in determining the amount of the respective adjustment. The Minimum Default Amount #1 and the Minimum Default Amount #2 shall be determined by multiplying the original Minimum Default Amount #1 or the original Minimum Default Amount #2, as the case may be, by a fraction, the numerator of which is the Adjustment Index and the denominator of which is the Beginning Index. If the 1982-1984 base of the Index is changed, the new base shall be converted to the 1982-1984 base in accordance with the U.S. Department of Labor's conversion factor, and the base as so converted shall be used. If the U.S. Department of Labor ceases to publish the Index, then the successor index designated by the U.S. Department of Labor or, if no successor index is so designated, the most nearly comparable index shall be used.

In the event that a non-defaulting Party elects to require that the defaulting Party's Allocated Space be redesignated and such redesignation under either of the two ratios set forth above has the effect of redesignating all of University Total Square Footage or the City Square Footage, as the case may be, this Operating Agreement shall terminate in accordance with the terms of Section 11.1.2.3 below. At any time prior to termination of this Operating Agreement, the defaulting Party shall retain the right to repay all outstanding Monetary Defaults it owes to the non-defaulting Party plus all accrued interest thereon and upon such full repayment, all redesignated space shall be designated back to the defaulting Party as it was prior to such redesignation. The remedies specified herein regarding Monetary Defaults are intended by the Parties to be the exclusive remedies under the terms of this Operating Agreement for Monetary Defaults.

- 9.2 **Non-Monetary Defaults.** No remedy or election given by any provision in this Lease for Non-Monetary Defaults shall be deemed exclusive unless so indicated, but each shall, whenever possible be cumulative in addition to all other remedies at law or in equity that either Party may have arising out of a Non-Monetary Default of the other Party. The Parties hereby agree that neither Party may terminate this Agreement, except as provided in Section 9.1 above and Section 11 below.

## 10. **RESTRICTIONS ON OWNERSHIP**

- 10.1 **Restriction on Transfer.** Except for licenses or use agreements for entities using portions of a Party's Allocated Space for a specific purpose directly related to the

provision of Library services and to the extent provided in Section 7 above, neither Party shall have the right to sell, lease or otherwise transfer, voluntarily or by operation of law, all or any portion of its interest in the Library Building or the Library Land to any third party. In the event that either Party shall at any time transfer or attempt to transfer its interest in the Library Building or the Library Land in violation of the provisions of this Operating Agreement, then the other Party shall, in addition to all rights and remedies at law or in equity, be entitled to a decree or order restraining and enjoining such transfer and the offending Party shall not plead in defense thereto that there would be an adequate remedy at law; it being hereby expressly acknowledged and agreed that damages at law will be an inadequate remedy for a breach or threatened breach of the violation of the provisions concerning transfer set forth in this Operating Agreement.

- 10.2 **Restriction on Use.** The Parties shall use the Library Building only as their respective libraries with substantially the same level of service and materials as used for each Party's main or principal library. In the event that either Party shall at any time attempt to use the Library Building in violation of the provisions of this Operating Agreement, then the other Party shall, in addition to all rights and remedies at law or in equity, be entitled to a decree or order restraining and enjoining such use and the offending Party shall not plead in defense thereto that there would be an adequate remedy at law; it being hereby expressly acknowledged and agreed that damages at law will be an inadequate remedy for a breach or threatened breach of the violation of the provisions concerning use set forth in this Operating Agreement.
- 10.3 **Restriction on Management.** Neither Party can engage or hire the services of a third party to manage its portion of the Joint Library or otherwise delegate or assign the responsibility to manage its portion of the Joint Library, without the written consent of other Party, such consent to be withheld in the sole discretion of the Party to whose consent is being sought. In the event that either Party shall at any time attempt to delegate the management of its portion of the Joint Library in violation of the provisions of this Operating Agreement, then the other Party shall, in addition to all rights and remedies at law or in equity, be entitled to a decree or order restraining and enjoining such action and the offending Party shall not plead in defense thereto that there would be an adequate remedy at law; it being hereby expressly acknowledged and agreed that damages at law will be an inadequate remedy for a breach or threatened breach of the violation of the provisions concerning management set forth in this Operating Agreement.
- 10.4 **Restriction on Mortgage, Pledge, Encumbrance.** No Party shall pledge or otherwise encumber its interest in the Library Building or the Library Land or permit any lien to attach to the Library Building or the Library Land or the interest of such Party therein. If any lien shall at any time attach to the Library Building or the Library Land, the Party responsible therefor shall cause the same to be discharged of record by payment, deposit, bond, order of a court of competent jurisdiction or otherwise within thirty (30) days after notice of the filing of such lien. If such Party fails to cause such lien to be discharged within

