

## Development Agreements Between Municipalities and Private Parties

Private Funding, Tax, and Infrastructure Issues for Long-Term Development and Redevelopment Projects

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THURSDAY, FEBRUARY 23, 2023

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Today's faculty features:

John C. Armentano, Partner, **Farrell Fritz**, Hauppauge, NY

William P. Curley, III, Partner, **Harper & Burns**, Orange, CA

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### Mammoth Lakes Found Liable For Breaching Development Deal

Jan 8, 2011

Cori Badgley, Inyo County, Legal Digest, Mammoth Lakes, Sierra Nevada Mountains, Vol. 26 No. 1 Jan 1, 2011



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The Town of Mammoth Lakes has been ordered to pay more than \$32 million for violating a development agreement.

In upholding a jury's award of damages to the developer, the Third District Court of Appeal made clear that local government agencies are treated like any other private contracting party when it comes to development agreements and can be held liable for damages if the agency breaches the agreement.

As previously established in *Building Industry Association of Central California v. City of Patterson*, (2009) 171 Cal.App.4th 886, (see [CP&DR Legal Digest, April 2009](#)), the interpretation of development agreements is governed by contract law and not statutory interpretation principles. In the Mammoth Lakes case, that breach of a development agreement by a municipality came with a hefty price tag. Under contract law, there are no immunities protecting the municipality from having to pay up.

In 1997, Terrence Ballas and the Town of Mammoth Lakes entered into a development agreement whereby Ballas would lease the land encompassing and surrounding the airport from the town with an option to purchase. Ballas would operate the airport in conjunction with developing the land near the airport into a 250-unit condominium or hotel complex. In 2000, after Ballas helped form Mammoth Lakes Land Acquisition, LLC, and invested \$15 million to \$17 million in required airport improvements, the developer submitted an application for development of a residential condominium complex.

The development agreement stated: "Town and its agents, employees and contractors shall exercise discretionary approvals applicable to the project reasonably, in good faith, and in a timely manner." However, town officials disliked the residential concept, and, in 2004, the developer submitted another application for what is known as the Hot Creek project. The new proposal involved a time-share condominium hotel in which units could be rented out when the owners were not using them.

Meanwhile, the town had been working to gain Federal Aviation Administration (FAA) approval to expand the airport facilities to accommodate commercial jets. About the same time the revised development proposal came forth, the FAA – which, unbeknownst to Ballas, questioned the development agreement before it was approved in 1997 – stated that it would not approve the airport expansion. The FAA further advised that the town was in jeopardy of losing federal grant funding for airport improvements if a condominium/hotel complex were built on the surrounding property. Based on this admonition, the town proceeded to work against the Hot Creek project and refused to process the application without first resolving the FAA issues.

Mammoth Lakes Land Acquisition sued the town in 2006 for anticipatory breach of contract. A Mono County jury found in favor of the developer and awarded \$30 million in damages for breach of contract. Subsequently, the judge also granted the developer \$2.3 in attorneys fees under the prevailing party provision of the development agreement. The town appealed on three grounds: (1) The developer failed to exhaust its administrative remedies; (2) three clauses in the development agreement excused the town's performance; and (3) there was no substantial evidence to support the jury's determination of breach. The appellate court found none of the town's arguments meritorious and upheld the award for damages and attorneys fees.

On the first issue of exhaustion, the town argued the developer was required to engage in the administrative process before filing suit. The appellate court disagreed. The lawsuit, the court ruled, rested solely on the terms of the development agreement and whether the town breached those terms. Therefore, exhaustion of the administrative process was not required, and the principles of contract law applied.

"There was no remedy available to the developer in the administrative process," Justice George Nicholson wrote for the unanimous three-judge Third District panel. "[O]nce the developer gave notice of default [which occurred in early 2005] and the town failed to cure the default, there was no longer a proposed land use to adjudicate in the town's quasi-judicial administrative process."

On the second issue of excused performance, the court rejected all of the town's attempts to assert defenses under the agreement. The court found that development agreement clauses requiring compliance with governmental restrictions and FAA regulations provided no protection because the restrictions at issue were under the town's control, and the grant assurances between the FAA and the town did not constitute FAA regulations. Additionally, the developer knew nothing of the grant assurances between the town and the FAA and, thus, did not assume any responsibility in regards thereto, the court ruled.

On the third issue of substantial evidence, the appellate court found that evidence was adequate to support the jury's determination. Therefore, the appellate court affirmed the jury's award of damages and attorneys fees.

This case acts as a reminder to local agencies that development agreements cannot simply be dismissed after they are executed. Future consequences must be taken into account before the agreement is entered into, as with any other contractual agreement between private parties.

#### The Case:

*Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes*, No. C059239, 2011 DJDAR 92. Filed December 30, 2010.

#### The Lawyers:

For Mammoth Lakes Land Acquisition: Daniel L. Brockett, Quinn, Emanuel, Urquhart & Sullivan, (212) 849-7345.

For the town: Peter E. Tracy, (760) 872-1101.

CP&DR's *Legal Digest* is reported by the attorneys of [Abbott & Kindermann, LLP](#).

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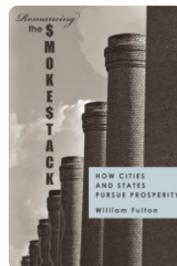
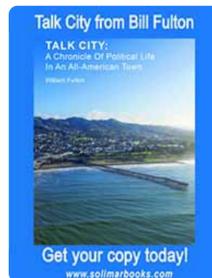
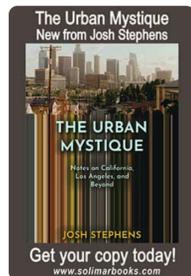
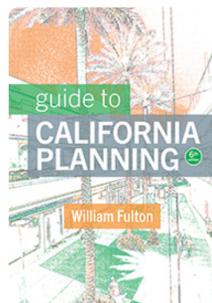
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## DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT (the “Agreement”) is entered into as of the \_\_\_\_\_ day of \_\_\_\_\_, 2020 (“Agreement Date”), by and between \_\_\_\_\_ (“OWNER”) and the CITY OF MISSION VIEJO, a municipal corporation, organized and existing under the laws of the State of California (hereinafter “CITY”), pursuant to the authority of Sections 65864 through 65869.5 of the California Government Code and Article XI, Section 2 of the California Constitution (collectively “Parties”).

### INTENT OF THE PARTIES

I. This Agreement is predicated upon the following facts:

A. This “Intent of the Parties” section refers to and utilize certain capitalized terms which are defined in this Agreement. The Parties intend to refer to those definitions in conjunction with the use thereof in these Recitals.

B. The Development Agreement Legislation authorizes the CITY to enter into binding development agreements with persons having legal or equitable interests in real property for the development of such property in order to, among other matters: ensure high quality development in accordance with comprehensive plans; provide certainty in the approval of development projects so as to avoid the waste of resources and the escalation in the cost of housing and other development to the consumer; provide assurance to the applicants for development projects that they may proceed with their projects in accordance with existing policies, rules and regulations and subject to conditions of approval, in order to strengthen the public planning process and encourage private participation in comprehensive planning and reduce the private and public economic costs of development; assist in the financing of public improvements; protect against initiatives, moratorium (processing or development) and other actions inconsistent with the Project anticipated by this Agreement; assure reimbursement of OWNER in accordance with the terms of this Agreement and state and federal law; and provide for economic assistance to OWNER for the entitlements authorizing development related improvements.

C. \_\_\_\_\_ and \_\_\_\_\_ are the owners of certain real property within the City of Mission Viejo, the County of Orange, State of California (individually, “\_\_\_\_\_ Property” or “\_\_\_\_\_ Property” and collectively, the “Property”), as more particularly described in Attachments \_\_\_\_\_ [including a plat graphically depicting each] respectively. The Parties agree and acknowledge that the respective boundaries may be amended to conform to final development proposals and that Attachment \_\_\_\_\_ will be amended pursuant to the Operating Memoranda set forth in Section \_\_\_\_\_. OWNER desires to develop the Property in accordance with the provisions of this Agreement, the Existing Regulations and those regulations of other agencies exercising jurisdiction upon the project. The Scope of Development of the Property as contemplated by this Agreement is described below.

D. OWNER has sought, negotiated, and received consideration for, and the CITY has agreed to, this Agreement in order to create a beneficial project and a physical environment that will conform to and complement the goals of the CITY, create a development project sensitive to human needs and values, facilitate efficient traffic circulation, and develop the Property consistent with City and State policy. As part of the process of granting this entitlement, the City Council of the CITY has required the preparation of and certification of the Project EIR in order to identify any significant environmental effects arising from the Development and has otherwise carried out all requirements of the California Environmental Quality Act (“CEQA”) of 1970, as amended.

E. The following actions were taken with respect to this Agreement and the Project:

1. On \_\_\_\_\_, following a duly noticed and conducted public hearing, the City Planning Commission recommended that the City Council approve this Agreement, by adoption of its Resolution No. \_\_\_\_\_ and making the findings of fact thereto.

2. On \_\_\_\_\_, after a duly noticed public hearing and pursuant to CEQA, the City Council certified the Project EIR and adopted the Mitigation Monitoring and Reporting Program by adoption of its Resolution No. \_\_\_\_\_ and making the findings of fact thereto.

3. On \_\_\_\_\_, after a duly noticed public hearing, the City Council determined that the provisions of this Agreement are consistent with the General Plan of the CITY by adoption of its Resolution No. \_\_\_\_\_ and making the findings of fact thereto.

4. On \_\_\_\_\_, after a duly noticed public hearing, the City Council introduced Ordinance No. \_\_\_\_\_ approving and authorizing the execution of this Agreement and on \_\_\_\_\_, the City Council adopted the Ordinance, a copy of which is on file with the City Clerk of the CITY, and the findings and conditions pertaining thereto.

F. The CITY has engaged in extensive studies and review of the potential impacts of the Project under the California Environmental Quality Act and all applicable Existing Regulations, as well as the various potential benefits to the CITY by the development of the Project and concluded that the Project is in the best interests of the CITY.

