

**DISPOSITION AND DEVELOPMENT AGREEMENT**

by and among

**THE CITY OF DALY CITY,**

**and**

**[1837 JUNIPERO SERRA HOTEL DEVELOPMENT, LLC]**

1837 Junipero Serra Boulevard

\_\_\_\_\_, 2020

THIS DISPOSITION AND DEVELOPMENT AGREEMENT (this “**Agreement**”) is entered into effective as of \_\_\_\_\_, 2020 (“**Effective Date**”) by and among the City of Daly City, a municipal corporation (“**City**”), and 1837 Junipero Serra Hotel Development, LLC (“**Developer**”). Developer and City are together referred to herein as the “**Parties**.”

## RECITALS

A. City is the owner of the real property consisting of approximately 55,012 square feet of vacant land located at 1837 Junipero Serra Boulevard in Daly City, California, known as San Mateo County Assessor’s Parcel Nos. \_\_\_\_\_, and more particularly described in Exhibit A-1 and depicted in Exhibit A-2 attached hereto (the “**Property**”). The Property was conveyed to City by the Successor Agency to the Daly City Redevelopment Agency pursuant to a Long-Range Property Management Plan approved by the California Department of Finance in accordance with Health and Safety Code Section 34191.5.

B. Following City’s evaluation of proposals submitted in response to a Request for Developer Qualifications, City and the Developer entered into an Exclusive Negotiating Rights Agreement dated as of July 30, 2018 (as subsequently amended to extend the term, the “**ENA**”), pursuant to which the Parties agreed to negotiate the terms for the proposed conveyance and development of the Property.

C. Developer has proposed the development of the Property with an approximately 200-room full-service/lifestyle hotel and conference facility, which is proposed to be branded with a flag owned by Marriott International, Inc. (e.g., Sheraton and Marriott) and proposed to be managed by Aimbridge Hospitality, Equinox Hospitality, or an equivalent qualified operator (the “**Project**”).

D. In connection with the proposed Project, Developer has applied, or within the timeframe specified in this Agreement will apply to City for a Design Review approval (collectively, the “**Design Review Approval**”).

G. Upon satisfaction of the conditions precedent set forth in this Agreement and subject to the terms and conditions set forth herein, City will convey the Property to Developer (or to a limited liability company wholly owned and controlled by Developer) for development of the Project.

H. A material inducement to City to enter into this Agreement is the agreement by Developer to develop the Project within the time periods specified herein and in accordance with the provisions hereof, and City would be unwilling to enter into this Agreement in the absence of an enforceable commitment by Developer to take such actions and complete such work in accordance with such provisions and within such time periods.

NOW, THEREFORE, in consideration of the mutual covenants contained herein and good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows.

## ARTICLE I

### DEFINITIONS; EXHIBITS

1.1 Definitions. The following terms shall have the meanings set forth below and, in the Sections, referenced below whenever used in this Agreement and the Exhibits attached hereto. Additional terms are defined in the Recitals and text of this Agreement.

“**Applicable Laws**” is defined in Section 5.15.

“**Authorized Representative**” means the City Manager of the City of Daly City, or his or her designee.

“**CEQA**” means the California Environmental Quality Act, Public Resources Code section 21000 *et seq.*

“**Certificate of Completion**” is defined in Section 5.12.

“**City**” means the City of Daly City, California, a municipal corporation.

“**City Council**” means the City Council of the City of Daly City, California.

“**City Documents**” means collectively, this Agreement, the Memorandum, the Parking Easement Agreement, and the Grant Deed.

“**Claims**” is defined in Section 5.11.

“**Closing Date**” or “**Close of Escrow**” shall be the date that escrow closes for the conveyance of the Property from City to Developer.

“**Conditions of Approval**” is defined in Section 5.4.

“**Construction Plans**” is defined in Section 5.6.

“**Design Documents**” is defined in Section 2.4.

“**Design Review Approval**” is defined in Recital D.

“**Developer**” means 1837 Junipero Serra Hotel Development, LLC.

“**Developer’s Permitted Exceptions**” is defined in Section 3.1.

“**ENA**” is defined in Recital B.

“**Environmental Laws**” is defined in Section 6.11.2.

“**Escrow Agent**” is defined in Section 3.3.

“**Financing Plan**” is defined in Section 2.5.2.

“**Force Majeure**” is defined in Section 11.2.

“**Franchise Term Sheet**” is defined in Section 2.5.5.

“**Good Faith Deposit**” means the good faith deposit provided by the Developer in the amount of One-Hundred Thousand Dollars (\$100,000) and all interest that is earned on the Deposit after the City deposits the Deposit in an interest-bearing account.

“**Grant Deed**” is defined in Section 3.1.

“**Hazardous Material**” is defined in Section 6.11.1.

“**Hotel Management Term Sheet**” is defined in Section 2.5.5.

“**Improvements**” means the improvements to be constructed on the Property pursuant to this Agreement.

“**Indemnites**” is defined in Section 5.11.

“**Living Wage Requirements**” is defined in Section 5.27.

“**Memorandum**” is defined in Section 3.7(e).

“**Official Records**” means the Official Records of San Mateo County.

“**Owner’s Title Policy**” is defined in Section 3.8.

“**Parking Easement Agreement**” is defined in Section 2.3.

“**Planning Commission**” means the Planning Commission of the City of Daly City.

“**Project**” is defined in Recital C and is more fully described in Section 2.3 and Exhibit C.

“**Property**” is defined in Recital A, described in Exhibit A-1, and depicted in Exhibit A-2.

“**Purchase Price**” is defined in Section 3.2.

“**Repurchase Option**” is defined in Section 9.9.

“**Title Company**” is defined in Section 3.3.

“**Title Report**” is defined in Section 3.1.

“**Transfer**” is defined in Section 7.2.

1.2 Exhibits. The following Exhibits are attached hereto and incorporated into this Agreement by this reference:

- A-1 Legal Description of the Property
- A-2 Site Map – Project Site
- B Project Scope
- C Parking Easement Agreement
- D Preliminary Financing Plan
- E Form of Certificate of Completion
- F Form of Memorandum of Option
- G Form of Grant Deed

## ARTICLE II

### REPRESENTATIONS; EFFECTIVE DATE; PROJECT SCOPE; FINANCING PLAN

2.1 Developer’s Representations. Developer covenants that until the expiration or earlier termination of this Agreement, upon learning of any fact or condition that would cause any of the warranties and representations in Section 2.1.1 or Section 2.1.2 to be untrue, Developer shall give prompt written notice of such fact or condition to City. Developer acknowledges that City shall rely upon Developer’s representations made herein notwithstanding any investigation made by or on behalf of City.

2.1.1 Representations of Developer. Developer hereby represents, warrants, and covenants that the following are true and correct as of the Effective Date, and shall be true and correct as of the Closing Date:

(a) Organization. Developer is a corporation, duly organized and in good standing under the laws of the State of Delaware.

(b) Authority of Developer. Developer has full power and authority to execute and deliver this Agreement and all other documents or instruments executed and delivered by Developer, or to be executed and delivered by Developer pursuant to or in

connection with this Agreement, and to perform and observe the terms and provisions of all the foregoing.

(c) Authority of Persons Executing Documents. This Agreement and all other documents or instruments that have been or that will be executed and delivered by Developer pursuant to or in connection with this Agreement, have been or will be executed and delivered by persons who are duly authorized to execute and deliver the same for and on behalf of Developer, and all actions required under Developer's organizational documents and applicable governing law for the authorization, execution, delivery and performance of this Agreement and all other documents or instruments that have been or that will be executed and delivered by Developer pursuant to or in connection with this Agreement, have been duly taken or will have been duly taken (to the extent such actions are required) as of the date of execution and delivery of such documents.

(d) Valid and Binding Agreements. This Agreement and all other documents or instruments that have been or that will be executed and delivered by Developer pursuant to or in connection with this Agreement constitute or, if not yet executed or delivered, will when so executed and delivered, constitute legal, valid and binding obligations of Developer, enforceable in accordance with their respective terms, subject to laws affecting creditors' rights and principles of equity.

(e) No Breach of Law or Agreement. Neither the execution nor delivery of this Agreement or any other documents or instruments that have been or that will be executed and delivered by Developer pursuant to or in connection with this Agreement, nor the performance of any provision, condition, covenant or other term hereof or thereof, will conflict with or result in a breach of any statute, rule or regulation, or any judgment, decree or order of any court, board, commission or agency binding on Developer, or any provision of the organizational documents of Developer, or will conflict with or constitute a breach of or a default under any agreement to which Developer is a party, or will result in the creation or imposition of any lien upon any assets or property of Developer, other than liens established pursuant hereto.

(f) Pending Proceedings. Except as disclosed in writing to City prior to execution of this Agreement, Developer is not in default under or in violation of any law or regulation or under any order of any court, board, commission or agency whatsoever, and to the best knowledge of the principals of Developer, there are no claims, actions, suits or proceedings pending or, to the best knowledge of the principals of Developer, threatened against or affecting Developer, or the Property, at law or in equity, before or by any court, board, commission or agency. Developer is not the subject of any bankruptcy or insolvency proceeding, and no general assignment or arrangement for the benefit of creditors or the appointment of a trustee or receiver to take possession of all or substantially all of Developer's assets has been made.