that thirty (30) days, then the other Party shall have the right, but shall not be obligated, to discharge the same either by paying the amount claimed to be due or by procuring the discharge of such lien by deposit or by bonding proceedings or otherwise. Any amount so paid by such other Party and all costs and expenses incurred by such other Party in connection therewith (together with interest at the Interest Rate from the respective dates of the making of the payment and/or the incurring of the cost and expense) shall be paid to such other Party by the Party suffering such lien to attach, such payment to be made within fifteen (15) days after written demand for such payment.

- 10.5 **Partition.** Each Party, for the mutual benefit and protection of both Parties, hereby specifically waives and releases any and all right to bring, at any time, any action for partition of the Library Building or the Library Land or any part thereof, and further waives the right to bring any action, the effect of which would cloud title to the Library Building or the Library Land or any interest therein, and specifically waives its right in connection with any action to file a notice of lis pendens against the Library Building or the Library Land or any interest therein.

## 11. **TERMINATION OF OPERATING AGREEMENT**

- 11.1 **Termination.** In recognition of the substantial capital investment being made by each of the Parties in the Library Building, it is the expectation and intent of the Parties that this Operating Agreement shall remain in effect on a long-term basis. The circumstance under which this Operating Agreement may terminate, either in part or in its entirety, are described below.

### 11.1.1 **Termination of Operation of Joint Library.**

- 11.1.1.1 **Withdrawal Right.** Each Party shall have the right to withdraw from the operation of the Joint Library (“Withdrawal Right”) at any time upon the determination that maintaining and operating such Party’s main library on a joint basis with the other Party is no longer in the best interests of such Party’s constituents. The Party proposing to withdraw from the operation of the Joint Library is referred to herein as the “Withdrawing Party,” and the other Party is referred to herein as the “Non-Withdrawing Party.”

### 11.1.1.2 **Exercise of Withdrawal Right.**

- 11.1.1.2.1 **Preliminary Notice.** Prior to any exercise of its Withdrawal Right, the Withdrawing Party must notify the Non-Withdrawing Party that the Withdrawing Party is considering the exercise of its Withdrawal Right (the “Preliminary Notice”). The Preliminary Notice shall set forth in detail the specific reasons for the Withdrawing Party’s

consideration of the exercise of its Withdrawal Right. Thereafter, the Parties shall meet and confer in good faith at least four times, not less than once every three months over a twelve-month period, in an effort to resolve the concerns of the Withdrawing Party.

11.1.1.2.2 **Withdrawal Resolution.** If the meet and confer process specified in Section 11.1.1.2.1 fails to resolve the concerns of the Withdrawing Party to its reasonable satisfaction, the Withdrawing Party may within six months thereafter exercise its Withdrawal Right. The Withdrawal Right may only be exercised by the governing body of the Withdrawing Party upon adoption of resolution setting forth such body's findings that the operation of the Withdrawing Party's main library on a joint basis with the Non-Withdrawing Party is no longer in the best interests of the Withdrawing Party's constituents (the "Withdrawal Resolution"). A Withdrawal Resolution shall be adopted by the governing body of the Withdrawing Party in accordance with its governing rules and procedures, which may include the requirement for a public hearing. The findings set forth in the Withdrawal Resolution must be supported by substantial evidence presented to such governing body in the course of its consideration of the Withdrawal Resolution. Within ten days following the final adoption of a Withdrawal Resolution, the Withdrawing Party shall deliver a certified copy thereof to the Non-Withdrawing Party.

11.1.1.3 **Withdrawal Process.** Once the Withdrawing Party exercises its Withdrawal Right in accordance with Section 11.1.1.2, the Parties shall undertake and accomplish the allocation of space within the Library Building and the reconfiguration of the Library Building that is required for the separate operation of each Party's main library, in good faith and in as efficient and cost effective manner as possible under the circumstances.

11.1.1.3.1 **Separate Library Operations.** The consequence of either Party's exercise of its Withdrawal Right shall be that, to the maximum extent feasible, each Party will maintain its own library operation within the Library Building, separate from the other Party's library operation. The foregoing shall

require, among other things, that (i) the Library Building be reconfigured to provide each Party with separate and distinct space within the Library Building for the operation of its main library, (ii) each Party shall maintain separate library operations, including computer and other systems, (iii) the collections and library resources of each Party shall be segregated and not commingled, (iv) each Party shall maintain a separate library staff with independent circulation, reference and other staff functions, and (v) each Party may establish its own policies regarding hours of library operation and access to and circulation of library materials. The Library Building structure, entrances, common areas and building systems shall continue to be maintained jointly in accordance with the terms of Section 6.1, 6.2 and 6.3 above.

