REPORT TO COUNCIL 3
City of Sacramento

915 I Street, Sacramento, CA 95814-2604
www. CityofSacramento.org

Consent Report
November 21, 2006

Honorable Mayor and
Members of the City Council

Continued from 11-21-06

Title: Agreement: Fulton Avenue Development Project (CB33) regarding Conditions Precedent to Lease of Land between the City and Mel Rapton, Inc.

Location/Council District: 3701 Fulton Avenue/Council District 2

Recommendation: Adopt a **Resolution** authorizing the City Manager to execute, in substantially the form attached, an Agreement Regarding Conditions Precedent to Lease of Land between the City and Mel Rapton, Inc. for the Fulton Avenue Development Project (CB33). The City Manager may make non-substantive changes to the Agreement with the approval of the City Attorney.

Contact: James R. Rinehart, Citywide Economic Development Manager, 808-5054

Presenters: N/A

Department: Economic Development

Division: Citywide

Organization No: 4453

Description/Analysis

Issue: The City of Sacramento owns the site proposed for the Fulton Avenue Development Project. Mel Rapton Honda, the proposed tenant for the site, has been negotiating with the City since 2004 and must provide evidence to Honda Corporate that negotiations are progressing. The attached Agreement Regarding Conditions Precedent to Lease of Land (CPA) will provide that evidence. It is a legal instrument, negotiated by the Economic Development Department and the City Attorney's Office with Mel Rapton's representatives, that memorializes the parties' progress in negotiating a lease and commits the parties to perform specified tasks. Among other things, the CPA requires the City to prepare an environmental impact report (EIR) of the Fulton Avenue Development Project, as required by CEQA. The EIR is scheduled to be presented to the City Council in January 2007. If City Council certifies the EIR, then a lease will be brought forward for consideration.

Environmental Considerations: In and of itself, the CPA does not have any environmental considerations.

Financial Considerations: The CPA imposes no financial responsibility on the City beyond that already authorized by the City Council.

Emerging Small Business Development (ESBD): N/A

Respectfully Submitted by: _____
James R. Rinehart
Citywide Development Manager

Recommendation Approved:

_____
Ray Kerridge
City Manager

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Attachment 1

BACKGROUND

The City had leased 21± acres of Del Paso Park to the Sacramento Trapshooting Club (STC) site since approximately 1915. On September 30, 2004, the STC lease expired, and the City notified the STC that its lease had converted to a month-to-month basis. By authorization of the Sacramento City Council, the STC was given a 60-day notification that their lease was terminated effective June 30, 2006. The STC has since vacated the premises.

In 2002, the City Council directed staff to examine potential alternatives for the "highest and best" uses for the site that would offer a compatible and productive use of the property. In 2004, Mel Rapton Honda, currently located on Fulton Avenue, submitted a written request that the City lease a portion of the site that was then leased to the STC. At the direction of City Council, an Exclusive Rights to Negotiate (ERN) was executed between the City and Rapton on June 1, 2004. The ERN has been renewed by City Council three times and expires on August 31, 2007.

Financing for this project (CB33) has been provided by a "pre-development funding" in the amount of $500,000 and by a "bridge loan" in the amount of $6.4 million, approved by City Council on May 23, 2006.

The Draft EIR for the Fulton Avenue Development project was released for public comment on October 6, 2006. Comments were due on November 20, 2006. The Draft EIR will be presented to the Planning Commission in December 2006 and will be presented to City Council for consideration in January 2007.

AGREEMENT REGARDING CONDITIONS PRECEDENT TO LEASE OF LAND

Effective Date: November ____, 2006

1. **Parties.** In this agreement, "the City" refers to the **City of Sacramento**, a California municipal corporation; "Rapton Inc." refers to **Mel Rapton, Inc.**, a California corporation; "Rapton LLC" refers to **Rapton Investment Group LLC**, a California limited-liability company; and "the Rapton Entities" refers to both Rapton Inc. and Rapton LLC.