G. In consideration of the substantial public improvements and benefits already provided and those to be provided by OWNER and the Project, as described in Attachment \_\_\_\_\_ in further consideration of the benefits that will inure to the CITY in conjunction with the implementation of the Project and in order to strengthen the public financing and planning process and reduce the economic costs of development, by this Agreement, the CITY intends to give and by this Agreement gives, OWNER assurance that OWNER can proceed with the Development of the Project for the Term of this Agreement pursuant to the terms and conditions of this Agreement and in accordance with the Development Plan Approval(s) and the Existing

Regulations. In reliance on the CITY's covenants in this Agreement concerning the Development of the Property, and the rights afforded OWNER hereunder, OWNER has agreed to provide those benefits described in Attachment \_\_\_\_ as "Development Agreement Benefits," and OWNER has and will in the future incur substantial indebtedness, as well as costs in planning, engineering, site preparation and the construction and installation of major infrastructure and facilities that OWNER would not incur but for the covenants of CITY provided in this Agreement.

H. Pursuant to Section 65867.5 of the Development Agreement Legislation, the City Council has found and determined that: (i) this Agreement and the Development Plan Approval(s) implement the goals and policies of the CITY's General Plan and the Specific Plan, provide balanced and diversified land uses and impose appropriate standards and requirements with respect to land development and usage in order to maintain the overall quality of life and the environment within the CITY, (ii) this Agreement and the Project are in the best interests of and not detrimental to the public health, safety and general welfare of the CITY and its residents; (iii) adopting this Agreement is consistent with the CITY's General Plan and constitutes a present exercise of the CITY's police power; and (iv) this Agreement is being entered into pursuant to and in compliance with the requirements of Section 65867 of the Development Agreement Legislation.

I. The CITY and OWNER agree that it may be beneficial to enter into operating memoranda, additional agreements or to modify this Agreement with respect to the implementation of the separate components of the Project when more information concerning the details of each component is available, and that this Agreement should expressly allow for such contemplated operating memoranda, additional agreements or modifications to this Agreement, including transfers to third parties, whether by assignment or delegation.

## **AGREEMENT**

**NOW, THEREFORE**, pursuant to the authority contained in the Development Agreement Legislation, pursuant to Article XI, Section 2 of the California Constitution, and in consideration of the foregoing facts which define the intent of the Parties, all of which are expressly incorporated into this Agreement, and the mutual covenants set forth in this Agreement, the Parties agree as follows:

1. **Definitions.**

Unless the context otherwise requires, the terms defined in this Section 1 shall, for I purposes of this Agreement, or any supplemental agreement, and any certificate, opinion or other document herein mentioned, have the meanings herein specified. All references herein to "Articles," "Sections" and other subdivisions are to the corresponding Articles, Sections or subdivisions of this Agreement, and the word "herein," "hereof," "hereunder" and other words of similar import refer to this Agreement as a whole and not to any particular Article, Section or subdivision hereof.

**“Agreement Date”** means \_\_\_\_\_, 20\_\_, the date of the second introduction and reading of the Authorizing Ordinance by the City Council.

**“Authorizing Ordinance”** means Ordinance No. \_\_\_\_\_ of the CITY approving this Agreement.

**“CITY”** means the City of Mission Viejo, a California municipal corporation, duly organized and existing under the Constitution and laws of the State of California, and all its officials, employees, agencies and departments and assignees or successors.

**“City Council”** means the duly elected and constituted city council of the CITY.

**“Develop”** or **“Development”** or **“Developing”** means the improvement of the Property for purposes consistent with the Development Plan, including, without limitation: subdividing, grading, the construction of infrastructure and public facilities related to the Off-Site Improvements, the construction of structures and buildings and the installation of landscaping, all in accordance with the phasing provided for herein.

**“Development Agreement Legislation”** means Sections 65864 through 65869.5 01 the California Government Code as it exists on the Agreement Date.

**“Development Impact Fees”** or **“DIF”** means, individually and in the aggregate, the CITY’s currently adopted development impact fees as set forth in Ordinance No. \_\_\_\_\_ in effect as of the Agreement Date as set forth in the \_\_\_\_\_ Municipal Code in Section \_\_\_\_\_.

**“Development Plan”** means the plan for Developing the Property contained in this Agreement, the City of Mission Viejo General Plan as amended on \_\_\_\_\_, 20\_\_ and as thereafter amended in accordance with Section \_\_\_\_ hereof, the \_\_\_\_\_ Specific Plan, Rezone, Tentative Tract Map, the Project EIR (including Mitigation Monitoring Program) and those Future Development Approvals, approved in conformance with Section \_\_\_\_\_ hereof. Each of the documents enumerated in the foregoing, except for the Future Development Approvals, is expressly incorporated by reference as if fully set forth herein and are necessary to interpret and apply this Agreement. Each of the documents are maintained in the official records of the City and shall be utilized whenever required to interpret or apply this Agreement.

**“Development Plan Approval(s)”** means the approvals of the City Council and other governmental agencies and other actions and agreements described in Attachment \_\_\_\_\_ hereto, including those amendments to this Agreement made in accordance with Section \_\_\_\_\_, those amended to the Development Plan Approvals made in accordance with Section \_\_\_\_\_ and those Future Development Approvals made in accordance with Section \_\_\_\_\_.

**“Development Transferee”** means a person or entity that expressly assumes obligations under this Agreement pursuant to Section \_\_\_\_\_ hereof.

**“Effective Date”** means the date the Authorizing Ordinance becomes effective.

**“End User”** means a buyer, assignee, or transferee of one or more individual subdivided unit(s)/lot(s) of the Project obtaining such unit(s) or lot(s) for the purpose of occupying or using such lots or units for its own purposes and not for use in the trade or business of further development or further subdivision. The term “End User” includes, but is not limited to, any homeowners’ association, merchants’ association, or like entity formed with respect to the Property which owns some interest in the Property, homeowners, tenants, commercial building owners, and owners of multi-family units.

**“Existing Regulations”** means, except as otherwise provided herein, those ordinances, rules, regulations and official policies of the CITY other than the Development Plan Approval(s) in effect on the Agreement Date, which (i) are not inconsistent with the Development Plan Approval(s) and this Agreement; and (ii) govern the permitted uses of the Property, building heights, the size of structures, the density and intensity of use of the Property, the timing, fees, and conditions to Development, exactions, assessments, the procedures for, and types of, permits required for the Development, the provisions for reservation or dedication of land for public purposes and the design, improvement and construction standards and specifications applicable to the Property and the infrastructure required for the Development. By way of enumeration, and not limitation, the Existing Regulations include those portions of the items identified on Attachment \_\_\_ hereof that are not inconsistent with the Development Plan Approvals and this Agreement. The CITY has certified three copies of each of the documents listed on Attachment \_\_\_\_\_. The CITY has retained one set of the certified documents and has provided each OWNER with a set.

**“Future Development Approvals”** means those entitlements and approvals that are: (a) made in accordance with Section \_\_\_\_; and (b) requested by the CITY or OWNER in order to authorize the Development to occur upon the Property in a manner consistent with the Development Plan Approval(s). By way of enumeration, and not limitation, the Future Development Approvals include actions such as development permits, development plan review, tentative maps, final maps, use permits, variances, grading permits, occupancy permits and building permits.

**“Merchant Builder”** means a buyer, assignee, or transferee (other than the OWNER or any End User) of one or more individual lots or tracts of the Project, acquiring such lots or tracts for the purpose of engaging in the business of developing, improving, or using such lots or tracts for development.

**“OWNER”** is \_\_\_\_\_ and \_\_\_\_\_ and others who subsequently are assigned the rights and obligations of OWNER pursuant to Section \_\_\_ hereof.

**“Planning Commission”** means the duly appointed and constituted planning commission of the CITY.

**“Public Facilities Plan”** means the plan attached hereto as Attachment \_\_\_\_\_.

“**Public Financing**” means the issuance of bonds and related provision of funds for acquisition of public facilities in accordance with the terms and conditions of the Public Facilities Finance Plan.

“**Public Infrastructure Improvements**” mean the improvements and the time for completion thereof as described in Attachment \_\_\_\_ and further described in the Development Plan Approval(s).

“**Project**” means the development of the Property as set forth in the Development Plan Approval(s).

“**Project CEQA**” means that environmental impact analysis prepared for the Project, as certified on \_\_\_\_\_, 20\_\_.

“**Property**” means that certain real property described in Attachment \_\_\_\_ hereof.

“**Term**” means the time frames set forth in Section \_\_\_\_\_.

## 2. **General Provisions.**

**2.1 Binding Covenants.** Except as otherwise provided for in this Agreement, the provisions of this Agreement to the extent permitted by law, constitute covenants which shall run with the Property for the benefit thereof, and the benefits and burdens of this Agreement shall bind and inure to the benefit of the Parties, all successors in interest to the Parties hereto to the extent provided for in this Agreement.

**2.2 Interest of OWNER.** OWNER represents that OWNER owns fee simple interest in the Property.

**2.3 Term.** This Agreement shall become effective on the Effective Date. Unless terminated pursuant to Section \_\_\_\_, \_\_\_\_\_ this Agreement shall terminate at 11:59 p.m. on the tenth (10th) anniversary of the earlier of either (I) the date the CITY issues either the first (1st) building permit for \_\_\_\_\_ or (ii) the second (2d) anniversary of the Effective Date. The termination shall occur subject to specific extensions, force majeure, revisions, and termination provisions of this Agreement. Unless terminated pursuant to Section \_\_\_\_, with respect to the Winchester Property, this Agreement shall terminate at 11:59 p.m. on the fifteenth (15th) anniversary of the later of either: (i) the date the CITY issues the first (1St) building permit for a non-residential building on the Winchester Property; or (ii) the date the limitations on development imposed by Section \_\_\_\_ hereof terminate.

**2.4 Termination.** This Agreement shall be deemed terminated and of no further Effect, except for those covenants and agreements that expressly survive termination, upon the occurrence of any of the following events without further action by the CITY, Planning Commission, or City Council:

**2.4.1** If termination occurs pursuant to any specific provision of this Agreement, including, without limitation, a termination in the event of default;

**2.4.2** Completion of the total build-out of the Development pursuant to the terms of this Agreement and the CITY's issuance of all required occupancy permits and acceptance of all dedications and improvements required to complete Development; or

**2.4.3** Entry after all appeals have been exhausted of a final judgment or issuance of a final order directed to the CITY as a result of any lawsuit filed against the CITY to set aside, withdraw, or abrogate the approval of the City Council of this Agreement.