11.1.1.3.2 **Allocation of Space.** Space within the Library Building shall be allocated to each Party on the basis of the University Percentage of Total Library Square Footage and the City Percentage of Total Library Square Footage. All jointly owned Personal Property shall be similarly allocated. It is the expectation and intent of the Parties that the allocation of space within the Library Building to each Party shall result in relative equivalencies with respect to access and accessibility, contiguity of space and functions, and the mutual recognition of the legitimate requirements of each Party's constituencies. Such space allocation shall also take into account all building code, fire safety and other legal requirements, including, without limitation, ingress and egress requirements and requirements regarding internal circulation and accessibility.

11.1.1.3.3 **Common Space.** The Parties shall establish reasonable rules and procedures for the shared use and operation of Common Space within the Library Building.

11.1.1.4 **Withdrawal Costs.** The Withdrawing Party shall pay all costs and expenses relating to or arising in connection with the separation of the Joint Library operation into separate operations, including, without limitation, the following:

- i. the costs of all space utilization and allocation studies required for the reallocation of space in the Library Building;
- ii. the costs of architectural and engineering services required for the reconfiguration of the Library Building;
- iii. all hard and soft costs for the work of reconfiguring the Library Building, including any required reconfiguration or alteration of any building systems, ducts, vents, pipes, conduit, wiring or other elements thereof, as well as any rehabilitation or refinishing of interior improvements, floors, walls, ceilings, lighting, floor and wall coverings, signage, service desks, reception areas cabinets, casework and shelving;
- iv. all costs of temporary space required to facilitate such reconfiguration of the Library Building; and
- v. all costs of moving, relocating, and reinstalling books and other Library Materials, furniture, fixtures, equipment, shelving, computer systems and other movable items.

The Withdrawing Party shall be responsible for undertaking and accomplishing any and all work required to achieve the separation of the Joint Library operations into separate operations, including any construction and renovation work required with respect to the Library Building. Prior to commencing such work, the Withdrawing Party shall post a bond for the benefit of the Non-Withdrawing Party, or shall provide other security reasonably acceptable to the Non-Withdrawing Party, in the amount of 125% of the estimated cost of all such work. Such work shall be undertaken and performed in accordance with plans and specifications and a project schedule approved by the Non-Withdrawing Party. The Withdrawing Party shall indemnify, defend and hold the Non-Withdrawing Party harmless from and against any loss, cost, liability, damage and expense (including, without limitation, reasonable attorneys' fees and costs) suffered or incurred by the Non-Withdrawing Party arising in whole or in part from the Withdrawing Party's exercise of its Withdrawal Right or the work required to be undertaken to separate the Joint Library operation into separate operation.

11.1.2 **Termination of Operating Agreement.** The operation of the Joint Library pursuant to this Operating Agreement shall cease and this Operating Agreement shall terminate upon a mutual determination by the Parties that the Library Building is obsolete and that neither party is

willing to continue to use the Library Building as the location of its main library facility.

11.1.2.1 **Determination of Obsolescence.** Either Party may at any time call for a meeting with the other Party to discuss the condition of the Library Building and whether or not the Library Building has become obsolete. The Parties shall discuss such matters in good faith, but each Party shall retain the right to make its determination of obsolescence in its sole and absolute judgment. In the event the Parties mutually determine that the Library Building is obsolete, the University shall then determine whether the Library Building is to be demolished or retained for such future use as the University may require. If the Library Building is to be demolished, such demolition shall include all above and below grade improvements, including footings and foundations, and the Library Land shall be back-filled to grade level with clean fill and covered with new sod. The Parties shall share all costs of demolishing the Library Building and restoring the Library Land to grade level in accordance with the Parties Cost Sharing Percentages. If the Library Building is not to be demolished, the City shall have no responsibility for the cost of any renovations to the Library Building that may be required by the University to utilize the Library Building after the termination of this Operating Agreement.