2. **Background.** The City and the Rapton Entities enter into this agreement with the following facts in mind:

   (a) The City owns the real property located at 3701 Fulton Avenue in Sacramento, California, and comprising approximately 20.3 gross acres ("the Property"). The Property is more particularly described and depicted on **Exhibit A** to this agreement.

   (b) The Property is adjacent to the City's Haggin Oaks Golf Complex and for decades had been leased to the Sacramento Trap Shooting Club. The club's lease expired on September 30, 2004, and the club has vacated the Property. The City now desires to have the Property developed for use by one or more high-volume automobile dealerships.

   (c) The Sacramento Trap Shooting Club's activities over the decades caused large quantities of lead shot and debris from clay pigeons to be deposited on the Property, and much of the soil on the Property is now contaminated as a result. In addition, the contaminated areas of the Property may contain isolated wetlands subject to the jurisdiction of the U.S. Army Corps of Engineers under the Federal Water Pollution Control Act of 1972 ("the Clean Water Act"). Accordingly, before the City can develop the property, the City must remediate the Property in accordance with applicable law.

   (d) Rapton LLC desires to lease the Property, together with certain appurtenant rights and easements, for the following purposes ("the Project"): (1) to install an asphalt cap in accordance with the City's plan for remediating the Property; (2) to construct and maintain improvements required to operate two high-volume automobile dealerships (with service departments and body shops) on the Property; (3) to sublease a portion of the Property to Mel Rapton, Inc. for operation of Mel Rapton Honda, a high-volume automobile dealership; (4) to sublease the balance of the Property to a second high-volume automobile dealership; and (5) to construct, maintain, and operate appropriate features such as landscaping, lighting, and related structures. The City desires, in turn, to lease the Property to Rapton LLC for these ends, given Rapton Inc.'s many years of experience in operating a successful high-volume automobile dealership in the Sacramento area. To these ends, the City and Rapton Inc. have entered into an *Agreement for Exclusive Right to Negotiate a Lease* dated August 1, 2004, which was subsequently amended as of August 31, 2005, and August 31, 2006.

(e) With this agreement, the City and the Rapton Entities provide the framework (1) for putting the Property in a condition suitable for development and (2) for the City's leasing of the Property to Rapton LLC

3. **The City's Representations and Warranties.** The City represents and warrants as follows:

(a) This agreement has been duly executed by the City and thus is a valid and binding obligation of the City, enforceable in accordance with its terms, except as limited by laws affecting creditors' rights (e.g., bankruptcy, insolvency, reorganization, arrangement, moratorium) or by equitable principles.

(b) The City has no actual knowledge of any pending or threatened condemnation proceeding that may affect the Property or any part of it

(c) The City has no actual knowledge of any other pending or threatened litigation or proceeding that relates to the Property or any part of it.

(d) The making of this agreement will not constitute a default under any other agreement to which the City is a party.

These warranties and representations will survive the consummation of the transactions contemplated by this agreement and the City's leasing of the Property to Rapton LLC.

4. **The Rapton Entities' Representations and Warranties.** The Rapton Entities represent and warrant as follows:

(a) Rapton Inc. is a corporation validly formed and existing under California law and is in good legal standing. Rapton LLC is a limited-liability company formed and existing under California law and is in good legal standing.

(b) Rapton Inc.'s board of directors has approved execution of this agreement by a resolution duly adopted at a regular or special meeting of the board. Rapton LLC's members have approved execution of this agreement

(c) The person executing this agreement on behalf of the Rapton Entities is duly authorized to do so, and his signature legally binds the Rapton Entities to this agreement so that this agreement is a valid and binding obligation of the Rapton Entities, enforceable against them in accordance with its terms, with no further authorizations or approvals required.

(d) To the actual knowledge of the Rapton Entities, as of the effective date of this agreement no lawsuit that names either Rapton Inc. or Rapton LLC as a party, and in which an unfavorable outcome would adversely affect this agreement or the transactions it contemplates, has been filed in any court.