**2.4.4** The expiration of the Term as set forth in Section \_\_\_\_\_. To provide notice to all, and not as a condition of the effectiveness of a termination of this Agreement, the Parties agree to execute and record terminations of or releases of this Agreement.

## **2.5 Transfers and Assignments.**

**2.5.1 Right to Transfer or Assign to End User.** The OWNER and any Merchant Builder, shall, with the prior consent of the CITY or any other party, have the right from time to time and on such number of occasions as it chooses, to sell, assign or otherwise transfer any or all individual lots on final maps approved on the Property or any portion thereof, to any End User at any time during the Term of this Agreement. Absent an express written assumption of the obligations or rights hereunder, upon the sale, assignment, or other transfer to an End User of one or more individual lots, this Agreement shall terminate with respect to such lots without the execution or recordation of any further documentation. For purposes of documentation only, the transferor/assignor shall provide CITY with written notice of the name of any End User, that assumed rights or obligations hereunder, together with a description of the assumed rights and obligations.

**2.5.2 Right to Assign to Merchant Builder.** Provided OWNER has previously delivered the security required of that OWNER by Section \_\_\_\_\_ hereof to the CITY, that OWNER shall, without the consent of the CITY or any other party, have the right from time to time and on such number of occasions as it chooses to sell, assign or otherwise transfer its interests in a portion of the Property together with some or all of its rights and obligations under this Agreement with respect to the portion of the Property which is subject to transfer (the "Transferred Property"), to any Merchant Builder at any time during the Term of this Agreement. If the OWNER has not delivered the security required of that OWNER by Section \_\_\_\_\_ hereof to the CITY, any assignment or transfer of the Transferred Property together with some or all of that OWNER's rights, duties, and obligations under this Agreement with respect to the Transferred Property to a Merchant Builder requires the prior written consent of the CITY, which consent shall not be unreasonably withheld or delayed unless the proposed transfer violates City or State housing law or policy or State Housing requirements. Any transfer or assignment must be pursuant to a sale, assignment or other transfer of an interest of such OWNER in a portion of the Property and shall be subject to the following criteria and conditions: (i) the transferor/assignor shall notify the CITY at least twenty (20) days prior to the transfer of the name of the Merchant Builder, together with the corresponding rights and obligations, if any,

being transferred to such Merchant Builder; and (ii) the agreement between the transferor/assignor and Merchant Builder pertaining to such transfer shall provide, and OWNER shall give CITY notice of such provision, which obligations of OWNER under this Agreement the Merchant Builder shall be liable to perform, and acknowledging those obligations OWNER retains.

**2.5.3 Assignment of Rights to Subsequent Owner.** Provided OWNER has previously delivered the security required of that OWNER by Section \_\_\_\_ hereof to the CITY, that OWNER shall, without the consent of the CITY or any other party, have the right from time to time and on such number of occasions as it chooses to sell, assign or otherwise transfer its interests in the Transferred Property together with its rights and obligations under this Agreement as an OWNER with respect to the Transferred Property to another person or entity (“Subsequent Owner”) at any time during the Term of this Agreement. If the OWNER has not delivered the security required of that OWNER by Section \_\_\_\_ hereof to the CITY, any assignment or transfer of the Transferred Property together with its rights and obligations under this Agreement as an OWNER with respect to the Transferred Property to a Subsequent Owner requires the prior written consent of the CITY, which consent shall not be unreasonably withheld or delayed. Any transfer or assignment must be pursuant to a sale, assignment or other transfer of an interest of such OWNER in a portion of the Property and shall be subject to the following criteria and conditions: (i) the transferor/assignor shall notify the CITY at least twenty (20) days prior to the transfer of the name of the Subsequent Owner, together with the corresponding rights and obligations, if any, being transferred to such Subsequent Owner; and (ii) the agreement between the Owner and Subsequent Owner pertaining to such transfer shall provide, and OWNER shall give CITY notice of such provision, which obligations of OWNER under this Agreement the Subsequent Owner shall be liable to perform and acknowledging those obligations OWNER retains. Upon transfer of title to the Transferred Property, the Subsequent Owner will be considered an OWNER for all purposes under this Agreement.

**2.5.4 Security for Transfer.** With respect to the \_\_\_\_\_ Property, prior to transferring or assigning all or a portion of that portion Property without obtaining the prior written consent of the CITY, \_\_\_\_\_ shall post a corporate guarantee as security for the construction of the improvements described in Attachment \_\_\_\_ in an amount equal to the costs attributed the those improvements listed on Attachment \_\_\_\_\_. The amount of the corporate guarantee will be proportionately reduced as the improvements described in Attachment \_\_\_\_\_ are completed.

### **3. Development Provisions.**

#### **3.1 Vesting.**

**3.1.1 Project.** CITY covenants that OWNER has, and OWNER shall have, the right to implement the Development pursuant to the Development Plan Approvals and the Existing Regulations, including, without limitation, specific uses, the intensities identified in Attachment \_\_\_\_\_, building heights, building sizes, lot sizes, infrastructure standards and specifications, densities and types of development provided for in the Specific Plan, and the CITY shall have the right to control the Development in accordance with the Existing

Regulations and the Development Plan Approval(s) (“vested right”). By way of enumeration, and not limitation, the vested rights afforded by this Agreement include those identified in Attachment \_\_\_\_ hereof. Except as otherwise expressly specified in this Agreement, the Development Plan Approval(s) shall control the design and development, and review and approval of all Future Development Approvals and all Off-Site Improvements and appurtenances in connection therewith. Except to the extent it has been amended, canceled, modified, or suspended in accordance with the terms of this Agreement, this Agreement shall be enforceable by OWNER or its assignees notwithstanding any change in any Existing Regulation.

**3.1.2 Limits on Development.** The California Supreme Court held in *Pardee Construction Company v. City of Camarillo*, 37 Cal.3d 465 (1984), that the failure of the Parties to address certain limits on a CITY’s ability to condition, restrict or regulate a development allowed a later adopted initiative to restrict the development. This Agreement cures that deficiency by expressly addressing the timing for the Development, the vested rights afforded by this Agreement and the scope of the CITY’s Reserved Authority. Except as expressly set forth in the Development Plan Approval(s), regardless of any future enactment, by initiative, or otherwise, OWNER shall have the discretion to develop the Development in such order, and at such rate, in one phase or in multiple phases, at such times as OWNER deems appropriate within the exercise of its subjective business judgment. Specifically, the CITY agrees that OWNER shall be entitled to apply for and receive the Future Development Approvals and to develop and use the Property at any time, provided that such application is made and such development occurs in accordance with this Agreement, the other Development Plan Approval(s) and the Existing Regulations. The CITY covenants that no Existing Regulation purports to limit the scope, rate or timing of Development or alter the sequencing of Development in a manner inconsistent with the Development Plan Approval(s). No future amendment of any CITY law, or future adoption of any CITY law or other action, that purports to limit the scope, rate or timing of Development on the Property or alter the sequencing of the Development, in a manner inconsistent with the Development Plan Approval(s), whether adopted or imposed by the City Council or through the initiative or referendum process, shall apply to the Property. In particular, but without limiting any of the foregoing, no numerical restriction shall be placed by CITY on the number of dwellings units or amount of commercial development that may be built in any particular year on any portion of the Property other than as expressly permitted by this Agreement.

### **3.1.3 Entitlements Permits and Approvals – Cooperation.**

**3.1.3.1 Processing.** CITY agrees that it shall accept and expeditiously process, pursuant to CITY’s regular procedures, OWNER’s applications for amendments to this Agreement, amendments to the Development Plan Approval(s) and the Future Development Approvals.

**3.1.3.2 Further Mitigation.** In connection with the issuance of any Future Development Approvals which are subject to review under CEQA, unless required under the California Public Resource Code and the Guidelines promulgated thereunder, the CITY shall not impose any environmental land use project alternatives or mitigation measures on OWNER or the Property beyond those referenced in the Development Plan Approval(s).

**3.1.3.3 Other Permits.** The CITY further agrees to reasonably cooperate with OWNER, at no cost to the CITY, in securing any County, State and Federal permits or authorizations which may be required in connection with Development of the Property. Except as expressly provided for in this Agreement, this cooperation shall not require any economic contribution or similar consideration by the CITY.

**3.1.3.4 Litigation.** The CITY agrees to reasonably cooperate with OWNER in all reasonable manners to keep this Agreement in full force and effect. If any legal action is instituted by a third party or other governmental entity or official challenging the Development Plan Approval(s) or Future Development Approvals, the Parties hereby agree to cooperate in jointly defending such action. Notwithstanding the foregoing OWNER shall be responsible for all of CITY's costs, direct or indirect, in nature, including, but not limited to, attorneys' fees, costs, expert witnesses document production, staff time, and the like. OWNER shall reimburse CITY its costs within thirty (30) calendar days of receipt of any invoice by OWNER.

**3.1.3.5 Acquisition of Off-Site Property.** The CITY shall not postpone or refuse approval of a Future Development Approval because the OWNER or Development Transferee has failed to acquire off-site property required for the construction or installation of Off-Site Improvements. To the extent the CITY, OWNER or a Development Transferee does not have sufficient title or interest to permit the Public Infrastructure Improvements to be made at the time the Future Development Approval is filed with the CITY, the applicable OWNER or Development Transferee shall make a good faith effort to acquire the required property. If the OWNER or Development Transferee is unable to acquire the required property, the CITY shall consider in good faith the acquisition of the required property. If the CITY is unable to acquire the required property by negotiation or condemnation within the time frame provided for in Government Code Section 66462.5, the CITY shall continue to issue Future Development Approvals for the Project despite the fact that the improvement has not been completed. Notwithstanding the above, the CITY's obligation to continue to issue Future Development Approvals as provided for in this Section is contingent upon: (i) the applicable OWNER or Development Transferee submitting the improvement plans required for the improvement to the CITY; and (ii) consistent with Government Code Section 66462.5, the OWNER or Development Transferee entering into a mutually acceptable agreement with the CITY that requires the OWNER or Development Transferee to reimburse the City for the costs incurred in acquiring the land and to construct the improvement at such time as the CITY acquires the required land.

## **3.2 Reserved Authority.**

**3.2.1 Uniform Codes.** This Agreement and especially section 3.1.2, shall not prevent the CITY from applying new uniform construction standards adopted by the State of California as State Codes, such as the Uniform Building Code, National Electrical Code, Uniform Mechanical Code or Uniform Fire Code, as modified by CITY, to the Development, provided those same standards are applied to all other development within the CITY.