#### 2.1.2 Intentionally Deleted.

2.2 Effective Date. The obligations of Developer and City hereunder shall be effective as of the Effective Date, which date is set forth in the preamble to this Agreement.

2.3 Project Scope; Parking Easement Agreement; BART Station Access. The Project will include the construction of an approximately 200-room full-service/lifestyle hotel and conference center (the “**Project**”). The Project scope is more particularly described in Exhibit B attached hereto. Concurrently with the closing for conveyance of the Property, the Parties shall execute and record an easement agreement substantially in the form attached hereto as Exhibit C (the “**Parking Easement Agreement**”) [PLEASE PROVIDE] pursuant to which Developer shall be granted access and parking easements to existing parking and BART station access.

2.3 Local Contractor Exchange Programs. Within thirty (30) days after full execution of this Agreement, City will provide contact information for local contractor exchange programs that could allow San Mateo County contractors to learn of the invitation for bids on the project. Developer will make a good faith effort to alert the local exchange program contacts provided by City of the opportunity to bid on the project, and will provide the City with reasonable confirmation of such good faith efforts. Developer is not required by this Agreement to hire a contractor through an exchange program.

2.4 Design Review. Within 30 days of execution of the Agreement, Developer will submit a pre-application for Design Review outlining the (i) a preliminary site plan (including proposed site ingress/egress), preliminary elevations, and a proposed typical floor plan (“**Design Documents**”) and (ii) a fee in connection with the pre-application for Design Review, for Design Review Approval.

2.5 Financing Plan.

2.5.1 Preliminary Financing Plan. As described in Exhibit D, Developer has preliminarily proposed financing the Project with a combination of a conventional construction loan, a conventional permanent loan, and equity contributions from investors.

2.5.2 Intentionally omitted.

2.5.3 Intentionally omitted.

2.5.4 Intentionally omitted.

2.5.5 Franchise Term Sheet; Hotel Management Term Sheet. Upon 90-days prior to Close of Escrow, Developer shall submit to City, for its information and review (i) a copy of a binding term sheet for a franchise agreement executed by and between Developer and Marriott International, Inc., pursuant to which the Project will be operated under full-service/lifestyle brand owned by Marriott International or another equivalent brand (the “**Franchise Term Sheet**”), and (ii) a copy of a binding term sheet for a management agreement executed by and between Developer and Aimbridge Hospitality, Equinox Hospitality, or another qualified operator addressing management of the hotel component of the Project (“**Hotel Management Term Sheet**”). The Franchise Term Sheet and the Hotel Management Term Sheet, and amendments to the foregoing will not require City's approval; provided however, any substitute franchisor or hotel operator shall be subject to City's prior written consent, which

consent shall not be unreasonably withheld, conditioned, or delayed. City will take appropriate measures to retain the confidentiality of the Franchise Term Sheet and the Hotel Management Term Sheet, subject to compliance with Applicable Laws.

### ARTICLE III

#### DISPOSITION OF THE PROPERTY; CONDITIONS PRECEDENT TO CLOSING

3.1 Purchase and Sale of Property; Review of Title. Developer acknowledges receipt of a preliminary title report for the Property issued by Title Company and dated [REDACTED], 20 [REDACTED] (the “**Title Report**”). Provided that all conditions precedent set forth in this Agreement have been satisfied or waived, City shall sell to Developer, and Developer shall purchase from City, the fee interest in the Property in accordance with and subject to the terms, covenants and conditions of this Agreement subject to: (a) the provisions and effects of City Documents, (b) applicable building and zoning laws and regulations, (c) any lien for current taxes and assessments or taxes and assessments accruing subsequent to recordation of the Grant Deed, (d) exception numbers [REDACTED] through [REDACTED] as shown on the Title Report, (e) liens and encumbrances created or permitted by Developer or Developer’s affiliates, employees, or agents, (f) the Parking Easement Agreement, and (g) such other conditions, liens, encumbrances, restrictions, easements and exceptions as Developer may approve in writing, which approval shall not be unreasonably withheld. All of the foregoing are collectively hereinafter referred to as “**Developer’s Permitted Exceptions.**” Conveyance of the Property shall be effectuated by grant deed substantially in the form attached hereto as Exhibit G (the “**Grant Deed**”).

3.2 Purchase Price. City shall sell the Property to Developer for the sum of One Million Dollars (\$1,000,000) (the “**Purchase Price**”). The Purchase Price shall be paid in full to City at the Close of Escrow.

3.3 Good Faith Deposit. As of the date of this Agreement, the Developer has delivered to the City the Good Faith Deposit, consisting of the sum of One Hundred Thousand Dollars (\$100,000) in cash that will be credited back to the Developer purchase at closing. The City shall promptly deposit the Good Faith Deposit in a short-term interest-bearing account, such as the Local Agency Investment Fund or another fund or account in which the City typically invests funds on a short-term basis. In the event that the Developer elects not to proceed with construction of the Project, or in the event of termination of the Agreement, the City shall retain the Good Faith Deposit pursuant to Section 9.1 below. Furthermore, if this Agreement is terminated as a result of an Event of Default, then the Good Faith Deposit and any interest earned thereon shall be retained by City.

3.4 Escrow. City and Developer shall open escrow at the office of Chicago Title, Attn: Ryan Huntsman, Phone: 949-724-3129, Email: rhuntsman@ctt.com (“**Escrow Agent**” or “**Title Company**”) in order to consummate the conveyance of the Property to Developer and the closing of escrow for the transactions contemplated hereby.



3.5 Costs of Closing and Escrow; Legal Fees. Developer shall pay all title insurance premiums for policies Developer elects to purchase in connection with the acquisition of the Property and the financing of the Project, and Developer shall pay all recording fees, transfer taxes, escrow fees and closing costs incurred in connection with the acquisition of the Property and the financing of the Project. Property taxes and assessments shall be prorated as of the Closing Date. City shall provide Escrow Agent with a copy of this Agreement, which together with such supplemental instructions as City or Developer may provide and which are consistent with the intent of this Agreement or which are otherwise mutually agreed upon by City and Developer, shall serve as escrow instructions for the Close of Escrow. By not later than the Close of Escrow, Developer shall pay City's legal fees and consulting fees incurred in connection with the transactions contemplated by this Agreement, including without limitation, attorneys' fees incurred in connection with the negotiation and preparation of this Agreement and the City Documents, and other documents required in connection with the conveyance of the Property, the financing of the Project, and the Close of Escrow. Payment for City's legal and consulting fees may be drawn from the deposit paid by Developer pursuant to the ENA as such is replenished in accordance with the ENA, and Developer shall pay any additional amount due to City in cash at Close of Escrow.

3.6 Closing. The Closing Date shall be occur on July 15, 2021 or an earlier date that is mutually acceptable to the Parties, subject to the Developer's satisfaction or City's waiver of all condition's precedent to conveyance of the Property as set forth in Sections 3.7 and 3.8. Prior to the Close of Escrow, Developer shall deposit into escrow the City Documents, executed and acknowledged as applicable, and Developer's share of closing costs. Provided that all conditions precedent to Close of Escrow have been satisfied or waived, City shall deposit into escrow the executed Grant Deed and executed copies of the City Documents. On the Closing Date, the Escrow Agent shall cause the Grant Deed, the Memorandum, and the Parking Easement Agreement to be recorded in the Official Records.

3.7 Tax Free Exchange. If Developer notifies City prior to the Close of Escrow that Developer wishes to attempt to effectuate a "tax-free" exchange pursuant to Section 1031 of the Internal Revenue Code in connection with the transaction contemplated in this Agreement, City will cooperate with Developer, at no cost, expense, or liability to City, in Developer's attempt to effectuate such exchange, but City makes no representations to Developer that any such exchange shall be treated as "tax-free" by the Internal Revenue Service. Developer agrees to indemnify City from all liability with respect to any action which Developer requests City to take pursuant to this Section, and to reimburse City for all fees, costs, and expenses (including reasonable attorneys' fees) incurred by City as a result of Developer's election to participate in a Section 1031 exchange. City shall not be required to hold title to any real estate or other assets in order to cooperate with Developer's Section 1031 exchange.

3.8 City's Conditions to Closing. City's obligations to convey the Property to Developer is conditioned upon the satisfaction of the terms and conditions set forth in this Section 3.8, unless any such condition is waived in writing by City acting in the discretion of its Authorized Representative.

(a) No Default. There shall exist no condition, event or act which would constitute a material breach or default under this Agreement or any other City Document, or which, upon the giving of notice or the passage of time, or both, would constitute such a material breach or default.

(b) Representations. All representations and warranties of Developer contained herein or in any other City Document or certificate delivered in connection with the transactions contemplated by this Agreement shall be true and correct in all material respects as of the Close of Escrow.

(c) Due Authorization and Good Standing. Developer shall have delivered to City copies of all of the following, including updated versions of any of the following that have been amended or modified since the date of any prior delivery to City: (i) certificates of good standing, certified by the Delaware Secretary of State, indicating that Developer is properly organized in Delaware and in good standing under the laws of California; and (ii) certified copies of Developer's operating agreement; and (iii) resolutions adopted by the Manager(s) of Developer, certified by an authorized officer of Developer authorizing the execution of, and performance under, this Agreement and the other City Documents.