(e) The making of this agreement will not constitute a default under any other agreement to which either Rapton Inc. or Rapton LLC is a party.

These warranties and representations will survive the consummation of the transactions contemplated by this agreement and the City's leasing of the Property to Rapton LLC.

5. **Lease of the Property.** Rapton LLC agrees to lease the Property from the City, and the City agrees to lease the Property to Rapton LLC, within 20 business days after all of the conditions precedent specified in Sections 6 and 7 have been completed to the City's and the Rapton Entities' reasonable satisfaction. For purposes of this agreement, "business day" means a day on which the City's offices are open to the public for transacting public business. Except as otherwise provided by this Section 5, the terms and conditions of the lease will be substantially the same as those set forth in **Exhibit B** to this agreement, with initial "Monthly Rent" of $54,313.83. When the Sacramento City Council authorizes the lease (and the City Council's approval of this agreement does not authorize the lease), the City may modify the terms and conditions, with the Rapton Entities' prior written approval, as needed to implement all mitigation measures identified by the environmental impact report approved or certified in connection with the City's completion of the conditions precedent set forth in Section 6.

6. **The City's Conditions Precedent to Lease.** Rapton LLC's obligation under Section 5 to lease the Property from the City is conditioned upon the City's completion of the conditions precedent set forth in Subsections 6(a) through 6(h). The City agrees to complete these conditions precedent by 5:00 p.m. on July 9, 2007.

   (a) *Site Remediation.* Sacramento County's Environmental Management Department ("the County") has been designated as the lead agency for overseeing the City's efforts to excavate, remove, and dispose of contaminated soil, lead shot, and clay-pigeon debris located on the Property. **Exhibit C** to this agreement is a copy of the City's proposed plan for excavating, removing, and properly disposing of the soil, shot, and debris. The City has submitted this plan to the County for review, and the City anticipates that the County will approve the plan, as submitted or with amendments, on February 15, 2007. The City will implement the approved plan ("the Remediation Plan") at no cost to the Rapton Entities, except as provided in Subsection 7(b). This condition precedent will be considered complete for purposes of Section 5 when the remaining work under the Remediation Plan will not interfere unreasonably with the Project (e.g., post-closure monitoring). The Rapton Entities acknowledge that the City has made no investigation concerning the possible presence of hazardous substances on the Property other than the investigation on which the Remediation Plan is based. The City will provide the Rapton Entities with copies of any no-further-action clearance letters the City receives from the County concerning implementation of the Remediation Plan.

   (b) *Rough Grading Etc.* At no cost to the Rapton Entities, the City will place the Property in a condition suitable for Rapton LLC's installation of the asphalt cap required under the Remediation Plan. Specifically, the City will fill, compact, and rough grade the Property to an elevation ranging from 60 feet above sea level on the north side to 69

feet above sea level on the south side; will place all contaminated soils on the portion of the Property designated as Parcel B on the City's tentative parcel map of the Property (a copy of which is attached as **Exhibit A**); and will install an impermeable liner and aggregate base materials.

(1) Before beginning the filling, compacting, and rough grading, the City agrees to submit the following documents for the Rapton Entities' review:

(A) Grading, compacting, and drainage plans prepared and signed by a licensed civil engineer. The plans must identify the existing topography, any proposed cut and fill, and the proposed finished grade; they must also include calculations of anticipated water runoff and identify concentration points

(B) A soils report prepared by a licensed civil engineer or licensed geologist.

(C) Plans for an underground storm-water-drainage system to be installed on the Property.

(2) The Rapton Entities and their agents may observe the filling, compacting, and rough grading at all times, subject only to reasonable security and safety precautions required by the City or the City's contractors. But the work may proceed even if the Rapton Entities or their agents are not present. All work will be conducted under the overall supervision of a licensed civil or geo-technical engineer. When the work is completed, the City will provide the Rapton Entities with the following documents:

(A) A final certificate of grading operations by a soil-testing laboratory acceptable to the Rapton Entities.