11.1.2.2 **Determination of Non-Obsolescence.** In the event one Party determines that the Library Building is not obsolete and the other Party determines that the Library Building is obsolete, the Party determining that the Library Building is not obsolete shall have the right to continue to occupy and use the Library Building for its library so long as such Party actually occupies and uses the Library Building in good faith with the same level of materials, services and programs as it had when the Parties used the Library Building for the Joint Library. All other terms and conditions of this Operating Agreement shall continue to apply to both Parties until such time as both Parties no longer use the Library Building for their respective libraries.

11.1.2.3 **Termination.** In the event the Parties mutually determine that the Library Building is obsolete, such determination must be set forth in a written agreement signed by both Parties (the "Termination Agreement"). Such Termination Agreement shall specify the University's decision whether to demolish the Library Building or retain it. The City shall vacate the Library Building and remove therefrom all property of the City that is



located therein promptly following the execution of the Termination Agreement.

- 11.2 **Quitclaim.** Upon the termination of this Operating Agreement, the City shall execute and cause to be recorded a Quitclaim Deed of all the City's right, title and interest in the Library Building and the Library Land in a form reasonably satisfactory to the University.

## 12. MISCELLANEOUS

- 12.1 **Notices.** Except as otherwise expressly provided herein, any notice, consent, authorization or other communication to be given hereunder shall be in writing and shall be deemed duly given and received when delivered personally, when transmitted by facsimile, one business day after being deposited for next-day delivery with a nationally recognized overnight delivery service, or three business days after being mailed by first class mail, charges and postage prepaid, properly addressed to the Party to receive such notice at the last address furnished for such purpose by the Party to whom notice is directed.
- 12.2 **Severability.** If any provision of this Operating Agreement, or the application of such provision to any Party or circumstance, shall be held by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Operating Agreement, or the application of such provision to such Party or circumstances other than those to which it is held to be invalid or unenforceable, shall not be affected thereby.
- 12.3 **Governing Law.** This Operating Agreement shall be governed by and construed and interpreted in accordance with the laws of the State of California, without regard to that state's conflict of laws principles.
- 12.4 **Entire Agreement.** This Operating Agreement and the Development Agreement contain the entire agreement of the Parties and supersede all prior or contemporaneous written or oral negotiations, correspondence, understandings and agreements between or among the Parties, regarding the subject matter hereof.
- 12.5 **Headings; Gender; Number; References.** The headings of the sections hereof are solely for convenience of reference and are not part of this Operating Agreement. As used herein, each gender includes each other gender, the singular includes the plural and vice versa, as the context may require. All references to sections are intended to refer to sections of this Operating Agreement, except as otherwise indicated.
- 12.6 **Parties in Interest.** Nothing in this Operating Agreement shall confer any rights or remedies under or by reason of this Operating Agreement on any party other than the University and the City nor shall anything in this Operating Agreement relieve or discharge the obligation or liability of any third party to any Party, nor



shall any provision give any third party any right of subrogation or action over or against any Party to this Operating Agreement.

- 12.7 **Amendments.** All amendments to this Operating Agreement must be in writing and signed or otherwise adopted or approved in writing by the University and the City.
- 12.8 **Waiver.** Failure of either Party to complain of any action, non-action or default of the other Party shall not constitute a waiver of such Party's rights hereunder with respect of such action, non-action or default. Waiver by the University or the City of any right or any default hereunder shall not constitute a waiver of any subsequent default of the same obligation or for any other default, past, present or future. No payment by a Party, or acceptance by the other Party, of a lesser amount than shall be due from one Party to the other shall be treated otherwise than as a payment on account. The acceptance by a Party of a check for a lesser amount, with an endorsement or statement thereon, or upon any letter accompanying such check, that such lesser amount is payment in full, shall be given no effect, and a Party may accept such check without prejudice to any rights or remedies which it may have against the other Party.
- 12.9 **Recordation.** The Parties hereto shall cause this Operating Agreement to be recorded in the Official Records of the County of Santa Clara.
- 12.10 **Construction.** This Operating Agreement has been negotiated by the Parties and their respective legal counsel and will be fairly interpreted in accordance with its terms and without any strict construction in favor of or against any Party.
- 12.11 **Appropriations.** The payment obligations of the Parties described in this Agreement are subject to annual appropriation of funds for said payments, however, in the event of non-payment, the failure to make said appropriations shall not affect in any manner the operation of the provisions of Section 8 DEFAULTS and Section 9 REMEDIES which specify the Partners' remedies for failure to make required payments.

WITNESS THE EXECUTION HEREOF on this 17<sup>th</sup> day of December, 1998.