**3.2.2 State and Federal Laws and Regulations.** Subject to compliance with the requirements of this Section 3.2.2, the Property may be subject to subsequently enacted state or federal laws or regulations which preempt local regulations, or mandate the adoption of local regulations, and are in conflict with the Development Plan Approval(s). Upon discovery of a subsequently enacted federal or state law meeting the requirements of this Section, CITY or OWNER shall provide the other Parties with written notice of the state or federal law or regulation, provide a copy of the law or regulation, and a written statement of conflicts with the provisions of this Agreement. Promptly thereafter CITY and OWNER shall meet and confer in good faith in a reasonable attempt to determine whether a modification or suspension of this Agreement, in whole or in part, is necessary to comply with such federal or state law or regulation. In such negotiations, CITY and OWNER agree to preserve the terms of this Agreement and the rights of OWNER as derived from this Agreement to the maximum feasible extent while resolving the conflict. CITY agrees to cooperate with OWNER in resolving the conflict in a manner which minimizes any financial impact of the conflict upon OWNER without materially increasing the financial obligations of CITY (from staff, consultants, or any reason) under this Agreement. CITY also agrees to process in a prompt manner OWNER's proposed changes to the Project as may be necessary to comply with such Federal or State law; provided, however, that the approval of such changes by CITY shall be subject to the discretion of CITY, consistent with this Agreement.

**3.2.3 Regulation for Health and Safety.** Nothing in this Agreement shall be construed to be in derogation of CITY's police power to protect the public health and safety from a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate and interim action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services involving the Property or the immediate community ("Exigent Event"). Upon discovery of an Exigent Event, CITY may suspend this Agreement for a period reasonably necessary to analyze, evaluate and develop a response to the Exigent Event. Immediately thereafter, the suspension shall end and CITY shall provide the OWNER with written notice of the existence of the Exigent Event, a detailed explanation of the CITY's proposed action, and a written statement of conflicts with the provisions of this Agreement. Promptly thereafter CITY and OWNER shall meet and confer in good faith in a reasonable attempt to determine whether a modification or suspension of this Agreement, in whole or in part, is necessary to comply with the Exigent Event. In such negotiations, CITY and OWNER agree to attempt to reasonably preserve the terms of this Agreement and the rights of OWNER as derived from this Agreement to the maximum feasible extent while resolving the conflict. CITY agrees to cooperate with OWNER in resolving the conflict in a manner which minimizes any financial impact of the conflict upon OWNER without materially increasing the financial obligations of CITY under this Agreement. CITY also agrees to process in an expedited manner OWNER's proposed changes to the Project as may be necessary to comply with the Exigent Event; provided, however, that the approval of such changes by CITY shall be subject to the discretion of CITY, consistent with this Agreement.

### **3.3 Further Assurances to OWNER Regarding Exercise of Reserved Authority.**

**3.3.1 Assurances to OWNER.** The Parties further acknowledge that the public benefits to be provided by OWNER to the CITY pursuant to this Agreement are in consideration

for and reliance upon assurances that the Property can be developed in accordance with the Development Plan Approval(s) and the Existing Regulations. Accordingly, while recognizing that the Development of the Property may be affected by the exercise of the authority and rights reserved and excepted as provided in Sections 3.1.2 (“Vesting”) and 3.2 (“Reserved Authority”), OWNER is concerned that normally the judiciary extends to local agencies significant deference in the adoption of rules, regulations and policies which might otherwise permit the CITY, in violation of the Reserved Authority, to attempt to apply rules, regulations and policies that are inconsistent with the Development Plan Approval(s). Accordingly, OWNER desires assurances that the CITY shall not, and the CITY agrees that it shall not, further restrict or limit the development of the Property in violation of this Agreement except in strict accordance with the Reserved Authority, which exercising of the Reserved Authority as defined herein shall not be considered to be a violation of this Agreement. CITY agrees that CITY will issue grading, building and occupancy permits if the Development contemplated in the requested permit substantially conforms to the Developing Plan Approval(s), including all relevant conditions of approval, and the Existing Regulations.

**3.3.2 Judicial Review.** Based on the foregoing if OWNER judicially (including by way of a reference proceeding) challenges the application of a future rule, regulation or policy as being in violation of this Agreement and as not being applied in accordance with the Reserved Authority, OWNER shall bear the burden of alleging that such rule, regulation or policy is inconsistent with the Existing Regulations and the Development Plan Approval(s) and the CITY shall thereafter bear the burden of proof in establishing by a preponderance of the evidence that such regulation was adopted pursuant to and in accordance with the Reserved Authority and was not applied by the CITY in violation of this Agreement.

### **3.4 Consistent and Inconsistent Enactments.**

**3.4.1 Assurances to OWNER.** The Parties further acknowledge that the public benefits to be provided by OWNER to the CITY pursuant to this Agreement are in consideration for and reliance upon assurances that the Property can be developed in accordance with the Development Plan Approval(s) and the Existing Regulations. Accordingly, while recognizing that the Development of the Property may be affected by the exercise of the authority and rights reserved and excepted as provided in Sections \_\_\_\_\_ (“Vesting”) and \_\_\_\_\_ (“Reserved Authority”), OWNER is concerned that normally the judiciary extends to local agencies significant deference in the adoption of rules, regulations and policies which might otherwise permit the CITY, in violation of the Reserved Authority, to attempt to apply rules, regulations and policies that are inconsistent with the Development Plan Approval(s). Accordingly, OWNER desires assurances that the CITY shall not, and the CITY agrees that it shall not, further restrict or limit the development of the Property in violation of this Agreement except in strict accordance with the Reserved Authority, which exercising of the Reserved Authority as defined herein shall not be considered to be a violation of this Agreement. CITY agrees that CITY will issue grading, building and occupancy permits if the Development contemplated in the requested permit substantially conforms to the Developing Plan Approval(s), including all relevant conditions of approval, and the Existing Regulations.

**3.4.1.1** Restricts the vested rights described in the Agreement or in any way limits or reduces the rate, timing, scope, intensity, use, density, manner, or sequencing of the Development or otherwise requires any reduction or increase in the number, size, height or square footage of lot(s), structures, buildings or other improvements, modifies the standards and specifications applicable to the infrastructure required for the Development or requires additional dedications, exactions, fees or mitigation other than that provided for in the Agreement;

**3.4.1.2** Is consistent with Section 3.2 hereof, but is not uniformly applied by the CITY to all substantially similar development within the CITY; or

**3.4.1.3** Imposes a new permit requirement or procedure not already part of the Existing Regulations.

**3.4.2 Consistent Enactments.** By way of enumeration and not limitation, the following types of enactments shall be considered consistent with this Agreement and Existing Regulations and not in conflict:

**3.4.2.1** Transfers of units or permitted uses within the Property;

**3.4.2.2** Changes in the phasing of the Development pursuant to an application from OWNER and as approved by the CITY; and

**3.4.2.3** Any enactment authorized by this Agreement.

**3.4.3 Consistency Between This Agreement, the Development Plan Approval(s), and Existing Regulations.** To the extent a conflict exists or develops between the Existing Regulations and the Development Plan Approval(s), the Development Plan Approval(s) shall be controlling. To the extent a conflict exists or develops between the combination of this Agreement and the Existing Regulations and any other Development Plan Approval(s), this Agreement shall be controlling.

### **3.5 Amendment of Development Agreement.**

**3.5.1 Initiation of Amendment.** Either CITY or OWNER may propose an amendment to this Agreement. CITY acknowledges that it shall not initiate an amendment of this Agreement with respect to the Development of the Property. \_\_\_\_\_ acknowledges that it shall not initiate an amendment of this Agreement with respect to the Development of the Property. No Development Transferee assigned the rights, duties, and obligations of an OWNER pursuant to Section \_\_\_\_\_ shall have the right to initiate an amendment with respect to any property other than the portion of the Property owned by that Development Transferee. Both CITY and OWNER agree that it may be beneficial to enter into an amendment of this Agreement in connection with the implementation of the separate components of the Project. Neither an End User, a Merchant Builder nor a Development Transferee shall have the right to initiate an amendment of this Agreement without the written consent of the OWNER. An operating memorandum, as defined below, is not an amendment of this Agreement.

**3.5.2 Changes Requiring an Amendment.** Unless otherwise required by law, neither an amendment to the Development Plan Approval(s) or the approval of a Future Development Approval shall require an amendment of this Agreement unless the amendment:

**3.5.2.1** Materially alters the permitted uses of the Property in a manner inconsistent with the procedures established in the Specific Plan;

**3.5.2.2** Increases the density or intensity of use of the Property as a whole in a manner inconsistent with the procedures established in the Specific Plan; or

**3.5.2.3** Increases the maximum height and size of permitted buildings. Notwithstanding anything to the contrary herein, an amendment of this Agreement is not required if OWNER pursues entitlements, permits or approvals pursuant to a waiver of vested rights as provided for in Section \_\_\_\_\_.

**3.5.1 Procedure.** Except as set forth in Section \_\_\_\_\_ below, the procedure for proposing and adopting an amendment to this Agreement shall be the same as the procedure required for entering into this Agreement in the first instance.

**3.5.2 Consent.** Any amendment to this Agreement shall require the written consent of both the CITY and the OWNER whose portion of the Property would be materially affected by the amendment. No amendment to all or any provision of this Agreement shall be effective unless set forth in writing, signed by duly authorized representatives of the CITY and the applicable OWNER, and adopted pursuant to legal requirements imposed on CITY. An amendment of this Agreement does not require the consent of an End User, Merchant Builder or Development Transferee. To the extent the consent of the OWNER that did not initiate the amendment is necessary, that OWNER shall not unreasonably withhold its consent. Notwithstanding the above, that OWNER shall consent to the amendment on or before the thirtieth (30<sup>th</sup>) day after receipt of notice of the initiation of the amendment if, as determined in that OWNER's reasonable business judgment, that proposed amendment will not have a material adverse impact on the Development of that OWNER's portion of the Property.