(B) A written certification from a civil or geo-technical engineer that the Property has been filled, compacted, and graded to the required elevations in accordance with the plans described in Subsection 6(b)(1)(A).

(3) After giving the City reasonable notice, the Rapton Entities' agents and consultants may conduct tests to ascertain the amount and extent of the fill or of any surface or subsurface condition on the Property. The Rapton Entities agree to provide the City with copies of any reports concerning these tests, at no cost to the City.

(4) The Rapton Entities agree to indemnify, defend (with attorneys reasonably acceptable to the City), protect, and hold the City and the City's officers, employees, and agents harmless from and against all liabilities, claims, damages, costs that arise directly or indirectly from the activities of the Rapton Entities or their agents or consultants in accordance with this Subsection 6(b), except to the extent caused by the gross negligence or willful misconduct of the City or the City's officers, employees, or agents. The term "costs" is to be

interpreted broadly and includes actual, reasonable attorneys' fees and litigation costs (including expert fees and costs) through final resolution on appeal, as well as fees and costs associated with execution upon any judgment or order. The Rapton Entities' obligation under this Subsection 6(b)(4) includes but is not limited to liabilities, claims, damages, and costs arising from any—

(A) injuries to any persons, including but not limited to members, officers, employees, agents, consultants, and invitees of Rapton Inc. or Rapton LLC; and

(B) damage to any property, including but not limited to any impermeable liner installed on the Property in connection with the remediation work described in Subsection 6(a).

The Rapton Entities' obligations under this Subsection 6(b)(4) will survive the expiration or termination of this agreement.

(c) *Utilities*. From existing available access points, the City will locate, install, and extend stubs for the following utility services to the perimeter boundary of the Property at the locations designated in **Exhibit D** to this agreement: water, sewer, gas, electricity, and telephone The City will do this at no cost to the Rapton Entities Before installation, the City will consult with the Rapton Entities concerning the sizes and capacities of the utility services.

(d) *Land-use Entitlements*. The City will obtain (1) a rezoning of the Property to a C-4 designation; (2) a planned-unit development, including any associated special permits and approvals, that allows the sale of new and used automobiles on the Property, as well as the installation of a freeway pole sign for the two automobile dealerships (at the "Project's Freeway Signage Area" designated on **Exhibit A**) and the installation of other on-site signage for the dealerships; and (3) any general-plan amendments needed for C-4 zoning and the planned-unit development (collectively, the "Land Use Entitlements"). The Rapton Entities acknowledge that this Subsection 6(d) does not commit the City's Planning Commission or the Sacramento City Council to approve the Land-Use Entitlements.

(e) *Drainage*. The City will have the Property graded and will install an underground storm-water-drainage system so as to cause the discharge of all water in a manner approved by the governmental agencies with jurisdiction over such discharges.

(f) *Street Improvements*. The City will construct all roadways, curbs, gutters, sidewalks, landscaping and irrigation, street lights, stop signs, and traffic signals described on **Exhibit E** to this agreement. All construction will be done in compliance with the City's standards for public streets and at no cost to the Rapton Entities, except as follows: the Rapton Entities agree to contribute one half of the cost of all traffic signals Caltrans or the City requires as mitigation for the Land Use Entitlements, up to a maximum total contribution of $100,000, payable to the City within 30 days after

the "Effective Date" of the lease of the Property (as defined in the lease attached as **Exhibit B**).

(g) *Wetlands.* At no cost to the Rapton Entities, and in connection with the City's remediation of the Property (under Subsection 6(a)) and its subsequent filling, compacting, and rough grading of the Property (under Subsection 6(b)), the City agrees to be responsible for filling the existing wetlands and drainage ditches on the Property and for—

(1) obtaining and complying with all necessary permits from the U.S. Army Corps of Engineers under the Clean Water Act;

(2) obtaining and complying with any necessary Streambed Alteration Agreement from the California Department of Fish and Game, as required under California's Fish and Game Code;

(3) complying with the associated mitigation requirements of the U.S. Fish and Wildlife Service and the California Department of Fish and Game for the loss of species listed as threatened or endangered and the loss of the species' habitat (but the City may terminate this agreement by written notice, without further obligation to the Rapton Entities under this agreement, if the actual or estimated cost of mitigation for endangered species exceeds $600,000); and

(4) obtaining and complying with all necessary permits from the California Regional Water Quality Control Board, Central Valley Region.