“University”

THE TRUSTEES OF THE CALIFORNIA  
STATE UNIVERSITY On Behalf Of  
SAN JOSÉ STATE UNIVERSITY

By: \_\_\_\_\_  
Robert L. Caret  
President, San José State University

“City”

APPROVED AS TO FORM:

CITY OF SAN JOSÉ

\_\_\_\_\_  
Assistant City Attorney

By: \_\_\_\_\_  
Regina V. K. Williams,  
City Manager

**Exhibit A**

Master Floor Plans  
[to be attached]

**Exhibit B**

CSU Definitions of  
Deferred Maintenance, Minor and Major Capital Repairs

[to be attached]

**Exhibit C**

Description of Library Land

[to be attached]

## **Exhibit D**

### **NORMAL DAILY SERVICES:**

#### All Areas:

Turn on lights. Change lights that are burned out, flickering, or hazardous. Tag lights which are broken and submit a work order request.

Empty trash receptacles, empty pencil sharpeners, and dispose of all trash.

Replace plastic trash receptacles liners, if soiled.

Sweep floor, removing debris from behind doors, in corners, and around furniture.

Vacuum carpets, removing debris from behind doors, in corners and around furniture.

Spot mop floors, removing spills.

Thoroughly dust all cleared flat surfaces, desks and tables.

Remove graffiti from desks and tables, as time allows.

Do not clean or dust bookshelves or books.

#### Offices:

Clean desk tops and tables (if cleared), including telephones.

Do not clean computers or printers.

Do not clean natural or artificial plants.

Do not water natural plants.

#### Restrooms:

Complete a full scale cleaning of restrooms. Disinfect wash basins, urinals, commodes, trash receptacle dispensers and mop floors.

Damp wipe doors, walls and partitions. Clean mirrors and bright metal surfaces.

Service all dispensers including sanitary napkins/tampon vending machines.

Replenish paper and soap supplies.

Lobbies, Corridors, and Stairwells:

Dust handrails and metal railings.

Clean drinking fountains.

Remove all pamphlets, circulars, flyers, etc., from walls and glass surfaces, unless posted on bulletin boards.

Entry Ways and Breeze Ways:

Sweep building entrances.

Vacuum entry mats and exchange as required.

Clean entry glass doors and walls.

**OTHER THAN DAILY SERVICES (TWO OR THREE TIMES PER WEEK)**

All Areas:

Clean around light switches.

Sweep and vacuum floors, removing debris from behind doors, corners and around furniture.

Entry Ways and Breeze Ways:

Sweep exterior floors, stairs and landings under all over hangs, entryways, and roof-covered breezeways.

Lobbies, Corridors, and Stairways:

Sweep and spot mop interior stairs and landings.

Clean metal railings.

Clean display cases glass (outside only).

Elevators:

Vacuum all elevator tracks.

## **WEEKLY SERVICES:**

### All Areas:

- Damp mop all interior stairs and landings.
- Damp mop all hard surfaces floors and hallways.
- Spot wash walls and doors, as needed.
- Spot clean all carpets.
- Dust all surfaces (below 6 feet from the floor).
- Dust air grills and vents in hallways/classrooms.
- Clean wash basins and utility sinks.

### Offices:

- Clean windowsills
- Vacuum floors and/or mop floors.

### Lobbies, Corridors and Stairwells:

- Buff corridor floors using floor restorer with a high-speed or ultra hi-speed floor machine.
- Dust fire extinguishers.

### Entry Ways and Breeze Ways:

- Wash down floors, exterior stairs and landings.

## **MONTHLY SERVICES:**

### All Areas:

- Dust all surfaces above 6 feet and ceilings areas for cobwebs, etc.
- Wash trash receptacles.
- Clean air grills and vents and dust venetian blinds.



Restrooms:

Spray clean walls, stalls, fixtures, and scrub restroom floors.

Lobbies, Corridors and Stairwells:

Apply a coat of floor finish and buff hard surfaces (Lobbies and corridors).

Bonnet-Shampoo carpeted area.

Clean stairwell railings.

**Wash windows once every two years for the first ten years following substantial completion of the Library Building and thereafter by mutual agreement of the Parties.**

#### **ONGOING MAINTENANCE:**

Maintain in accordance with manufacturers specifications all equipment, including the heating, ventilating, and air conditioning systems and equipment, elevator equipment and system, utility and plumbing systems and equipment, fire sprinkler systems and equipment and any other mechanical, electronic, computer or other systems or equipment that serve the building systems within the Library Building and Library Land (as opposed to the Library operations (i.e., cataloging of Library Materials, on-line access, etc.)).