**3.5.3 Operating Memoranda.** The Parties acknowledge that practical and technical refinements and further development of the Project may demonstrate that changes are appropriate with respect to the details and performance of the Parties under this Agreement. The Parties desire to retain a certain degree of flexibility with respect to the details of the Development Plan and with respect to those items covered in general terms under this Agreement. If and when the City and an Owner or Owners mutually find that changes, adjustments, or clarifications are appropriate to further the intended purposes of this Agreement, and such are not materially inconsistent with the Development Plan Approval(s), they may, unless otherwise required by law, effectuate such changes, adjustments, or clarifications without amendment to this Agreement through one or more operating memoranda mutually approved by the City Manager, or designee, on behalf of the CITY and by any corporate officer or other person designated for such purpose in a writing signed by a corporate officer on behalf of that respective OWNER, which, after execution, shall be attached hereto as addenda and become a part hereof. Unless otherwise required by law or by the Development Plan Approval(s), no such

changes, adjustments, or clarifications shall require prior notice or hearing, public or otherwise. Nothing herein shall authorize the delegation of authority to the City Manager, or designee, contrary to California or Federal Law.

**3.6 Future Amendments to Development Plan Approval(s).** The following rules apply to future amendments to the Development Plan Approval(s), except that Section \_\_\_\_ shall control with respect to an amendment of this Agreement and Section \_\_\_\_ shall control with respect to Future Development Approvals:

**3.6.1 OWNER's Written Consent.** It is contemplated by the Parties that mutually agreed upon amendments to the Development Plan Approval(s) may be necessary. Any amendments to the Development Plan Approval(s) to which OWNER does not agree in writing shall not apply to the Property or the Project while this Agreement is in effect.

**3.6.2 Concurrent Development Agreement Amendment.** Any other Development Plan amendment requiring amendment of this Agreement, as provided for in Section \_\_\_\_ hereof, shall be processed concurrently with an amendment to this Agreement in the manner required by law.

**3.6.3 Effect of Amendment.** Except as expressly set forth within this Agreement, an amendment of the other Development Plan Approval(s) will not alter, affect, impair, or otherwise impact the rights, duties, and obligations of the Parties under this Agreement. To the extent an amendment to the Development Plan Approval(s) is approved in accordance with Section \_\_\_\_\_, the amendment shall constitute for all purposes a Development Plan Approval and shall be treated as if it were in existence on the Agreement Date.

**3.7 Future Development Approvals.**

**3.7.1 Exercise of CITY Discretion.** In connection with Future Development Approval or any other actions which the CITY is expressly permitted to make under this Agreement relating to the Project, the CITY shall exercise its discretion or take action in a manner which complies and is consistent with the Development Plan Approval(s) and the Existing Regulations.

**3.7.2 Concurrent Development Agreement Amendment.** Any Future Development Approval requiring amendment of this Agreement, as provided for in Section \_\_\_\_ hereof, shall be processed concurrently with an amendment to this Agreement.

**3.7.3 Effect of Future Development Approvals.** Except as expressly set forth within this Section \_\_\_\_, a Future Development Approval will not alter, affect, impair, or otherwise impact the rights, duties, and obligations of the Parties under this Agreement. To the extent a Future Development Approval is approved in accordance with Sections \_\_\_\_ and \_\_\_\_, the Future Development Approval shall constitute for all purposes a Development Plan Approval and shall be treated as if it were in existence on the Agreement Date.

**4. Obligations of the Parties.**

**4.1 Benefits to CITY.** The direct and indirect benefits the CITY (including, without limitation the existing and future residents of the CITY who are not deemed third party beneficiaries to this Agreement) will receive from the approval of the Development Plan Approval(s) generally include, but are not limited to, the items identified below. Nothing in the Development Plan Approval(s) or otherwise obligate OWNERS to construct the Development or any part thereof. OWNER further reserves the right to waive, in whole or in part, the vested rights afforded by the Development Plan Approval(s), and pursue entitlements, permits or approvals other than those provided for in the Development Plan Approval(s).

**4.1.1 Growth Management.** The City agrees that the Project conforms to the CITY's policy to require development provide beneficial and managed growth through the use of, among other things, comprehensive planning and design, project-wide continuity of landscaping and architectural design, design standards and layout concepts and amenities exceeding the CITY's standards for residential development, and the housing needs of the CITY.

**4.1.2 Schools.** \_\_\_\_\_.

**4.1.3 Parks and Recreation.** The public parks and other recreational facilities to be dedicated and/or constructed as provided for in this Section \_\_\_\_ satisfy the CITY's requirements for open space and parks, and contribute to meeting the need for open space and parks in the area, including, without limitation, the 16.5 acre Community Park, and Winchester Creek Park.

**4.1.4 Project Benefits.** In addition to the above benefits, the Project will provide those benefits identified in Attachment \_\_\_\_ hereof.

**4.2 Development Fees.**

**4.2.1 Fee Rates.** The CITY hereby agrees that neither the Property OWNER, Transferee, Merchant Builder, End User nor, except as provided hereunder, the Development shall be subject to any revised fees or charges, including, without limitation, Development Impact Fees, except as provided in 4.2.2, that the CITY may enact, adopt, or impose on or after the Agreement Date; provided that OWNER may elect to have the Development governed by fee rates made available to other owners and developers within the CITY after the Agreement Date.

**4.2.2 Processing and Application Fees.** OWNER shall pay the application a mid-processing fees customarily imposed on the type of entitlement sought at the rate, and in the amount, imposed by CITY pursuant to the fee schedule, resolution or ordinance applicable to all projects in the CITY and in effect at the time the application is deemed complete and accepted by CITY for action.

**4.2.3 Fees for the \_\_\_\_\_ Property.** Except as expressly modified in this Agreement, the presently adopted Development Impact Fees as charged by the CITY on the Agreement Date shall be imposed upon \_\_\_\_\_ Development at the rate in effect as of the Agreement Date. The Development Impact Fees imposed on the \_\_\_\_\_ Development are

not subject to upward adjustment. DIF payments shall be made at the time of the issuance of building permits.

**4.2.3.1 Fire Protection Facilities Fee for the \_\_\_\_\_ Property.** Upon the issuance of a building permit for a dwelling unit or commercial structure within the \_\_\_\_\_ Development, the \_\_\_\_\_ Development shall pay the Fire Protection Facilities Component of the DIF at the rate specified for that building permit in the DIF Ordinance in effect on the Agreement Date. \_\_\_\_\_ agrees to pay to the CITY an additional Fire Protection Facility fee of One Hundred Fifty Thousand Dollars (\$150,000) prior to the issuance of the first (1st) residential building permit for a dwelling unit other than a model home. CITY agrees to dedicate this additional fee to Fire Protection Facilities and equipment that service the \_\_\_\_\_ Development.

**4.2.3.2 Credit for Other Development Impact Fees for the \_\_\_\_\_ Property.** CITY shall credit \_\_\_\_\_ for the following DIF components and consider the \_\_\_\_\_ Development's obligation with respect to those DIF components to be paid in full.

**4.2.3.2.1 Park and Recreation Fee Component.** CITY acknowledges that \_\_\_\_\_ will construct park and recreation improvements that satisfy the \_\_\_\_\_ Development's obligation with respect to Park and Recreation Fee Component of the DIF. CITY agrees that one hundred percent (100%) of the \_\_\_\_\_ Development's obligation with respect to the Park and Recreation Fee Component of the DIF shall be credited to \_\_\_\_\_ upon CITY's acceptance of the park and recreation improvements \_\_\_\_\_ is required to design, construct and deliver to CITY. Notwithstanding the foregoing, \_\_\_\_\_ shall not be required to pay this component of the DIF, or a portion thereof, unless and until the CITY determines that \_\_\_\_\_: (i) is in default as to its obligation to design, construct and deliver a required park and recreation improvements pursuant to this Agreement; and (ii) has not designed, constructed or financed other improvements which the City and \_\_\_\_\_ agree entitle \_\_\_\_\_ to credit in an amount at least equal to the amount of the component of the DIF at issue.

**4.2.3.2.2 Street Improvement Fee Component.** CITY acknowledges that \_\_\_\_\_ has or shall construct or finance, street improvements at a cost in excess of the \_\_\_\_\_ Development's obligation with respect to the Street Improvements Component of the DIF. CITY agrees that one hundred percent (100%) of the \_\_\_\_\_ Development's obligation with respect to the Street Improvement Component of the DIF shall be credited to \_\_\_\_\_ upon CITY's acceptance of the Public Infrastructure Improvements. The Public Infrastructure Improvements and an estimate of the amount of credits due are described on Attachment \_\_\_\_\_. Notwithstanding the foregoing \_\_\_\_\_ shall not be required to pay this component, or a portion thereof, of the DIF unless and until the CITY determines that \_\_\_\_\_: (i) is in default as to the obligation to complete the Public Infrastructure Improvements pursuant to this Agreement; and (ii) has not designed, constructed or financed other street improvements for which \_\_\_\_\_ would be entitled to credit in an amount at least equal to the amount of the component of the DIF at issue.

**4.2.3.2.3 Traffic Signal Fee Components.** CITY acknowledges that \_\_\_\_\_ has constructed or financed, and that \_\_\_\_\_ will construct or finance, traffic signal related improvements in an amount in excess of the \_\_\_\_\_ Development's obligation with respect to the Traffic Signal Fee Component of the DIF. CITY agrees that one hundred percent (100%) of the \_\_\_\_\_ Development's obligation with respect to the Traffic Signal Component of the DIF shall be credited to \_\_\_\_\_ upon CITY's acceptance of the Public Infrastructure Improvements. Notwithstanding the foregoing \_\_\_\_\_ shall not be required to pay this component of the DIF, or a portion thereof, unless and until the CITY determines \_\_\_\_\_: (i) is in default as to the obligation to complete the Public Infrastructure Improvements pursuant to this Agreement; and (ii) has not designed, constructed or financed other improvements for which \_\_\_\_\_ would be entitled to credit in an amount at least equal to the amount of the component of the DIF at issue. The Public Infrastructure Improvements and an estimate of the amount of credits due are described in Attachment \_\_\_\_.

**4.2.4 Fees Applicable to the Property.**

**4.2.4.1 Development Impact Fees Subject to Full Credit; Limitation.**

\_\_\_\_\_ shall, upon delivery to the City of the Grant Deed referenced in Section \_\_\_\_\_, receive full credit for the Development Impact Fees set forth hereunder. In the Event the Grant Deed is not delivered pursuant to this Agreement, the Development Impact Fees identified in this Section \_\_\_\_\_ shall be due and payable by Winchester at the time of application for building permits in the amount the City has imposed.