(h) *CEQA Compliance.* At no cost to the Rapton Entities, in conjunction with the conditions precedent set forth in Subsections 6(a) through 6(g), the City will comply with the California Environmental Quality Act as required by law.

7. **Rapton LLC's Conditions Precedent to Lease.** The City's obligation under Section 5 to lease the Property to Rapton LLC is conditioned upon the Rapton Entities' completion of the conditions precedent set forth in Subsections 7(a) and 7(b).

(a) *Financial Information.* The Rapton Entities will provide the City with copies of the following documents by 5:00 p.m. on November 30, 2006:

(1) Rapton Inc.'s most current articles of incorporation and corporate bylaws; and Rapton LLC's most current articles of organization and operating agreement, as well as the statement Rapton LLC last filed with the California Secretary of State in accordance with Corporations Code section 17060.

(2) Rapton Inc.'s and Rapton LLC's financial statements for the last five years (e.g., balance sheets, income statements, statements of changes in owner's equity, statements of cash flows), audited by a certified public accountant, if Rapton Inc. or Rapton LLC has its statements audited in the normal course of business. To the extent these statements qualify as confidential financial records and

proprietary information that are exempt from disclosure under the California Public Records Act, the City agrees to take all reasonable and lawful measures to keep them confidential and to oppose any requests for disclosure. The City also agrees to notify the Rapton Entities promptly of any request for disclosure

(3) Evidence confirming that the Rapton Entities have secured adequate financing to carry out the Project.

(b) *Project Plans*. The Rapton Entities must submit to the City, for the City's review and approval, two sets of detailed improvement-and-business plans for the Project. The plans must be consistent, in the City's sole judgment, with the operation on the Property of a "High-Volume Automobile Dealership" (as defined in the lease attached as **Exhibit B**). The plans must also include installation (at no cost to the City) of the asphalt cap required by the Remediation Plan. Within 30 days after the City receives the plans, the City must either—

(1) approve the plans by endorsing the City's approval on them and returning one set of the plans to the Rapton Entities; or

(2) notify the Rapton Entities in writing of the City's objections to the plans, specifying in detail each objection.

If the City does not respond in accordance with either Subsection 7(b)(1) or 7(b)(2) within 30 days receiving the plans, then the document will be considered approved. Within 20 days after the Rapton Entities receive written notice of the City's objections to a document, the Rapton Entities may deliver corrective amendments to the City. Within 20 days after receiving the corrective amendments, the City must serve written notice on the Rapton Entities of the City's approval or rejection of the amended document. If the City does not serve the Rapton Entities with written notice of approval or rejection within 20 days after receiving the corrective amendments, then the amended document will be considered approved. To the extent the plans qualify as confidential financial records and proprietary information that are exempt from disclosure under the California Public Records Act, the City agrees to take all reasonable and lawful measures to keep them confidential and to oppose any requests for disclosure. The City also agrees to notify the Rapton Entities promptly of any request for disclosure.

8. **Mediation and Arbitration.** The City and the Rapton Entities agree that any dispute between them over their rights and obligations under this agreement, including but not limited to any dispute about the completion of a condition precedent, will be resolved solely by mediation and arbitration in accordance with the provisions of this Section 8.

(a) Either party may initiate mediation-and-arbitration procedures by giving the other party a written Notice of Dispute that generally describes the nature of the dispute and invokes this Section 8.