(d) Execution, Delivery and Recordation of Documents. Developer shall have executed, acknowledged as applicable, and delivered to City this Agreement, and all other documents required in connection with the transactions contemplated hereby, including without limitation, a Memorandum of Option substantially in the form attached hereto as Exhibit F (the "**Memorandum**"), a Parking Easement Agreement substantially in the form attached hereto as Exhibit C, and a counter-signed original of the Grant Deed. Concurrently with the Close of Escrow, the Grant Deed, the Memorandum, and the Parking Easement Agreement shall be recorded in the Official Records.

Financing Plan. City shall have reviewed and approved the Financing Plan, without unreasonable delay.

Evidence of Availability of Funds. Developer shall have provided evidence reasonably satisfactory to the City that all funds necessary for the construction of the Project will be available pursuant to the binding commitments from equity investors and lenders subject to commercially reasonable conditions.

(e) Franchise Term Sheet, Hotel Management Term Sheet. Developer shall have delivered to City of copies of the executed binding Franchise Term Sheet and the Hotel Management Term Sheet.

(f) General Contractor; Construction Budget and Schedule. City shall have received information relating to the proposed general contractor and the preliminary Project construction budget.

(g) Design Documents and Pre-Application Fee. Developer shall have submitted the Design Documents to City and the related fee of each in connection with a Pre-Application in preparation for an application for Design Review Approval.

(h) Deposit of Funds. Developer shall have deposited into escrow the Purchase Price and funds in the amount of all other costs and expenses required to be paid by Developer through escrow.

(i) Settlement Statement. City shall have approved in its reasonable discretion, consistent with this Agreement, the final settlement statement for the Close of Escrow.

3.9 Developer's Conditions to Closing. Developer's obligation to proceed with the acquisition of the Property is subject to the satisfaction or Developer's waiver of the following conditions:

(a) No Default. City shall not be in default under the terms of this Agreement, and all representations and warranties of City contained herein shall be true and correct in all material respects;

(b) Execution of Documents. City shall have executed and acknowledged the Grant Deed and the Memorandum, and all other City Documents to which City is a party, and shall have delivered such documents into escrow; and

(c) Owner's Title Policy. The Title Company shall, upon payment of the premium therefor, be ready to issue an Owner's Title Insurance Policy for the benefit and protection of Developer ("**Owner's Title Policy**") showing title to the Property vested in Developer, subject only to Developer's Permitted Exceptions and containing such endorsements as Developer may reasonably require, with the cost of such Owner's Title Policy to be paid by Developer.

#### ARTICLE IV

[Intentionally omitted.]

#### ARTICLE V

### DEVELOPMENT AND USE OF THE PROPERTY

5.1 Development Schedule. Subject to Force Majeure (with an extension not to exceed 24 months), Developer shall submit to City a signed Franchise Agreement not later than six (6) months following Close of Escrow and shall commence construction of the Project by no later than January 1, 2022, and shall diligently prosecute to completion the construction of the Project to enable City to issue a final certificate of occupancy or equivalent for the Project [three (3) years] following commencement of construction. Developer shall use diligent and commercially reasonable efforts to perform Developer's obligations under this Agreement within the times periods set forth herein, and if no such time is provided, within a reasonable time,

designed to permit issuance of a final certificate of occupancy or equivalent for the Project by the date specified in this Section 5.1.

5.2 Cost of Acquisition and Construction. Developer shall be solely responsible for all direct and indirect costs and expenses incurred in connection with the acquisition of the Property, including without limitation appraisal fees, title reports and any environmental assessments Developer elects to undertake. All costs of designing, developing and constructing the Project and compliance with the Conditions of Approval, including without limitation all off-site and on-site improvements required by City in connection therewith, shall be borne solely by Developer and shall not be an obligation of City.

5.3 Permits and Approvals; Payment of Fees; Cooperation. Developer acknowledges that the execution of this Agreement by City does not constitute City approval for the purpose of the issuance of building permits, does not limit in any manner the discretion of City in such approval process, and does not relieve Developer from the obligation to apply for and to obtain from City and all other agencies with jurisdiction over the Property, all necessary approvals, entitlements, and permits for the development of the Property and the construction of the Project (including without limitation, the approval of architectural plans, the issuance of any certificates regarding historic resources required in connection with the development of the Property (if any), and the approval of the Project in compliance with CEQA and if applicable, NEPA), nor does it limit in any manner the discretion of City or any other agency in the approval process. Developer shall pay when due all customary and usual fees and charges in connection with the processing of all applicable permits and approvals. Developer shall not commence construction work on the Project prior to issuance of building permits required for such work. City staff shall work cooperatively with Developer to assist in coordinating the expeditious processing and consideration of all permits, entitlements and approvals necessary for the development and operation of the Project as contemplated by this Agreement.

City agrees to discount \$150,000 of total building and planning fees at the issuance of building permits.

5.4 Conditions of Approval. Developer shall develop the Property in accordance with the terms and conditions of this Agreement and in compliance with the terms and conditions of all approvals, entitlements and permits that City or any other governmental body or agency with jurisdiction over the Project or the Property has granted or issued as of the date hereof or may hereafter grant or issue in connection with development of the Project, including without limitation, all mitigation measures imposed in connection with environmental review of the Project and all conditions of approval imposed in connection with any entitlements, approvals or permits (all of the foregoing approvals, entitlements, permits, mitigation measures and conditions of approval are hereafter collectively referred to as the “**Conditions of Approval**”).

5.5 Fees. Developer shall be solely responsible for, and shall promptly pay when due, all customary and usual fees and charges of City and all other agencies with jurisdiction over development of the Property in connection with obtaining building permits and other approvals for the Project, including without limitation, those related to the processing and consideration of amendments, if any, to the current entitlements, any related approvals and permits,

environmental review, architectural review, historic review, and any subsequent approvals for the Project.

5.6 Construction Plans. Developer shall submit to City's Building Department detailed construction plans for the Project (the "**Construction Plans**"). As used herein "**Construction Plans**" means all construction documents upon which Developer and Developer's contractors shall rely in developing the Property and constructing the Project (including the landscaping, parking, and common areas) and shall include, without limitation, the site development plan, final architectural drawings, landscaping, exterior lighting and signage plans and specifications, materials specifications, final elevations, and building plans and specifications. The Construction Plans shall be based upon the scope of development set forth herein and upon the approvals issued by the City for the Project and shall not materially deviate therefrom without the express written consent of City.

5.7 Construction Pursuant to Plans. Developer shall develop each component of the Project in accordance with the approved Construction Plans, the Conditions of Approval, and all other permits and approvals granted by City pertaining to the Project. Developer shall comply with all directions, rules and regulations of any fire marshal, health officer, building inspector or other officer of every governmental agency having jurisdiction over the Property or the Project. Each element of the work shall proceed only after procurement of each permit, license or other authorization that may be required for such element by any governmental agency having jurisdiction. All design and construction work on the Project shall be performed by licensed contractors, engineers or architects, as applicable.

5.8 Change in Construction Plans. If Developer desires to make any material change in the approved Construction Plans, Developer shall submit the proposed change in writing to City for its written approval, which approval shall not be unreasonably withheld or delayed if the Construction Plans, as modified by any proposed change, conform to the requirements of this Agreement and any approvals issued by City after the Effective Date. Unless a proposed change is approved by City within thirty (30) days, it shall be deemed rejected. If rejected, the previously approved Construction Plans shall continue to remain in full force and effect. Any change in the Construction Plans required in order to comply with applicable codes shall be deemed approved, so long as such change does not substantially nor materially change the architecture, design, function, use, or amenities of the Project as shown on the latest approved Construction Plans. Nothing in this Section is intended to or shall be deemed to modify City's standard plan review procedures.

5.9 Rights of Access. Following the Close of Escrow, for the purpose of ensuring that the construction of the Project is undertaken and completed in compliance with this Agreement, Developer shall permit representatives of City to enter upon the Property during normal business hours and following 24 hours' written notice (except in the case of emergency in which case such notice as may be practical under the circumstances shall be provided).

5.10 City Disclaimer. Developer acknowledges that City is under no obligation, and City neither undertakes nor assumes any responsibility or duty to Developer or to any third party, to in any manner review, supervise, or inspect the progress of construction or the operation of the Project. Developer and all third parties shall rely entirely upon its or their own supervision and

inspection in determining the quality and suitability of the materials and work, the performance of architects, subcontractors, and material suppliers, and all other matters relating to the construction and operation of the Project. Any review or inspection undertaken by City is solely for the purpose of determining whether Developer is properly discharging its obligations under this Agreement and shall not be relied upon by Developer or any third party as a warranty or representation by City as to the quality of the design or construction of the Project or otherwise.

5.11 Defects in Plans. City shall not be responsible to Developer or to any third party for any defect in the Construction Plans or for any structural or other defect in any work done pursuant to the Construction Plans. To the greatest extent permitted by law, Developer shall indemnify, defend (with counsel reasonably approved by City) and hold harmless City and its elected and appointed officers, officials, employees, agents, consultants, and contractors (all of the foregoing, collectively, the “**Indemnitees**”) from and against all liability, loss, cost, expense (including without limitation attorneys’ fees and costs of litigation), claim, demand, action, suit, judicial or administrative proceeding, penalty, deficiency, fine, order, and damage (all of the foregoing collectively “**Claims**”) arising out of, or relating to, or alleged to arise from or relate to defects in the Construction Plans or defects in any work done pursuant to the Construction Plans whether or not any insurance policies shall have been determined to be applicable to any such Claims. Developer’s indemnification obligations set forth in this Section shall survive the expiration or earlier termination of this Agreement and the recordation of a Certificate of Completion. Developer’s indemnification obligations pursuant to this Section shall not extend to Claims to the extent arising from the gross negligence or willful misconduct of the Indemnitees and are subject to the additional terms set forth in Section 10.2 below.