<u>Component</u>	<u>Type of Land Use</u>	<u>Credit</u>
Street System Improvements	Office	
	Retail Commercial	
	Service Commercial	
	Business Park/Industrial	
Traffic Signals and Traffic Control Systems	Office	
	Retail Commercial	
	Service Commercial	
	Business Park/Industrial	

**4.2.4.2 Development Impact Fees \_\_\_\_\_ Must Pay.**

\_\_\_\_\_ shall pay, at the time of application for building permits, the fee amount then in effect, subject to the following maximum amounts:

Current Fees	Proposed Maximum Fees

<u>Component</u>	<u>Type of Land Use</u>	<u>(1)</u>	<u>(2)</u>
Corporate Facilities	Office		
	Retail Commercial		
	Service Commercial		
	Business Park/Industrial		
Fire Protection Facilities	Office		
	Retail Commercial		
	Service Commercial		
	Business Park/Industrial		

These payable Development Impact Fees are to be assessed on \_\_\_\_\_'s nonresidential development by multiplying the square foot based fee by the square footage comprising the gross building area of the structure for which a building permit is sought.

**4.2.4.3 Development Impact Fees; Land Use Based Exemptions.**

Winchester is not required to pay the Development Impact Fees set forth hereunder so long as no residential development occurs on the \_\_\_\_\_ Property. In the event residential development does occur, \_\_\_\_\_ shall pay the amount then due at the time of building application.

Improvements	Park and Recreation	Office
	Retail Commercial	
	Service Commercial	
	Business Park/Industrial	
Libraries	Office	
	Retail Commercial	
	Service Commercial	
	Business Park/Industrial]	

**4.3 Related Real Property Conveyances: Conditions to Development Agreement.**

**4.3.1 Intent of the Parties.** The CITY and OWNER agree that the entitlements, vesting and other rights that will allow OWNER to develop the Project in accordance with the Development Plan Approval(s), along with the timely completion and performance of the real estate transactions and the related agreements described hereafter are a material component of the consideration each party has relied upon in its respective decision to enter into this Agreement. OWNER and the CITY, individually and collectively, represent that neither party would have entered into this Agreement but for these commitments. Termination of this Agreement terminates the obligation of the applicable party to perform with respect to those items discussed in Sections \_\_\_\_\_.

**4.3.2 Community Park.** In consideration of the CITY's performance pursuant to the terms of this Agreement, \_\_\_\_\_ has agreed to design and construct \_\_\_\_\_ acre community park in the approximate location depicted in the Specific Plan ("Community Park"). The following describes \_\_\_\_\_'s and the CITY's rights and obligations with respect to the Community Park.

**4.3.2.1** All real property shall be conveyed as provided for in Section \_\_\_\_\_ shall demonstrate the condition of title pursuant to a CLTA title insurance policy, in amount equal to the fair market value of the land.

**4.3.2.2** Prior to the issuance of the first building permit in Phase II, as such phase is identified in the Specific Plan, \_\_\_\_\_ agrees to construct, complete the 90-day maintenance period to the satisfaction of the Director of Community Services and dedicate fee title to the Community Park.

**4.3.2.3** \_\_\_\_\_ shall work with the City to design the Community Park site to the reasonable satisfaction of the Director of Community Services and consistent with the requirements of Section \_\_\_\_\_ of the Specific Plan.

**4.3.2.4** CITY and \_\_\_\_\_ agree to cooperate on the design of the Community Park. Conceptual plans for the Community Park are incorporated into the Specific Plan. \_\_\_\_\_ shall prepare schematic plans for the Community Park and submit the same for review and approval by the CITY. Following approval of the schematic plans, \_\_\_\_\_ shall prepare construction plans and submit the same for review and approval b/ the CITY.

**4.3.2.5** Notwithstanding anything to the contrary herein, CITY shall continue to issue building and occupancy permits for residential units within the \_\_\_\_\_ Property even if the total number of building permits exceeds the threshold established in Section \_\_\_\_\_ if; (i) the CITY fails to act on the plans in a reasonable time frame; or (ii) an event described in Sections \_\_\_\_\_ or \_\_\_\_\_ occurs, including, without limitation, the failure to determine the final and permanent alignment of \_\_\_\_\_ Road, and \_\_\_\_\_ CITY determine in their reasonable discretion that the event will cause, or has caused, \_\_\_\_\_ to not be able to substantially complete the Community Park improvements (including the 90 day maintenance period) within the time frame provided for in Section \_\_\_\_\_.

**4.4 Development Agreement Fee.** A routine term negotiated by CITY as consideration for entering into a development agreement, is a development agreement fee. Tie CITY agrees that the OWNER and the Project will not have to pay a development agreement fee of any kind because \_\_\_\_\_ has agreed to put up the security required by Section \_\_\_\_\_.

**4.5 Public Art, Open Space and Habitat Preservation.** In consideration of CITY's performance pursuant to the terms of this Agreement, \_\_\_\_\_ agrees to pay a fee of Two Hundred Dollars (\$200) per dwelling unit which the CITY agrees to use for public art, open space and habitat preservation programs. The fee will be paid upon the issuance of a building permit for a dwelling unit. The CITY agrees to use all proceeds of the fee it designates as being the public art component of the fee paid pursuant to this Section on projects located within the

\_\_\_\_\_ Property. The CITY shall consult with, but shall not be bound by the response of, the \_\_\_\_\_ or its designee on the use of the fees collected for public art. CITY agrees that a public art, open space and habitat preservation fee will not be imposed against the commercial components of the Project.

**4.6 Public Recreation Amenities.** In accordance with the approvals, it is required to design and construct a \_\_\_\_\_ for public and private use. These amenities are provided in addition to other required public and private recreation features required by the Specific Plan.

**5. Indemnification.** Except to the extent of the active negligence or willful misconduct of the Indemnified Parties (as defined below), \_\_\_\_\_, with respect to the portion of the \_\_\_\_\_ Property owned by \_\_\_\_\_, \_\_\_\_\_ with respect to the portion of the \_\_\_\_\_ Property owned by \_\_\_\_\_, and the Development Transferee, with respect to the portion of the Property transferred to that Development Transferee, agree that during the Term of this Agreement, to defend the CITY and its agents, officers, contractors, attorney, and employees (the “Indemnified Parties”) from and against any claims or proceeding against the Indemnified Parties to set aside, void or annul the approval of this Agreement. \_\_\_\_\_, \_\_\_\_\_ and Development Transferee may be individually referred to herein as “Indemnifying Party” and collectively as “Indemnifying Parties”. Each Indemnifying Party shall retain settlement authority with respect to any matter concerning that Indemnifying Party provided that prior to settling any such lawsuit or claim with respect that Indemnifying Party, the Indemnifying Party shall provide the CITY and the other Indemnifying Parties with a minimum ten (10) business days written notice of its intent to settle such lawsuit or claim. If the CITY or the other Indemnifying Parties, in their reasonable discretion, do not desire to settle such lawsuit or claim, it may notify the applicable Indemnifying Party of the same, in which event the applicable Indemnifying Party may still elect to settle the lawsuit or claim as to itself, but the non-settling Parties may elect to continue such lawsuit, at their cost and expense, so long as: (i) with respect to the CITY, the CITY’s decision is predicated upon a legitimate and articulated threat to either the exercise of its police powers or a risk of harm to those present within the CITY; or (ii) with respect to the other Indemnifying Parties, the decision is predicated upon a legitimate and articulated threat to the Development of that Indemnifying Party’s property.

**6. Relationship of Parties.** OWNER is not the agent or employee of the CITY. The CITY and OWNER hereby renounce the existence of any form of joint venture or partnership between them, and agree that nothing contained in this Agreement or in any document executed in connection with the Project shall be construed as making the CITY and OWNER joint ventures or partners.

**7. Periodic Review of Compliance with Agreement.**

**7.1 Periodic Review.** The CITY and OWNER shall review this Agreement once every 12-month period from the Effective Date until the Agreement terminates. The CITY shall notify OWNER in writing of the date for review at least thirty (30) days prior thereto.

**7.2 Good Faith Compliance.** During each periodic review, OWNER shall be required to demonstrate good faith compliance with all material terms of this Agreement. The Parties recognize that this Agreement and the documents incorporated herein could be deemed to contain hundreds of requirements and that evidence of each and every requirement would be a wasteful exercise of the Parties' resources. Accordingly, OWNER shall be deemed to have satisfied its good faith compliance when it presents evidence of substantial compliance with the material provisions of this Agreement. Generalized evidence or statements of compliance shall be accepted in the absence of any evidence that such evidence is untrue.

**7.3 Failure to Conduct Annual Review.** The failure of the CITY to conduct the annual review shall not constitute or be asserted by OWNER or CITY as a breach of this Agreement.

**7.4 Initiation of Review by City Council.** In addition to the annual review, the City Council may at any time initiate a review of this Agreement by giving written notice to OWNER. The Notice must describe in detail the specific issues which caused the CITY to question OWNER'S good faith compliance and the evidence the CITY believes is necessary for the review. Within thirty (30) days following receipt of such notice, OWNER shall submit evidence to the CITY Council of OWNER's good faith compliance with this Agreement and such review and determination shall proceed in the same manner as provided for the annual review. The City Council shall initiate its review pursuant to this Section \_\_\_\_\_ only if it has probable cause to believe the CITY's general health, safety or welfare is at risk as a result of specific acts or failures to act by OWNER in violation of this Agreement.

**7.5 Administration of Agreement.** Any final decision by the CITY staff concerning the interpretation and administration of this Agreement and Development of the Property in accordance herewith may be appealed by OWNER first to the Planning Commission and thereafter to the City Council, provided that any such appeal shall be filed with the City Clerk within thirty (30) days after OWNER receives written notice that the staff decision is final all as pursuant to routine planning appeal procedures. The City Council shall render, at a noticed public hearing, its decision to affirm, reverse or modify the staff decision within thirty (30) days after the appeal was filed.