(b) Within 15 days after a Notice of Dispute is given, the party giving the notice will attempt to employ the services of a third person, reasonably acceptable to the other party, to conduct the mediation ("the Mediator"). The City and the Rapton Entities agree to bear the Mediator's fees and costs equally. The mediation will begin within 10 days after the Mediator is employed. The parties agree to attempt in good faith to employ the Mediator and to mediate the dispute. If, however, the parties cannot agree on a Mediator, or if mediation fails to resolve the dispute, then the parties agree to refer their dispute to arbitration in accordance with Subsections 8(c) and 8(d).

(c) Any dispute that is referred to arbitration will be decided by an arbitration conducted by the American Arbitration Association in accordance with Subsection 8(d). The arbitration will be conducted in the City of Sacramento, California, before a single arbitrator selected by the parties. If the parties cannot agree on an arbitrator within 15 days after the dispute is referred to arbitration, then the parties will ask the Presiding Judge of the Superior Court of Sacramento County to appoint an arbitrator as soon as practicable.

(d) The provisions of the Commercial Arbitration Rules of the American Arbitration Association in effect at the time of arbitration will apply, subject to the following:

(1) Referral to arbitration will be barred after the date that commencement of legal or equitable proceedings based on the dispute would be barred by the applicable statute of limitations.

(2) The arbitrator must be an attorney, a former judge, or a retired judge who has at least 10 years experience in real property, commercial, and municipal law.

(3) The parties, or either of them, may have the arbitration hearing reported by a certified shorthand court reporter, with a written transcript prepared. If both parties request a court reporter and transcript, they will share the cost of the reporter and transcript equally; otherwise, the cost of the reporter and transcript will be paid by the party requesting them.

(4) The arbitrator will provide the parties with a written final decision that includes the arbitrator's factual findings and the reasons on which the arbitrator's decision is based.

(5) The arbitrator must hear the dispute and provide the parties with a written final decision within 90 days after the parties select the arbitrator. The arbitrator will set a hearing date that, in the arbitrator's judgment, is sufficient to meet this deadline.

(6) The arbitrator will award the prevailing party reasonable attorneys' fees and costs incurred in connection with the arbitration (this includes representation of the City by the City Attorney's Office), unless the arbitrator determines otherwise for good cause.

(7) The parties will share the arbitrator's fees and costs equally.

(8) The arbitrator's decision will be final, and judgment may be entered on it in accordance with applicable law in any court having jurisdiction over the matter.

(9) Chapter 3 (commencing with section 1282) in title 9 of the Code of Civil Procedure and its successor statutes will apply to all disputes arbitrated under this Section 8.

9. **Acknowledgment of Government Code section 53084.** The Rapton Entities acknowledge that Government Code section 53084 prohibits a local agency from providing financial assistance to automobile dealers who relocate to the local agency's jurisdiction from another agency's jurisdiction within the same market area. The Rapton Entities further acknowledge that they have discussed section 53084 with their legal counsel. Based solely on that discussion, and not on any representations by the City or the City's officers, employees, or agents, the Rapton Entities agree with the City as follows:

(a) Section 53084 does not apply to the City's performance of the conditions precedent specified in Section 6 above, and will not apply to the lease of the Property, because that lease will be for rental at the market rate for a similar lease of comparable, privately owned property (i.e., property that is not environmentally impaired, is zoned for automobile dealerships, and has utility service readily available).

(b) Nevertheless, the possibility exists that someone may file a lawsuit alleging that section 53084 prohibits this agreement, or the lease of the Property, or both.

(c) If such a lawsuit is filed and results in a judgment invalidating this agreement, or the lease of the Property, or both, then the Rapton Entities waive and release the City and the City's officers, employees, and agents from any claim, at law or in equity, for any losses arising from, or are in any way related to, that judgment. The Rapton Entities intend that this waiver and release include all known and unknown claims for such losses. As to unknown claims in particular, the Rapton Entities expressly waive the benefits of Civil Code section 1542, which provides as follows: "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known to him must have materially affected his settlement with the debtor."