5.12 Certificate of Completion for Project. Promptly after completion of construction of the Project, City’s issuance of a final Certificate of Occupancy or equivalent for the Project, and the written request of Developer, City will provide a certificate substantially in the form attached hereto as Exhibit E (“**Certificate of Completion**”) so certifying, provided that at the time such certificate is requested all applicable work has been completed for the Project. The Certificate of Completion shall be conclusive evidence that Developer has satisfied its obligations regarding the development of the Property and construction of the Project. At Developer’s option the Certificate of Completion shall be recorded in the Official Records. The Certificate of Completion shall not constitute evidence of compliance with or satisfaction of any obligation of Developer to any holder of a deed of trust or mortgage securing money loaned to finance the Project or any part thereof and shall not be deemed a notice of completion under the California Civil Code, nor shall such Certificate provide evidence that Developer has satisfied any obligation that survives the expiration of this Agreement.

5.13 Equal Opportunity. There shall be no discrimination on the basis of race, color, religion, creed, sex, sexual orientation, marital status, ancestry or national origin in the hiring, firing, promoting or demoting of any person engaged in construction work on the Property, and Developer shall direct its contractors and subcontractors to refrain from discrimination on such basis.

5.14 Prevailing Wage Requirements. Developer and its contractors, subcontractors and agents shall comply with the California Labor Code Section 1720 *et seq.* and the regulations adopted pursuant thereto (and if applicable, the federal Davis Bacon Act and implementing

regulations) (all of the foregoing, collectively, “**Prevailing Wage Laws**”), and shall be responsible for carrying out the requirements of such provisions. If applicable, Developer shall submit to City a plan for monitoring payment of prevailing wages and at Developer’s expense shall implement such plan and comply with all applicable reporting and recordkeeping requirements.

To the greatest extent permitted by law, Developer shall indemnify, defend (with counsel reasonably approved by City) and hold the Indemnitees harmless from and against all Claims that directly or indirectly, in whole or in part, are caused by, arise in connection with, result from, relate to, or are alleged to be caused by, arise in connection with, or relate to, the payment or requirement of payment of prevailing wages (including without limitation, all claims that may be made by contractors, subcontractors or other third party claimants pursuant to Labor Code Sections 1726 and 1781) or the requirement of competitive bidding in connection with the Project, the failure to comply with any state or federal labor laws, regulations or standards in connection with this Agreement, including but not limited to the Prevailing Wage Laws, or any act or omission of Developer related to this Agreement with respect to the payment or requirement of payment of prevailing wages or the requirement of competitive bidding, whether or not any insurance policies shall have been determined to be applicable to any such Claims. The provisions of this Section 5.14 shall survive the expiration or earlier termination of this Agreement and the issuance of a Certificate of Completion for the Project. Developer’s indemnification obligations set forth in this Section shall not apply to Claims to the extent arising from the gross negligence or willful misconduct of the Indemnitees and are subject to the additional terms set forth in Section 10.2 below.

5.15 Compliance with Laws. Developer shall carry out and shall cause its contractors and subcontractors to carry out the construction of the Project in conformity with all applicable federal, state and local laws, rules, ordinances and regulations (“**Applicable Laws**”), including without limitation, all applicable Environmental Laws, all applicable federal and state labor laws and standards, applicable provisions of the California Public Contracts Code, the City’s zoning and development standards, building, plumbing, mechanical and electrical codes, all other provisions of the City’s Municipal Code, and all applicable disabled and handicapped access requirements, including without limitation, the Americans with Disabilities Act, 42 U.S.C. Section 12101, *et seq.*, Government Code Section 4450, *et seq.*, Government Code Section 11135, *et seq.*, and the Unruh Civil Rights Act, Civil Code Section 51, *et seq.* To the greatest extent permitted by law, Developer shall indemnify, defend (with counsel reasonably approved by City) and hold harmless the Indemnitees from and against any and all Claims arising in connection with the breach of Developer’s obligations set forth in this Section whether or not any insurance policies shall have been determined to be applicable to any such Claims. Developer’s indemnification obligations set forth in this Section shall not apply to Claims to the extent arising from the gross negligence or willful misconduct of the Indemnitees. Developer’s defense and indemnification obligations set forth in this Section 5.15 shall survive the expiration or earlier termination of this Agreement and the issuance of a Certificate of Completion for the Project and shall be subject to the additional terms set forth in Section 10.2 below.

5.16 Liens and Stop Notices. Developer shall not allow to be placed on the Property or any part thereof any lien or stop notice on account of materials supplied to or labor performed on behalf of Developer. If a claim of a lien or stop notice is given or recorded affecting the Project

or the Property or any part thereof, Developer shall within twenty (20) days of such recording or service: (a) pay and discharge (or cause to be paid and discharged) the same; or (b) effect the release thereof by recording and delivering (or causing to be recorded and delivered) to the party entitled thereto a surety bond in sufficient form and amount; or (c) provide other assurance satisfactory to City that the claim of lien or stop notice will be paid or discharged.

5.17 Intentionally Deleted

5.18 Intentionally Deleted

5.19 Insurance Requirements. Developer shall maintain and shall cause its contractors to maintain all applicable insurance coverage specified in Article X.

5.20 Semi-Annual Performance Reporting. During construction of the Project, Developer shall submit to City, at least twice per year, a performance report, which shall be in the form of a narrative description of all activities performed in relation to the Project including all development activities. The report shall include any material changes to Project timeline, including a schedule for completing milestones and/or tasks, and indicate the status of the Project in relation to this timeline. Developer shall provide the reports described in this Section until construction of the Project is complete.

5.21 Intentionally omitted.

5.22 Intentionally omitted.

5.23 Intentionally omitted.

5.24 Taxes and Assessments. Commencing upon Developer's acquisition of the Property, Developer shall pay all real and personal property taxes, assessments and charges and all franchise, income, payroll, withholding, sales, and other taxes assessed against the Property and/or the Improvements, at such times and in such manner as to prevent any penalty from accruing, or any lien or charge from attaching to the Property or Improvements; provided, however, Developer shall have the right to contest in good faith, any such taxes, assessments, or charges. In the event the Developer exercises its right to contest any tax, assessment, or charge, the Developer, on final determination of the proceeding or contest, shall immediately pay or discharge any decision or judgment rendered against it, together with all costs, charges and interest.

5.25 Obligation to Refrain from Discrimination. Developer shall not restrict the rental, sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the Property or the Project, or any portion thereof, on the basis of race, color, religion, creed, sex, sexual orientation, gender identity, disability, marital status, ancestry, or national origin of any person. Developer covenants for itself and all persons claiming under or through it, and this Agreement is made and accepted upon and subject to the condition that there shall be no discrimination against or segregation of any person or group of persons on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the sale, lease, sublease, transfer, use, occupancy, tenure or



enjoyment of the Property or the Improvements, or part thereof, nor shall Developer or any person claiming under or through Developer establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees or vendees in, of, or for the Property or Improvements, or part thereof. Developer shall use commercially reasonable efforts to include such provision in all deeds, leases, and contracts relating to development or operation of the Project, and shall enforce the same diligently and in good faith.

5.26 Intentionally Deleted

5.27 Living Wage. Developer agrees to comply with all of the requirements set forth in this Section (the “**Living Wage Requirements**”) and agrees to enter into written agreements subject to City’s written approval, that will require all Project managers, operators, tenants, and lessees of the Project to comply with the Living Wage Requirements.

Developer agrees (i) to pay, and to cause Project managers, operators, tenants, and lessees of the Project to pay, a minimum level of compensation to all covered employees (defined below) equal to at least \$15.69 per hour, and (ii) to provide all covered employees with health insurance coverage and pension contributions comparable to union benefits applicable to each class of employees. These initial minimum hourly rates are in effect as of January 1, 2022, and shall be increased annually by the percentage increase in the Consumer Price Index-All Urban Consumers (CPI-U) for the San Francisco-Oakland-San Jose, California area over the prior year as published by the United States Department of Labor, Bureau of Labor Statistics. If the foregoing index ceases to be published, City may utilize any substitute index published by the federal government or the State of California that it deems suitable to measure general price changes in the regional economy.

Developer agrees to do all of the following and to cause all Project managers, operators, tenants, and lessees of the Project to do all of the following: (i) pay the specified minimum compensation to its covered employees, (ii) offer compensated and uncompensated leave time to its covered employees, (iii) provide written notice describing the Living Wage Requirements to its covered employees, (iv) include in all Project-related service contracts (including without limitation, management and maintenance contracts) that exceed \$25,000, language requiring the contractor to comply with Living Wage Requirements for its covered employees, and (v) submit to City all reasonably required documentation regarding compliance with the foregoing requirements. Developer shall submit a copy of each such service contract to City.

For purposes of this section, “**covered employees**” mean any natural person who performs services for the employer on Project-related work or on the Project site, but does not include managerial, supervisory, or confidential employees, independent contractors, volunteers, or those construction employees who are entitled to be paid at prevailing wages.

Failure to comply with the Living Wage Requirements shall constitute a default under this Agreement. This Section shall survive the termination of this Agreement.