**7.6 Availability of Documents.** If requested and reimbursed for all costs, by OWNER, the CITY agrees to provide to OWNER copies of any documents, reports or other items reviewed, accumulated or prepared by or for the CITY in connection with any periodic compliance review by the CITY, provided OWNER reimburses the CITY for all reasonable and direct costs and fees incurred by the CITY in copying the same. The CITY shall respond to OWNER's request on or before ten (10) business days have elapsed from the CITY's receipt of such request.

**8. Events of Default: Remedies and Termination.** Unless amended as provided in Section \_\_\_\_\_, or modified or suspended pursuant to Section \_\_\_\_\_ or terminated pursuant to this Section \_\_\_\_\_, this Agreement is enforceable by CITY, OWNER or express assignee under Section \_\_\_\_\_ hereto.

**8.1 Defaults by OWNER.** If, after following the procedures established in Section \_\_\_\_ hereof, the CITY determines on the basis of a preponderance of the evidence that \_\_\_\_\_ or \_\_\_\_\_ or a Development Transferee has not complied in good faith with the material terms and conditions of this Agreement, the CITY shall, by written notice to \_\_\_\_\_, \_\_\_\_\_, and the applicable Development Transferee, specify the manner in which the allegedly defaulting party has failed to so comply and state the steps the allegedly defaulting party must take to bring itself into compliance. If, within thirty (30) days after the effective date of notice from the CITY specifying the manner in which the allegedly defaulting party has failed to so comply, the allegedly defaulting party does not commence all steps reasonably necessary to bring itself into compliance and thereafter diligently pursue such steps to completion, then the allegedly defaulting party shall be deemed to be in default under the terms of this Agreement and the CITY may terminate this Agreement with respect solely to the allegedly defaulting party's property pursuant to Government Code Section 65865.1 or may seek specific performance as set forth in Section \_\_\_\_\_.

**8.2 Defaults by CITY.** If OWNER determines on the basis of a preponderance of the evidence that the CITY has not complied in good faith with the terms and conditions of this Agreement, OWNER shall, by written notice to the CITY, specify the manner in which the CITY has failed to so comply and state the steps the CITY must take to bring itself into compliance. If, within sixty (60) days after the effective date of notice from OWNER specifying the manner in which the CITY has failed to so comply, the CITY does not commence all steps reasonably necessary to bring itself into compliance as required and thereafter diligently pursue such steps to completion, then the CITY shall be deemed to be in default under the terms of this Agreement and OWNER may terminate this Agreement and, in addition, may pursue any other remedy available at law or equity, including specific performance as set forth in Section \_\_\_\_\_.

**8.3 Specific Performance Remedy.** Due to the size, nature, and scope of the Project, it may not be practical or possible to restore the Property to its natural condition once implementation of this Agreement has begun. After such implementation, OWNER may be foreclosed from other choices it may have had to utilize the Property and provide for other benefits. CITY and OWNER has already invested significant time and resources and performed extensive planning and processing of the Project in agreeing to the terms of this Agreement and will be investing even more significant time and resources in implementing the Project in reliance upon the terms of this Agreement, and it may not be possible to determine the sum of money which would adequately compensate OWNER for such efforts. For the above reasons, the CITY and OWNER agree that damages may not be an adequate remedy if the CITY or OWNER fails to carry out its obligations under this Agreement and that CITY or OWNER shall have the right to seek and obtain specific performance as a remedy for any breach of this Agreement. Notwithstanding the foregoing, if the CITY is authorized by Section \_\_\_\_ to withhold an approval or permit upon a specified condition being satisfied by \_\_\_\_\_, \_\_\_\_\_ or a Development Transferee in the future, and if \_\_\_\_\_, \_\_\_\_\_ or a Development Transferee then fails to satisfy such condition, the CITY may be entitled to specific performance for the sole purpose of causing that nonperforming party, and only that nonperforming party, or any other party with an express obligation under the Agreement to so perform the condition, to satisfy such condition as a condition of granting the approval or issuing the permit. The CITY's right to specific performance shall be limited to those circumstances set forth above, and the

CITY s-rail have no right to seek specific performance to cause OWNER or a Development Transferee to otherwise proceed with the Development of the Project in any manner. Notwithstanding the above, to the extent Attachment \_\_\_\_ requires the completion and acceptance of an infrastructure improvement specified in Attachment \_\_\_\_ prior to the issuance of a particular Future Development Approval, and OWNER requests that the CITY approve the Future Development Approval, the CITY may seek specific performance of the construction of that infrastructure improvement as a condition of issuance of that Future Development Approval.

**8.4 Institution of Legal Action.** Any legal action hereunder shall be heard by a reference from the \_\_\_\_\_ County Superior Court pursuant to the reference procedures of the California Code of Civil Procedure Sections 638, et seq. OWNER and the CITY shall agree upon a single referee who shall then try all issues, whether of fact or law, and report a finding and judgment thereon and issue all legal and equitable relief appropriate under the circumstances of the controversy before him. If OWNER and the CITY are unable to agree on a referee within ten (10) days of a written request to do so by either party hereto, either party may seek to have one appointed pursuant to the California Code of Civil Procedure Section 640. The cost of such proceeding shall initially be borne equally by the Parties. Any referee selected pursuant to this Section \_\_\_\_\_ shall be considered a temporary judge appointed pursuant to Article 6, Section 21 of the California Constitution.

**8.4.1 Effect of Noncompliance.** Notwithstanding the foregoing, to the extent the Development Plan Approval(s) expressly provide(s) that Development of the Project or a portion thereof is directly dependent upon the performance of material obligations assumed by a Development Transferee and/or OWNER, which material obligations have not been performed, the CITY may, in its reasonable discretion, withhold any approvals, including, without limitation, certificates of occupancy, with respect to those directly dependent portions of the Project from OWNER and/or the Development Transferee until such obligations have been substantially performed. CITY agrees that CITY will not withhold approvals if the OWNER or the Development Transferee provides security for the provision of Public Infrastructure Improvements.

**8.4.1.1 Non-Compliance by Development Transferee.** From and after the assumption of obligations under this Agreement by a Development Transferee pursuant to Section \_\_\_\_\_, noncompliance by any such Development Transferee with a material term and condition of this Agreement assumed by such Development Transferee shall entitle CITY to pursue any and all of its rights under this Agreement against such Development Transferee. Such noncompliance by Development Transferee shall not be deemed a default or grounds for termination hereof with respect to, or constitute cause for CITY to initiate enforcement action against or withhold any approvals from, OWNER or other persons then owning or holding an interest in the property or any portion of the Property, regardless of the ownership.

**8.4.1.2 Noncompliance by \_\_\_\_\_.** Noncompliance by \_\_\_\_\_ with respect to any material term and condition of this Agreement assumed by \_\_\_\_\_ shall entitle CITY to pursue any and all of its rights under this Agreement against \_\_\_\_\_. Such noncompliance by \_\_\_\_\_ shall not be deemed a default, grounds for specific performance or grounds for termination hereof with respect to, or constitute cause for

CITY to initiate enforcement action against or withhold any approvals from a Development Transferee, Winchester or other persons then owning or holding interest in the 1-A or any portion of the Property, regardless of ownership.

**8.4.1.3 Noncompliance by \_\_\_\_\_.** Noncompliance by \_\_\_\_\_ with respect to any material term and condition of this Agreement assumed by \_\_\_\_\_ shall entitle CITY to pursue any and all of its rights under this Agreement against Winchester, but, such noncompliance by \_\_\_\_\_ shall not be deemed a default, grounds for specific performance or grounds for termination hereof with respect to, or constitute cause for CITY to initiate enforcement action against or withhold any approvals from a Development Transferee.

**8.5 Estoppel Certificates.** A party may at any time deliver written notice to the other party requesting an estoppel certificate (the “Estoppel Certificate”). A party receiving a request for an Estoppel Certificate shall provide a signed certificate to the requesting party within thirty (30) days after receipt of the request. The City Manager or any person designated by the City Manager may sign Estoppel Certificates on behalf of the CITY. Any officer or member of a private party may sign on behalf of that party. An Estoppel Certificate is intended to be relied on by assignees and mortgagees. If that one party requests an Estoppel Certificate from the other, the requesting party shall reimburse the other party for all reasonable and direct costs and fees incurred by such party with respect thereto. The Estoppel Certificate shall address issues such as whether:

**8.5.1** The Agreement is in full force and effect and is a binding obligation of the Parties.

**8.5.2** The Agreement has been amended or modified either orally or in writing and, if so amended, identifying the amendments.

**8.5.3** A default in the performance of the requesting party’s obligations under the Agreement exists and, if a default does exist, the nature and amount of any default.

**9. Waivers and Delays.**

**9.1 No Waiver.** Failure by a party to insist upon the strict performance of any of the provisions of this Agreement by the other party, and failure by a party to exercise its rights upon a default by the other party hereto, shall not constitute a waiver of such party’s right to demand strict compliance by such other party in the future.

**9.2 Third Parties.** Non-performance shall not be excused because of a failure of a third person, except as provided in Sections \_\_\_\_\_ or \_\_\_\_\_.

**9.3 Force Majeure.** A party shall not be deemed to be in default where failure or delay in performance of any of its obligations under this Agreement is caused by floods, earthquakes, other Acts of God, fires, wars, riots or similar hostilities, strikes and other labor difficulties beyond that party’s control, action or inaction by the CITY, other governmental bodies or public utilities other than those related to the normal and customary processing of

Future Development Approvals or any modifications to the Development Plan Approval(s), judicial decisions, litigation regarding the Development Plan Approval(s) or Future Development Approvals or other similar events. To the extent applicable to the Project and Property pursuant to Section \_\_\_\_ hereof, government regulations (including, without limitation, local, state and federal environmental and natural resource regulations), voter initiative or referenda or moratoria (including, without limitation, any “development moratorium” as that term is applied in Government Code Section 66452.6) constitute force majeure events.

**9.4 Extensions.** The Term of this Agreement and the time for performance by a party of any of its obligations hereunder or pursuant to the other Development Plan Approval(s) shall be extended by the actual period of time that any of the events described in Section \_\_\_\_ exist and/or prevent performance of such obligations. Notwithstanding anything to the contrary herein, the performance by CITY of its obligations shall not be delayed or extended by the action or inaction of the CITY.

**9.5 Notice of Delay.** OWNER or CITY shall give notice to the other party of any delay which OWNER or CITY anticipates or believes to have occurred as a result of the occurrence of any of the events described in Sections \_\_\_\_ or \_\_\_\_\_. In no event, however, shall notice of a delay of any length be given later than thirty days after the end of the delay or ten (10) days before the end of the Term (unless the cause of the delay arises during if at time), whichever comes first.