10. **Miscellaneous Provisions.**

(a) *Notices.* Any notice, delivery, or other communication under this agreement must be in writing to be effective and will be considered properly given when delivered or mailed to the following persons in the manner provided in this Subsection 10(a):

(1) If to the City: City Manager
City of Sacramento
915 Street, Fifth Floor
Sacramento, CA 95814

(2) If to the Rapton Entities: Mel Rapton, Inc.
Attn: Mel Rapton, President
2820 Fulton Avenue
Sacramento, CA 95821

With a copy to— Law Offices of Gregory D. Thatch
1730 "I" Street, Suite 220
Sacramento, CA 95814

Any party may change its address for these purposes by giving written notice of the change to the other party in the manner provided in this section. If sent by mail, a notice, delivery, or other communication will be effective or will be considered to have been given 48 hours after it has been deposited in the U.S. Mail (certified mail and return receipt requested) and addressed as set forth above, with postage prepaid. Neither party may refuse or evade delivery of any notice. Notice personally served will be considered effective or to have been given upon delivery.

(b) *Relationship of the Parties.* This agreement does not create any relationship or association between the City and the Rapton Entities. For example, and without limiting the previous sentence, this agreement does not create the relationship of principal and agent, nor does it create a partnership or joint venture.

(c) *Effective Date.* This agreement is effective as of the date on which both the City and the Rapton Entities have signed it, as indicated by the dates in the signature blocks below.

(d) *Attorneys' Fees.* The party prevailing in any litigation concerning this agreement or the Property is entitled to a court award of reasonable attorneys' fees and litigation costs through final appeal (including expert-witness fees and costs) in addition to any other relief that may be granted in the litigation. The prevailing party is also entitled to recover reasonable attorneys' fees and costs incurred in any post-judgment proceedings to collect or enforce a judgment. This Subsection 10(d) covers representation of the City by the City Attorney's Office.

(e) *Force Majeure.* As used in this agreement, the term "Force Majeure Event" means a cause of delay that is not the fault of the party who is required to perform under this agreement and is beyond that party's reasonable control, including but not limited to the elements (including but not limited to floods, earthquakes, windstorms, and unusually severe weather), fire, energy shortages, war or war-defense conditions, the acts of any public enemy, acts of terrorism, the action or inaction of any governmental entity with regulatory authority over the Property (including but not limited to the City, the County, and the U.S. Corps of Engineers) or the entity's

agents, litigation, labor shortages (including but not limited to shortages caused by strikes or walkouts), and materials shortages. Except as otherwise expressly provided in this agreement, if the performance of any act required by this agreement to be performed by the City, Rapton Inc., or Rapton LLC is prevented or delayed by a Force Majeure Event, then the time for performance will be extended for a period equivalent to the period of delay, and performance of the act during the period of delay will be excused. This Subsection 10(e) does not excuse the obligation of either party to perform an act rendered difficult or impossible solely because of that party's financial condition.

(f) *Brokerage Commission*. The City will pay half and the Rapton Entities will pay half of the following real-estate brokerage commission to Colliers International (for services provided to the Rapton Entities by David R. Swanson). The commission is equal to 2.5% of Rapton LLC's total rental under the lease described in Section 5 during the first 10 years of the lease and will be paid in two equal installments. The first installment is due within 30 days after the "Effective Date" of the lease, and the second installment is due within 30 days after the "Operations Phase" of the lease begins. As used in this subsection 10(f), the terms "Effective Date" and "Operations Phase" have the meanings ascribed to them in the lease attached as **Exhibit B** to this agreement. The Rapton Entities agree to provide the City with proof from Colliers International that they have paid their half of each installment. The City and the Rapton Entities each represent and warrant to the other that neither of them has been represented by any broker or finder in connection with this transaction other than Colliers International, which represented the Rapton Entities. Each party agrees to indemnify, defend, protect, and hold the other party harmless from and against all liabilities, claims, demands, damages, and costs (including actual, reasonable attorney's fees and litigation costs through final resolution) that the indemnified party incurs if the representation and warranty set forth in this Subsection 10(f) proves incorrect.