**ARTICLE VI**

## CONDITION OF THE SITE; ENVIRONMENTAL MATTERS

6.1 Access to Site; Inspections. Prior to the Close of Escrow, Developer and Developer's authorized representatives may enter upon and conduct reviews and assessments of the physical and environmental condition of the Property and the condition of the existing improvements. City may require Developer to execute a right of entry agreement satisfactory to City prior to entry onto the Property for such purpose and shall require Developer to provide proof of liability insurance acceptable to City. Developer's inspection, examination, survey and review of the Property shall be at Developer's sole expense. Developer shall provide City with copies of all reports and test results promptly following completion of such reports and testing. Developer hereby agrees to notify City twenty-four (24) hours in advance of its intention to enter the Property and will provide workplans, drawings, and descriptions of any intrusive sampling it intends to do. Developer must keep the Property in a safe condition during its entry. Developer shall repair, restore and return the Property to its condition immediately preceding Developer's entry thereon at Developer's sole expense. Developer will not permit any mechanics liens, stop notices or other liens or encumbrances to be placed against the Property prior to Close of Escrow. Without limiting any other indemnity provisions set forth in this Agreement, to the greatest extent permitted by law, Developer shall indemnify, defend (with counsel reasonably approved by City) and hold the Indemnitees harmless from and against all Claims resulting from or arising in connection with entry upon the Property by Developer or Developer's agents, employees, consultants, contractors or subcontractors pursuant to this Section 6.1 except to the extent arising from the gross negligence or willful misconduct of the Indemnitees. The foregoing indemnity shall not apply to conditions existing prior to Developer's entry onto the Property unless exacerbated by Developer. Developer's indemnification obligations set forth in this Section 6.1 shall survive the Close of Escrow and the termination of this Agreement and shall be subject to the additional terms and conditions set forth in Section 10.2 below.

6.2 Environmental Disclosure. To the extent City has copies of investigation reports concerning the Property, City represents and warrants that it has provided copies of the same to Developer prior to the Effective Date; but the Parties acknowledge that City will not be conducting a public records search of any regulatory agency files—although City urges Developer to do so to satisfy itself regarding the environmental condition of the Property. By execution of this Agreement, Developer: (i) acknowledges its receipt of the foregoing notice respecting the environmental condition of the Property; (ii) acknowledges that it will have an opportunity to conduct its own independent review and investigation of the Property prior to the Close of Escrow; (iii) agrees to rely solely on its own experts in assessing the environmental condition of the Property and its sufficiency for its intended use; and (iv) waives any and all rights Developer may have to assert that City failed to disclose information about the environmental condition of the Property other than due to a breach of representation and warranty set forth in this Section 6.2.

6.3 Property Sold and Conveyed "AS IS." Developer specifically acknowledges that City is selling, and Developer is purchasing, the Property on an "AS IS", "WHERE IS" and "WITH ALL FAULTS" basis and that Developer is not relying on any representations or warranties of any kind whatsoever, express or implied, from City, its employees, board members, agents, or brokers as to any matters concerning the Property other than those expressly set forth in this Agreement. Other than as expressly set forth in this Agreement, City makes no

representations or warranties as to any matters concerning the Property, including without limitation: (i) the quality, nature, adequacy and physical condition of the property or the improvements (if any) located thereon, including, but not limited to, the structural elements, foundation, roof, appurtenances, access, landscaping, parking facilities, and the electrical, mechanical, HVAC, plumbing, sewage, and utility systems, facilities and appliances, (ii) the quality, nature, adequacy, and physical condition of soils, geology and any groundwater, (iii) the existence, quality, nature, adequacy and physical condition of utilities serving the Property, (iv) the development potential of the Property, and the use, habitability, merchantability, or fitness, suitability, value or adequacy of the Property for any particular purpose, (v) the zoning or other legal status of the property or any other public or private restrictions on use of the Property, (vi) the compliance of the Property or its operation with any Environmental Laws, covenants, conditions and restrictions of any governmental or quasi-governmental entity or of any other person or entity, (vii) the presence or removal of Hazardous Material, substances or wastes on, under or about the Property or the adjoining or neighboring property; (viii) the quality of any labor and materials used in any improvements on the Property, (ix) the condition of title to the Property, (x) the leases, service contracts, or other agreements (if any) affecting the Property, or (xi) the economics of the operation of the Property.

6.4 Developer to Rely on Own Experts. Developer understands that notwithstanding the delivery by City to Developer of any materials, including, without limitation, third party reports, Developer will rely entirely on Developer's own experts and consultants and its own independent investigation in proceeding with the acquisition of the Property.

6.5 Release by Developer. Effective upon the Close of Escrow for the Property, Developer WAIVES, RELEASES, REMISES, ACQUITS AND FOREVER DISCHARGES the Indemnitees and any person acting on behalf of City, from any and all Claims, direct or indirect, known or unknown, foreseen or unforeseen, which Developer now has or which may arise in the future on account of or in any way arising out of or in connection with the physical condition of the Property, the presence of Hazardous Material in, on, under or about the Property, or any law or regulation applicable thereto including, without limiting the generality of the foregoing, all Environmental Laws (unless due to a breach by City of an express representation or warranty set forth in this Agreement).

DEVELOPER ACKNOWLEDGES THAT DEVELOPER IS FAMILIAR WITH SECTION 1542 OF THE CALIFORNIA CIVIL CODE, WHICH PROVIDES AS FOLLOWS:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

BY INITIALING BELOW, DEVELOPER EXPRESSLY WAIVES THE BENEFITS OF

SECTION 1542 OF THE CALIFORNIA CIVIL CODE WITH RESPECT TO THE FOREGOING RELEASE:

Developer's initials: \_\_\_\_\_

6.6 Developer's Post-Closing Obligations. Developer hereby covenants and agrees that:

(1) Developer shall not knowingly permit the Property, or any portion thereof to be a site for the use, generation, treatment, manufacture, storage, disposal or transportation of Hazardous Material or otherwise knowingly permit the presence or release of Hazardous Material in, on, under, about or from the Property with the exception of limited amounts of cleaning supplies and other materials customarily used in construction, use or maintenance of hotel or other commercial properties and related parking facilities similar in nature to the Project, and used, stored and disposed of in compliance with Environmental Laws.

(2) Developer shall keep and maintain the Property and each portion thereof in compliance with, and shall not cause or permit the Project or the Property, or any portion of the foregoing to be in violation of, any Environmental Laws.

(3) Upon receiving actual knowledge of the same, Developer shall promptly advise City in writing of: (i) any and all enforcement, cleanup, removal or other governmental or regulatory actions instituted, completed or threatened in writing against the Developer, or the Property pursuant to any applicable Environmental Laws; (ii) any and all claims made or threatened in writing by any third party against the Developer or the Property relating to damage, contribution, cost recovery, compensation, loss or injury resulting from any Hazardous Material; (iii) the presence or release of any Hazardous Material in, on, under, about or from the Property; or (iv) Developer's discovery of any occurrence or condition on any real property adjoining or in the vicinity of the Project classified as "Border Zone Property" under the provisions of California Health and Safety Code, Sections 25220 *et seq.*, or any regulation adopted in connection therewith, that may in any way affect the Property pursuant to any Environmental Laws or cause it or any part thereof to be designated as Border Zone Property. The matters set forth in the foregoing clauses (i) through (iv) are hereinafter referred to as "**Hazardous Materials Claims**"). City shall have the right to join and participate in, as a party if it so elects, any legal proceedings or actions initiated in connection with any Hazardous Materials Claim.

(4) Without City's prior written consent, which shall not be unreasonably withheld, conditioned or delayed, Developer shall not, prior to the Close of Escrow, take any remedial action in response to the presence of any Hazardous Material in, on, under, or about the Property (other than in emergency situations or as required by governmental agencies having jurisdiction in which case City agrees to provide its consent), nor enter into any settlement agreement, consent decree, or other compromise in respect to any Hazardous Materials Claim. Prior to the Close of Escrow, City shall have the right to join and participate in, as a party if it so elects, any legal proceedings or actions initiated

in connection with any Hazardous Materials Claims and to have its reasonable attorneys' fees in connection therewith paid by Developer.

6.7 Environmental Indemnity. To the greatest extent permitted by law, Developer shall indemnify, defend (with counsel reasonably approved by City) and hold Indemnitees harmless from and against all Claims resulting, arising, or based directly or indirectly in whole or in part, upon (i) the presence, release, use, generation, discharge, storage or disposal of any Hazardous Material on, under, in or about the Property, or the transportation of any such Hazardous Material to or from, the Property, or (ii) the failure of Developer, Developer's employees, agents, contractors, subcontractors, or any person acting on behalf of or as the invitee of any of the foregoing to comply with Environmental Laws, except to the extent caused by City's gross negligence or willful misconduct.

Developer's obligation to indemnify the Indemnitees shall not be limited or impaired by any of the following: (i) any amendment or modification of any City Document; (ii) any extensions of time for performance required by any City Document; (iii) the accuracy or inaccuracy of any representation and warranty made by Developer under this Agreement or by Developer or any other party under any City Document, and (iv) the release of Developer or any other person, by City or by operation of law, from performance of any obligation under any City Document.