**10. Notices.** All notices required or provided for under this Agreement shall be in writing and delivered in person, sent by certified mail, postage prepaid, return receipt requested or by Federal Express or other similar nationwide overnight delivery service. Notices required to be given to the CITY shall be addressed as follows:

City of Fountain Valley  
10200 Slater Avenue  
Fountain Valley, CA 92708

Attention: \_\_\_\_\_

With a copy to:

Attention:

Notices required to be given to  
OWNER shall be addressed as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Attention: \_\_\_\_\_

With a copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attention: \_\_\_\_\_

Any notice given as required by Section \_\_\_\_ shall be deemed given only if in writing and upon delivery as provided for in this Section \_\_\_\_\_. A party may change its address for notices by giving notice in writing to the other party as required by this Section \_\_\_\_\_ and thereafter notices shall be addressed and transmitted to the new address.

**11. Attorneys' Fees.** If legal action is brought by any party against another for breach of this Agreement, including actions derivative from the performance of this Agreement, or to compel performance under this Agreement, the prevailing party shall be entitled to an award of its costs, including reasonable attorneys' fees, and shall also be entitled to recover its contribution for the costs of the referee referred to in Section \_\_\_\_\_ above as an item of damage and/or recoverable costs.

**12. Recording.** This Agreement and any amendment or cancellation hereto shall be recorded, at no cost to the CITY, in the Official Records of \_\_\_\_\_ County by the City Clerk within the period required by Section 65868.5 of the Government Code.

**13. Effect of Agreement on Title.**

**13.1 Effect on Title.** OWNER and the CITY agree that this Agreement shall not continue as an encumbrance against any portion of the Property as to which this Agreement has terminated or released.

**13.2 Encumbrances and Lenders' Rights.** The mortgagee of a mortgage or beneficiary of a deed of trust encumbering the Property, or any part thereof, and their successors and assigns shall, upon written request to CITY, be entitled to receive from CITY written notification of any default by OWNER of the performance of OWNER's obligations under the Agreement which has not been cured within the time frame established in Section \_\_\_\_ hereof.

**13.2.1** Notwithstanding OWNER's default, this Agreement shall not be terminated by CITY as to any mortgagee or beneficiary to whom notice is to be given and to which either or the following is true:

(i) the mortgagee or beneficiary cures any default by OWNER involving the payment of money within ninety (90) days after receipt from CITY of the written notice of default.

(ii) as to defaults requiring title or possession of the Property or any portion thereof to effectuate a cure: (a) the mortgagee/beneficiary agrees in writing, within ninety (90) days after receipt from CITY of the written notice of default, to perform the proportionate share of OWNER's obligations under this Agreement allocable to that part of the Property in which the mortgagee/beneficiary has an interest conditioned upon such mortgagee's/beneficiary's acquisition of the Property or portion thereof by foreclosure (including a trustee sale) or by a deed in lieu of foreclosure; (b) the mortgagee/beneficiary commences foreclosure proceedings to reacquire title to the Property or applicable portion thereof within said ninety (90) days and thereafter diligently pursues such foreclosure to completion, and (c) the mortgagee/beneficiary promptly and diligently commences to cure such Default after obtaining title or possession.

**13.2.2** Notwithstanding Section \_\_\_\_\_ of this Agreement, if any mortgagee/beneficiary is prohibited from commencing or prosecuting foreclosure or other appropriate proceedings including by any process of injunction issued by any court or by reason of any action by any court having jurisdiction of any bankruptcy or insolvency proceeding involving OWNER, the times specified in Section \_\_\_\_\_ of this Agreement for commencing or prosecuting foreclosure or other proceedings shall be extended for the period of the prohibition.

**13.2.3** The lien of any existing or future deeds of trust recorded against all or any part of the Property shall be superior and senior to any lien created by this Agreement or the recordation thereof. At the request of any lender whose loan will be secured by a deed of trust on all or any part of the Property, CITY shall execute a subordination agreement subordinating their interest hereunder to the lien of such deed of trust, which subordination agreement shall be subject to the reasonable approval of CITY. Nothing in this Agreement shall be deemed to construe, permit, or authorize any such mortgagee to devote the Property, or any part thereof, for any uses, or to construct any improvements thereon, other than those uses or improvements provided for or authorized by this Agreement.

**13.2.4** Neither entering into this Agreement nor a breach of this Agreement shall defeat, render invalid, diminish, or impair the lien of any existing or future mortgage or deed of trust on the Property made in good faith and for value.

**13.2.5** Except as provided to the contrary in this Agreement, no mortgagee or beneficiary shall have an obligation or duty under this Agreement to perform the obligations of OWNER or other affirmative covenants of OWNER hereunder, or to guarantee such performance, and no mortgagee or beneficiary shall be liable for any defaults or monetary obligations of OWNER arising prior to acquisition of title to the Property by such mortgagee or beneficiary or their respective successors or assigns; except that to the extent any covenant to be performed by OWNER is expressly identified in the Development Plan Approval(s) as a condition to the performance of a covenant by CITY, the performance thereof shall continue to be a condition precedent to CITY's performance hereunder. If a mortgagee or beneficiary elects to develop the Property in accordance with the Development Plan Approval(s), the mortgagee or beneficiary shall be required to assume and perform the obligations or other affirmative covenants of OWNER under this Agreement.

**14. Severability of Terms.** If any term, provision, covenant or condition of this Agreement shall be determined invalid, void or unenforceable, the remainder of this Agreement shall not be affected thereby if the tribunal finds that the invalidity was not a material part of consideration for the OWNER or the CITY. If the tribunal finds that the invalidity was a material part of the consideration, this Agreement will terminate unless CITY and OWNER agree to amend this Agreement as provided for herein.

**15. Subsequent Amendment to Authorizing Statute.** This Agreement has been entered into in reliance upon the provisions of the Development Agreement Legislation in effect as of the Agreement Date. Accordingly, subject to Section \_\_\_\_\_ above, to the extent that subsequent amendments to the Government Code would affect the provisions of this Agreement, such amendments shall not be applicable to this Agreement unless necessary for this Agreement to be enforceable or required by law or unless this Agreement is modified pursuant to the provisions set forth in this Agreement.

**16. Rules of Construction and Miscellaneous Terms.**

**16.1 Interpretation and Governing Law.** The language in all parts of this Agreement shall, in all cases, be construed as a whole and in accordance with its fair meaning. This Agreement and any dispute arising hereunder shall be governed and interpreted in accordance with the laws of the State of California. The Parties understand and agree that this Agreement is not intended to constitute, nor shall be construed to constitute, an impermissible attempt to contract away the legislative and governmental functions of the CITY, and in particular, the CITY's police powers. In this regard, the Parties understand and agree that this Agreement shall not be deemed to constitute the impermissible surrender or abnegation of the CITY's governmental powers over the Property or any decision arising from the Agreement, directly or indirectly.

**16.2 Section Headings.** All section headings and subheadings are inserted for convenience only and shall not affect any construction or interpretation of this Agreement.

**16.3 Gender.** The singular includes the plural; the masculine gender includes the feminine; "shall" is mandatory, "may" is permissive.

**16.4 No Joint and Several Liability.** No breach hereof by \_\_\_\_\_, \_\_\_\_\_ or Development Transferee shall constitute a breach by the non-breaching party. Any remedy, obligation, or liability, including but not limited to the obligations to defend and indemnify the CITY, arising by reason of such breach shall be applicable solely to the party that committed the breach. However, the CITY shall send a copy of any notice of violation to all OWNERS and Development Transferee, including those not in breach.

**16.5 Covenant of Good Faith and Fair Dealing.** No party shall do anything which shall have the effect of materially harming or injuring the right of the other Parties to receive the benefits provided for in this Agreement; each party shall refrain from doing anything which would render its performance under this Agreement impossible; and each party shall do

everything which this Agreement contemplates that such party shall do in order to accomplish the objectives and purposes of this Agreement.

**16.6 No Waiver of Vesting.** Nothing in this Agreement shall be construed as limiting or impairing any vested rights to proceed with the Development or use of the Property arising independently from entitlements, including those approved for the Project, issued by the CITY or others prior to, concurrently with, or subsequent to the approval of this Agreement, Federal and State Constitutions, statutes, or decisional law.

**16.7 Time of Essence.** Time is of the essence regarding each provision of this Agreement of which time is an element.

**16.8 Recitals.** All Recitals set forth herein are incorporated in this Agreement as though fully set forth herein.

**16.9 Entire Agreement.** This Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof, and the Agreement supersedes all previous negotiations, discussion and agreements between the Parties, and no parol evidence of any prior or other agreement shall be permitted to contradict or vary the terms hereof.

**17. Extension of Maps.** In accordance with Government Code Section 66452.6(a), any tentative map which relates to all or a portion of the Property shall be extended for the greater of (i) the Term of the Agreement or (ii) expiration of the tentative map pursuant to Section 66452.6.

**18. Not for Benefit of Third Parties.** This Agreement and all provisions hereof are for the exclusive benefit of the CITY and OWNER and its assignees pursuant to Section \_\_\_\_\_ and shall not be construed to benefit or be enforceable by any third party.

**19. Attachments.** The following attachments are hereby incorporated by reference as if fully set out in the body of this Agreement.

<u>Attachments</u>	<u>Description</u>
--------------------	--------------------

**20. Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original.

**IN WITNESS WHEREOF**, the Parties hereto have executed this Agreement on the day and year dated below.

Dated: \_\_\_\_\_, 20\_\_

“CITY”  
CITY OF \_\_\_\_\_, a municipal  
Corporation

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: Mayor

ATTEST:

\_\_\_\_\_  
City Clerk

APPROVED AS TO FORM:

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

Dated: \_\_\_\_\_, 20\_\_

Dated: \_\_\_\_\_, 20\_\_

“OWNER”  
\_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

A notary public or other officer competing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy of validity of that document.

State of California )  
 ) ss  
County of \_\_\_\_\_ )

On \_\_\_\_\_ before me, \_\_\_\_\_ personally appeared \_\_\_\_\_ personally known to me or proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

Witness my hand and official seal.

\_\_\_\_\_  
Signature of Notary