(g) *No Assignments*. The Rapton Entities may not assign this agreement.

(h) *Partial Invalidity*. If any nonmaterial provision of this agreement is held by a court of competent jurisdiction to be invalid, void, voidable, or unenforceable, then the remaining provisions will remain in full force.

(i) *Time of Essence*. Time is of the essence of this agreement.

(j) *Interpretation*. This agreement is to be interpreted and applied in accordance with California law, except that the rule of interpretation in Civil Code section 1654 will not apply

(k) *Exhibits*. **Exhibits A, B, C, D,** and **E** to this agreement are incorporated into this agreement and made part of it. Any litigation concerning this agreement must be brought and prosecuted in the Sacramento County Superior Court.

(l) *City Council Approval.* This agreement will bind the City only if it has been approved by the Sacramento City Council. Approval of this agreement does not constitute approval of the lease of the Property.

(m) *Modification.* This agreement supersedes all prior or contemporaneous agreements, representations, and negotiations (written, oral, express, or implied) and may be modified only by another written agreement signed by both parties.

(n) *Integration.* This agreement sets forth the parties' entire understanding regarding the matters set forth above and is intended to be their final, complete, and exclusive expression of those matters, except as follows: it is not intended to be the parties' final, complete, and exclusive expression of the lease described in Section 5.

City of Sacramento

By: _____
Ray Kerridge, City Manager
Date: November ___, 2006

Attest:

By: _____
City Clerk

Approved for Legal Form
Sacramento City Attorney

By: _____
Senior Deputy City Attorney

Mel Rapton, Inc.

By: _____
Mel Rapton, President
Date: November ___, 2006

Rapton Investment Group LLC

By: _____
Mel Rapton, Manager
Date: November ___, 2006

Approved for Legal Form
Law Offices of Gregory D. Thatch

By: _____
Gregory D. Thatch
Attorneys for Mel Rapton, Inc. and Rapton Investment Group LLC

RESOLUTION NO.

Adopted by the Sacramento City Council

AGREEMENT REGARDING CONDITIONS PRECEDENT TO LEASE OF LAND BETWEEN THE CITY AND MEL RAPTON, INC. FOR THE FULTON AVENUE DEVELOPMENT PROJECT (CB33)

BACKGROUND

A. The City of Sacramento owns the property at 3701 Fulton Avenue, the proposed site of the Fulton Avenue Development Project.

B. In 2002, the City Council directed staff to examine potential alternatives for the "highest and best" uses for the site that would offer a compatible and productive use of the property.

C. An Exclusive Rights to Negotiate (ERN) was executed on June 1, 2004, between the City and Mel Rapton, Inc. The ERN grants Mel Rapton, Inc. the exclusive right to negotiate with the City for a lease of 3701 Fulton Avenue. It has been renewed by City Council three times and expires on August 31, 2007.

D. The Fulton Avenue Development Project is currently undergoing environmental analysis under California Environmental Quality Act (CEQA) and will not be presented to the City Council for consideration until January 2007; therefore, the City cannot execute a lease for this project at this time.

E. The Agreement Regarding Conditions Precedent to Lease of Land presented to the City Council at this meeting is a legal instrument that was negotiated by the Economic Development Department and the City Attorney's Office with Mel Rapton Honda's representatives. It memorializes the parties' progress in negotiating a lease and commits both parties to perform specified actions.

BASED ON THE FACTS SET FORTH IN THE BACKGROUND, THE CITY COUNCIL RESOLVES AS FOLLOWS:

Section 1. The facts set forth in the Background are correct.

Section 2. The agreement regarding the conditions precedent to lease of land between the City and Mel Rapton, Inc. is approved and the City Manager is authorized to execute such agreement.

Section 3. The City Manager may make non-substantive changes to the Agreement with the approval of the City Attorney.