The provisions of this Section 6.7 shall be in addition to any and all other obligations and liabilities that Developer may have under applicable law, and each Indemnitee shall be entitled to indemnification under this Section without regard to whether City or that Indemnitee has exercised any rights against the Property or any other security, pursued any rights against any guarantor or other party, or pursued any other rights available under the City Documents or applicable law. The obligations of Developer to indemnify the Indemnitees under this Section shall survive any foreclosure proceeding, any foreclosure sale, and any delivery of any deed in lieu of foreclosure. Developer's indemnification obligations under this Section shall not extend to Claims to the extent arising from the gross negligence or intentional misconduct of the Indemnitees and are subject to the additional terms set forth in Section 10.2 below.

6.8 Intentionally omitted.

6.9 Intentionally omitted.

6.10 Intentionally omitted.

6.11 Definitions.

6.11.1 "**Hazardous Material**" means any chemical, compound, material, mixture, or substance that is now or may in the future be defined or listed in, or otherwise classified pursuant to any Environmental Laws (defined below) as a "hazardous substance", "hazardous material", "hazardous waste", "extremely hazardous waste", "infectious waste", "toxic substance", "toxic pollutant", or any other formulation intended to define, list or classify substances by reason of deleterious properties such as ignitability, corrosivity, reactivity, carcinogenicity, or toxicity. The term "hazardous material" shall also include asbestos or

asbestos-containing materials, radon, chrome and/or chromium, polychlorinated biphenyls, petroleum, petroleum products or by-products, petroleum components, oil, mineral spirits, natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable as fuel, perchlorate, and methyl tert butyl ether, whether or not defined as a hazardous waste or hazardous substance in the Environmental Laws.

6.11.2 "**Environmental Laws**" means any and all federal, state and local statutes, ordinances, orders, rules, regulations, guidance documents, judgments, governmental authorizations or directives, or any other requirements of governmental authorities, as may presently exist, or as may be amended or supplemented, or hereafter enacted, relating to the presence, release, generation, use, handling, treatment, storage, transportation or disposal of Hazardous Material, or the protection of the environment or human, plant or animal health, including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 (42 U.S.C. § 9601), the Hazardous Materials Transportation Act (49 U.S.C. § 1801 *et seq.*), the Resource Conservation and Recovery Act (42 U.S.C. § 6901 *et seq.*), the Federal Water Pollution Control Act (33 U.S.C. § 1251 *et seq.*), the Clean Air Act (42 U.S.C. § 7401 *et seq.*), the Toxic Substances Control Act (15 U.S.C. § 2601 *et seq.*), the Oil Pollution Act (33 U.S.C. § 2701 *et seq.*), the Emergency Planning and Community Right-to-Know Act (42 U.S.C. § 11001 *et seq.*), the Porter-Cologne Water Quality Control Act (Cal. Water Code § 13000 *et seq.*), the Toxic Mold Protection Act (Cal. Health & Safety Code § 26100, *et seq.*), the Safe Drinking Water and Toxic Enforcement Act of 1986 (Cal. Health & Safety Code § 25249.5 *et seq.*), the Hazardous Waste Control Act (Cal. Health & Safety Code § 25100 *et seq.*), the Hazardous Materials Release Response Plans & Inventory Act (Cal. Health & Safety Code § 25500 *et seq.*), and the Carpenter-Presley-Tanner Hazardous Substances Account Act (Cal. Health and Safety Code, Section 25300 *et seq.*).

## ARTICLE VII

### LIMITATIONS ON CHANGE IN OWNERSHIP, MANAGEMENT AND CONTROL OF DEVELOPER

7.1 Identity of Developer; Changes Only Pursuant to this Agreement. Developer and its principals have represented that they possess the necessary expertise, skill and ability to carry out the development of the Project pursuant to this Agreement. The qualifications, experience, financial capacity and expertise of Developer and its principals are of particular concern to City. It is because of these qualifications, experience, financial capacity and expertise that City has entered into this Agreement with Developer. No voluntary or involuntary successor, assignee or transferee of Developer shall acquire any rights or powers under this Agreement, except as expressly provided herein.

7.2 Prohibition on Transfer. Prior to City's issuance of a final certificate of occupancy or equivalent for the Project, Developer shall not, except as expressly permitted by this Agreement, directly or indirectly, voluntarily, involuntarily or by operation of law make or attempt any total or partial sale, transfer, conveyance, encumbrance, assignment (including without limitation, any assignment for security purposes) or lease (collectively, "**Transfer**") of the whole or any part of the Property, the Project, the Improvements, or this Agreement, without the prior written approval of City which approval shall not be unreasonably withheld. Any such

attempt to assign this Agreement without City's consent shall be null and void and shall confer no rights or privileges upon the purported assignee. In addition to the foregoing, prior to City's issuance of a final certificate of occupancy or equivalent for the Project, except as expressly permitted by this Agreement, Developer shall not undergo any significant change of ownership or control (as defined below) without the prior written approval of City. For purposes of this Agreement, a "significant change of ownership or control" shall mean a transfer of the beneficial interest of more than fifty percent (50%) in aggregate of the present ownership of Developer, taking all transfers into account on a cumulative basis; provided, however, a syndication of Developer's limited partner or non-managing member interests, coupled with a right of such partner(s) or non-managing member(s) to vote on stated major decisions shall not be considered a "significant change of ownership or control" or be subject to City's required approval for purposes of this Agreement.

7.3 Permitted Transfers. Notwithstanding any contrary provision hereof, the prohibitions set forth in this Article shall not be deemed to prevent: (i) the granting of temporary easements or permits to facilitate development of the Property; (ii) the dedication of any property required pursuant to this Agreement; (iii) the lease or rental of commercial and retail space in the Project; (iv) assignments creating security interests for the purpose of financing the acquisition, construction or permanent financing of the Project, subject to the requirements of Article VIII, or Transfers directly resulting from the foreclosure of, or granting of a deed in lieu of foreclosure of, such a security interest; and (v) a Transfer to an entity under the direct control of or under common control with Developer.

7.4 Requirements for Proposed Transfers. City may, in the exercise of its sole discretion, consent to a proposed Transfer of this Agreement, the Property, the Improvements or part thereof if all of the following requirements are met (provided however, the requirements of this Section 7.4 shall not apply to Transfers described in clauses (i), (ii), (iii), (iv) or (v) of Section 7.3):

(i) The proposed transferee demonstrates to City's satisfaction that it has the qualifications, experience and financial resources necessary and adequate as may be reasonably determined by City to competently complete and manage the Project and to otherwise fulfill the obligations undertaken by the Developer under this Agreement.

(ii) The Developer and the proposed transferee shall submit for City review and approval all instruments and other legal documents proposed to effect any Transfer of all or any part of or interest in the Property, the Improvements or this Agreement, including without limitation, the organizational documents and authorizing resolution of the proposed transferee, and such documentation of the proposed transferee's qualifications and development capacity as City may reasonably request.

(iii) The proposed transferee shall expressly assume all of the rights and obligations of the Developer under this Agreement and the other City Documents arising after the effective date of the Transfer and all obligations of Developer arising prior to the effective date of the Transfer (unless Developer expressly remains responsible for such obligations), and shall agree to be subject to and assume all of Developer's obligations pursuant to the Conditions of Approval and all other conditions, and restrictions set forth in this Agreement. The

assumption of such obligations shall be documented in an assignment and assumption agreement in form reasonably approved by City.

(iv) The Transfer shall be effectuated pursuant to a written instrument reasonably satisfactory to City in form recordable in the Official Records.

Consent to any proposed Transfer may be given by City's Authorized Representative unless the Authorized Representative, in his or her discretion, refers the matter of approval to the City Council. If City has not rejected a proposed Transfer or requested additional information regarding a proposed Transfer in writing within thirty (30) days following City's receipt of written request by Developer, the proposed Transfer shall be deemed approved.

7.5 Effect of Transfer without City Consent. It shall be an Event of Developer Default hereunder entitling City to pursue remedies including without limitation, termination of this Agreement if without the prior written approval of City, Developer assigns or Transfers this Agreement, the Improvements, or the Property, or any part thereof or interest therein, or undertakes any other Transfer (including without limitation any assignment for security or encumbrance of the Property or any part thereof) in violation of Article VII. This Section 7.5.2 shall not apply to Transfers described in clauses (i), (ii), (iii), (iv) or (v) of Section 7.3.

7.6 Recovery of City Costs. Within ten (10) days following City's delivery to Developer of an invoice detailing such costs, Developer shall reimburse City for reasonable City costs, including but not limited to reasonable attorneys' fees [(up to \$2,500 unless otherwise approved by Developer)], incurred in reviewing instruments and other legal documents proposed to effect a Transfer of this Agreement, the Property or the Improvements, or part thereof or interest therein, and in reviewing the qualifications and financial resources of a proposed successor, assignee, or transferee.

## ARTICLE VIII

### SECURITY FINANCING AND RIGHTS OF MORTGAGEES

8.1 Mortgages and Deeds of Trust. Mortgages and deeds of trust, or any other reasonable security instrument are permitted to be placed upon the Property or the Improvements only for the purpose of securing loans for the purpose of financing the acquisition of the Property, the design and construction of the Improvements, the refinance of an acquisition and/or construction loan, and other expenditures reasonably necessary for the development, ownership and operation of the Project pursuant to this Agreement. As used herein, the terms "mortgage" and "deed of trust" shall mean any security instrument used in financing real estate.

8.2 Intentionally omitted.

8.3 Holder Not Obligated to Construct. The holder of any mortgage or deed of trust authorized by this Agreement shall not be obligated to complete construction of the Project or to guarantee such completion. Nothing in this Agreement shall be deemed to permit or authorize any such holder to devote the Property or any portion thereof to any uses, or to construct any



improvements thereon, other than those uses, or improvements provided for or authorized by this Agreement.

8.4 Notice of Default and Lender Right to Cure. Whenever City delivers any notice of default hereunder, City shall concurrently deliver a copy of such notice to each holder of record of any mortgage or deed of trust secured by the Property or the Improvements, provided that City has been provided with the address for delivery of such notice. City shall have no liability to any such holder for any failure by City to provide such notice to such holder. Each such holder shall have the right, but not the obligation, at its option, to cure or remedy any such default or breach within an additional ninety (90) day cure period after the cure period provided to Developer has expired. In the event that possession of the Property or the Improvements (or any portion thereof) is required to effectuate such cure or remedy, the holder shall be deemed to have timely cured or remedied the default if it commences the proceedings necessary to obtain possession of the Property or Improvements, as applicable, within the applicable cure period, diligently pursues such proceedings to completion, and within six (6) months after obtaining possession, diligently commences its efforts to cure or remedy. A holder who chooses to exercise its right to cure or remedy a default or breach shall first notify City of its intent to exercise such right prior to commencing to cure or remedy such default or breach. Nothing contained in this Agreement shall be deemed to permit or authorize such holder to undertake or continue the construction of the Project (beyond the extent necessary to conserve or protect the same) without first having expressly assumed in writing Developer's obligations to City under this Agreement. The holder (itself or through its affiliated entity) in that event must agree to complete, in the manner provided in this Agreement, the Project and the Improvements and submit evidence reasonably satisfactory to City that it has the development capability on staff or retainer and the financial capacity necessary to perform such obligations. Any such holder properly completing the Project pursuant to this Section shall, itself or through its affiliated entity, assume all rights and obligations of Developer under this Agreement.

8.5 Failure of Holder to Complete Improvements. In any case where, six (6) months after default by Developer in completing construction of the Project in accordance with Section 5.1, the holder of record of any mortgage or deed of trust has not exercised its option to complete construction of the Project, or having first exercised such option, has not proceeded diligently with such work subject to Force Majeure, City shall be afforded those rights against such holder that it would otherwise have against Developer under this Agreement.

8.6 City Right to Cure Defaults. In the event of a breach or default by Developer under a mortgage or deed of trust secured by the Property or the Improvements, City may cure the default, without acceleration of the subject loan, following prior notice thereof to the holder of such instrument and Developer. In such event, Developer shall be liable for, and City shall be entitled to reimbursement from Developer for all costs and expenses incurred by City associated with and attributable to the curing of the default or breach.

8.7 Holder to be Notified. Developer agrees to use best efforts to ensure that each term contained herein dealing with security financing and rights of holders shall be either inserted into the relevant deed of trust or mortgage or acknowledged and accepted in writing by the holder prior to its creating any security right or interest in the Property or the Improvements.

8.8 Modifications to Agreement. City shall not unreasonably withhold its consent to modifications of this Agreement requested by Project lenders or investors provided such modifications do not alter City's substantive rights and obligations under this Agreement.

8.9 Estoppel Certificates. Either Party shall, at any time, and from time to time, within fifteen (15) days after receipt of written request from the other Party, execute and deliver to such Party a written statement certifying that, to the knowledge of the certifying Party: (i) this Agreement is in full force and effect and a binding obligation of the Parties (if such be the case), (ii) this Agreement has not been amended or modified, or if so amended, identifying the amendments, and (iii) the requesting Party is not in default in the performance of its obligations under this Agreement, or if in default, describing the nature of any such defaults.

## ARTICLE IX

### DEFAULTS, REMEDIES AND TERMINATION

9.1 Event of Developer Default. The following events shall constitute an event of default on the part of Developer hereunder ("**Event of Developer Default**"):

- (a) Intentionally Deleted
- (b) A Transfer occurs, either voluntarily or involuntarily, in violation of Article VII, and Developer fails to cure such default within five (5) days after receiving written notice of such failure from City;
- (c) Developer fails to maintain insurance as required pursuant to this Agreement and Developer fails to cure such default within five (5) days;
- (d) Subject to Developer's rights pursuant to Section 5.24 above, Developer fails to pay prior to delinquency taxes or assessments due on the Property or the Improvements, or fails to pay when due any other charge that may result in a lien on the Property or the Improvements, and Developer fails to cure such default within twenty (20) days of the date of delinquency, but in all events prior to the date upon which the holder of any such lien has the right to foreclose thereon;
- (e) A default arises under any loan secured by a mortgage; deed of trust or other security instrument recorded against the Property and remains uncured beyond any applicable cure period such that the holder of such security instrument has the right to accelerate repayment of such loan;
- (f) Any representation or warranty contained in this Agreement or in any application, financial statement, certificate or report submitted to City in connection with this Agreement proves to have been incorrect in any material and adverse respect when made and continues to be materially adverse to City;
- (g) If, pursuant to or within the meaning of the United States Bankruptcy Code or any other federal or state law relating to insolvency or relief of debtors ("**Bankruptcy Law**"), Developer: (i) commences a voluntary case or proceeding; (ii) consents to the entry of

an order for relief in an involuntary case; (iii) consents to the appointment of a trustee, receiver, assignee, liquidator or similar official (iv) makes an assignment for the benefit of its creditors; or (v) admits in writing its inability to pay its debts as they become due;

(h) A court of competent jurisdiction shall have made or entered any decree or order (1) adjudging Developer to be bankrupt or insolvent, (2) approving as properly filed a petition seeking reorganization of Developer seeking any arrangement for Developer under bankruptcy law or any other applicable debtor's relief law or statute of the United States or any state or other jurisdiction, (3) appointing a receiver, trustee, liquidator, or assignee of Developer in bankruptcy or insolvency or for any of its properties, or (4) directing the winding up or liquidation of Developer, if such decree, order, petition, or appointment is not removed or rescinded within sixty (60) days;

(i) Developer shall have assigned its assets for the benefit of its creditors (other than pursuant to a mortgage loan) or suffered a sequestration or attachment of or execution on any substantial part of its property, unless the property so assigned, sequestered, attached or executed upon shall have been returned or released within sixty (60) days after such event (unless a lesser time period is permitted for cure pursuant to paragraphs (h) or (i) above or pursuant to any other mortgage on the Property, in which event such lesser time period shall apply under this subsection as well) or prior to any sooner sale pursuant to such sequestration, attachment, or execution;

(j) Developer shall have voluntarily suspended its business or Developer shall have been dissolved or terminated;

(k) An event of default arises under any City Document and remains uncured beyond any applicable cure period or, if not stated cure period, within sixty (60) days after written notice by City of such event of default; or

(l) Developer defaults in the performance of any term, provision, covenant or agreement contained in this Agreement other than an obligation enumerated in this Section 9.1 and unless a shorter cure period is specified for such default, the default continues for ten (10) days in the event of a monetary default or sixty (60) days in the event of a nonmonetary default after the date upon which City shall have given written notice of the default to Developer; provided however, if the default is of a nature that it cannot be cured within sixty (60) days, an Event of Developer Default shall not arise hereunder if Developer commences to cure the default within sixty (60) days and thereafter prosecutes the curing of such default with due diligence and in good faith to completion.

9.2 City Default. An event of default on the part of City (“**Event of City Default**”) shall arise hereunder if City fails to keep, observe, or perform any of its covenants, duties, or obligations under this Agreement, and the default continues for a period of sixty (60) days after written notice thereof from Developer to City, or in the case of a default which cannot with due diligence be cured within sixty (60) days, City fails to commence to cure the default within sixty (60) days of such notice and thereafter fails to prosecute the curing of such default with due diligence and in good faith to completion.

9.3 City's Right to Terminate Agreement. If an Event of Developer Default shall occur and be continuing beyond any applicable cure period, then City shall, in addition to other rights available to it under law or this Agreement, subject to the rights of any holder of a mortgage or deed of trust as described in Article VIII, have the right to terminate this Agreement. If City makes such election, City shall give written notice to Developer and to any mortgagee entitled to such notice specifying the nature of the default and stating that this Agreement shall expire and terminate on the date specified in such notice, and upon the date specified in the notice, this Agreement and all rights of Developer under this Agreement, shall expire and terminate.

9.4 City's Remedies and Rights Upon an Event of Developer Default. Upon the occurrence of an Event of Developer Default and the expiration of any applicable cure period, City shall have all remedies available to it under this Agreement or under law or equity, including, but not limited to the following, and City may, at its election, without notice to or demand upon Developer, except for notices or demands required by law or expressly required pursuant to the City Documents, exercise one or more of the following remedies:

- (a) Seek specific performance to enforce the terms of the City Documents;
- (b) Terminate this Agreement pursuant to Section 9.3 (subject to the rights of any holder of a mortgage or deed of trust as described in Article VIII); and
- (c) Pursue any and all other remedies available under this Agreement or under law or equity to enforce the terms of the City Documents and City's rights thereunder.

9.5 Developer's Remedies Upon an Event of City Default. Upon the occurrence of an Event of City Default, Developer may terminate this Agreement and/or pursue an action for equitable relief seeking the specific performance of the terms and conditions of this Agreement, and/or enjoining, abating, or preventing any violation of such terms and conditions.

9.6 Remedies Cumulative. Except as otherwise expressly stated in this Agreement, the rights and remedies of the Parties are cumulative, and the exercise by either Party of one or more of such rights or remedies shall not preclude the exercise by it, at the same or different time, of any other rights or remedies for the same or any other default by the other Party.

9.7 Inaction Not a Waiver of Default. No failure or delay by either Party in asserting any of its rights and remedies as to any default shall operate as a waiver of such default or of any such rights or remedies, nor deprive either Party of its rights to institute and maintain any action or proceeding which it may deem necessary to protect, assert or enforce any such rights or remedies in the same or any subsequent default.

9.8 Intentionally Omitted

9.9 Option to Purchase, Enter and Possess Upon Default. Subject to the rights of any holder of a mortgage or deed of trust as described in Article VIII, following conveyance of the Property to Developer, City shall have the right at its option to purchase, enter and take possession of the Property with all improvements thereon (the "**Repurchase Option**"), if after

conveyance of the Property, Developer (i) fails to commence construction of the Project within the **time specified in Section 5.1** as such date may be extended pursuant to the terms of this Agreement, (ii) abandons or suspends construction of the Project for a period of one hundred eighty (180) days, or (iii) directly or indirectly, voluntarily or involuntarily Transfers the Property or part thereof or this Agreement in violation of Article VII, if following written notice, Developer fail to cure such default within the applicable cure period. If it exercises the Repurchase Option, City shall pay to the Developer cash in an amount equal to:

- (i) The Purchase Price; plus
- (ii) All amounts paid to the City by Developer; less
- (vi) All taxes, assessments and utility charges payable with respect to the Property for the period prior to the date City acquires title to the Property; less
- (vii) The amount of any payments necessary to discharge or prevent from attaching any subsequent encumbrances or liens due to obligations, defaults, or acts of the Developer, its successors or transferees. .

In order to exercise the Repurchase Option, City shall give Developer written notice of such exercise, and Developer shall, within **thirty (30) days** after receipt of such notice, provide City with a summary of all of Developer's costs incurred as described in this Section 9.9. Within thirty (30) days of City's receipt of such summary, City shall pay into an escrow established for such purpose cash in the amount of all sums owing pursuant to this Section 9.9, and Developer shall execute and deposit into such escrow a grant deed transferring to City all of Developer's interest in the Property, or portion thereof, as applicable, and the improvements located thereon.

9.10 Memorandum of Power of Termination/Option to Purchase. The Parties shall cause a memorandum of the rights granted City in Sections 9.8 and 9.9 of this Agreement to be recorded in the Official Records at the time of the Close of Escrow for conveyance of the Property to Developer. In addition, the rights afforded City pursuant to Sections 9.8 and 9.9 may be described in the Grant Deed. Upon the completion of construction of the Project (i.e., City's issuance of a final Certificate of Occupancy or equivalent), unless City is pursuing its remedies under Section 9.8 or Section 9.9, City shall cause the memorandum referenced above in this section to be canceled and no longer of any force or effect.

9.11 Rights of Mortgagees. Any rights of City under this Article IX shall not defeat, limit or render invalid any mortgage or deed of trust permitted by this Agreement or any rights provided for in this Agreement for the protection of holders of such instruments. Any conveyance or return of the Property to City pursuant to this Article IX shall be subject to mortgages and deeds of trust permitted by this Agreement.

9.12 Assignment. The City shall have the right to assign the Repurchase Option to any other governmental entity or private party.

9.13 Construction Plans. If this Agreement is terminated by mutual agreement of the

Parties or by City as a result of an Event of Developer Default, the Developer shall have the right, but shall not have any obligation to deliver to City copies of any construction plans or studies for the Project. City shall not utilize the Construction Plans or any studies without having reimbursed Developer for the costs incurred by Developer in having the same prepared. Without limiting the foregoing restriction on City, if City utilizes the Construction Plans or studies, City shall indemnify the Developer for any claims arising from such use.

## ARTICLE X

### INDEMNITY AND INSURANCE

10.1 Indemnity. To the greatest extent permitted by law, Developer shall indemnify, defend (with counsel reasonably approved by City) and hold the Indemnitees harmless from and against any and all Claims (including without limitation, Claims arising from any injury, death, illness, property damage, or loss of property) arising directly or indirectly, in whole or in part, as a result of or in connection with the development, construction, improvement, operation, ownership or maintenance of the Project or the Property, or any part thereof by Developer or Developer's contractors, subcontractors, agents, employees or any other party acting for or on behalf of Developer, or otherwise arising out of or in connection with Developer's performance or failure to perform under this Agreement, including without limitation, Claims arising or alleged to have arisen in connection with any violation of Applicable Laws in connection with the development, operation or management of the Project, or relating to approval of the Project or approval of this Agreement. Developer's indemnification obligations under this Section 10.1 shall not extend to Claims to the extent arising from the gross negligence or willful misconduct of Indemnitees and are subject to the additional terms set forth in Section 10.2 below. The provisions of this Section 10.1 shall survive the expiration or earlier termination of this Agreement. It is further agreed that City does not and shall not waive any rights against Developer that it may have by reason of this indemnity and hold harmless agreement because of the acceptance by City, or the deposit with City by Developer, of any of the insurance policies described in this Agreement.

10.2 Terms Applicable to Indemnity Provisions. The terms set forth in this Section 10.2 shall apply to all provisions of this Agreement that pertain to Developer's obligations to indemnify City and the other Indemnitees, including without limitation, Sections 5.11, 5.14, 5.15, 6.1, 6.7, 10.1, and 11.1. In connection with each such provision, all of the following shall apply:

(a) City does not and shall not waive any rights against Developer that it may have by reason of any indemnity and hold harmless provision set forth in this Agreement because of the acceptance by City, or the deposit with City by Developer, of any of the insurance policies described in this Agreement.

(b) Developer's obligation to indemnify the Indemnitees shall not be limited or impaired by any of the following: (i) any amendment or modification of any City Document; (ii) any extensions of time for performance required by any City Document; (iii) the accuracy or inaccuracy of any representation and warranty made by Developer under this Agreement or by

Developer or any other party under any City Document, and (iv) the release of Developer or any other person, by City or by operation of law, from performance of any obligation under any City Document.

10.3 Liability, Workers Compensation, and Property Insurance. [UNDER REVIEW]

(a) Commercial General Liability. From and after the commencement of construction of the Project and until issuance of the final certificate of occupancy or equivalent for the Project, Developer all contractors working on behalf of Developer on the Project shall maintain a commercial general liability policy including coverage for bodily injury, property damage, products, completed operations and contractual liability coverage with coverage limits in the greater of: (a) the amounts required by the construction and permanent lenders for the Project, or (b) Two Million Dollars (\$2,000,000) each occurrence, Two Million Dollars (\$2,000,000) annual aggregate, together with Five Million Dollars (\$5,000,000) excess liability coverage, or such other policy limits as City may require in its reasonable discretion. Such policy or policies shall be written on an occurrence basis and shall name the Indemnitees as additional insureds.

(b) Automobile. From and after the commencement of construction of the Project and until issuance of the final certificate of occupancy or equivalent for the Project, Developer and all contractors working on behalf of Developer on the Project shall maintain a comprehensive automobile liability coverage in the amount of Two Million Dollars (\$2,000,000), combined single limit including coverage for owned and non-owned vehicles. Automobile liability policies shall name the Indemnitees as additional insureds.

(c) Worker's Compensation; Employer's Liability. As of the commencement of construction of the Project, Developer shall furnish or cause to be furnished to City evidence satisfactory to City that Developer, and any contractor with whom Developer has contracted for the performance of work on the Property or otherwise pursuant to this Agreement, carries statutory Workers' Compensation insurance and Employer's Liability insurance in a minimum amount of Two Million Dollars (\$2,000,000) per accident.

(d) Builder's Risk. From and after the commencement of construction of the Project and until issuance of the final certificate of occupancy or equivalent for the Project, Developer and all contractors working on behalf of Developer shall maintain a policy of builder's all-risk insurance in an amount not less than the full insurable cost of the Project on a replacement cost basis naming City as loss payee as its interests may appear.

(e) Professional Liability/Errors and Omissions. Professional Liability/Errors and Omissions insurance as appropriate for design/build operations with limits not less than Two Million Dollars (\$2,000,000) each claim. If the professional liability/errors and omissions insurance is written on a claims made form: (i) the retroactive date must be shown and must be before the Effective Date, (ii) insurance must be maintained and evidence of insurance must be provided for at least three (3) years after completion of Project construction, and (iii) if coverage is cancelled or non-renewed and not replaced with another claims made policy form with a retroactive date prior to the Effective Date, Developer must purchase extended period coverage for a minimum of three (3) years after completion of construction.

(f) Property. Commencing upon completion of construction of the Project, Developer shall maintain property insurance covering all risks of loss including earthquake (if required) and flood (if required) for 100% of the replacement value of the Project with deductible, if any, in an amount acceptable to City, naming City as loss payee as its interests may appear.

(g) Insurance Providers. Companies writing the insurance required hereunder shall be licensed to do business in the State of California. Insurance shall be placed with insurers with a current A.M. Best's rating of no less than A: VII.

(h) Evidence of Insurance; Endorsements; Policies. Prior to the Effective Date of this Agreement, Developer shall furnish City with certificates of insurance in form acceptable to City evidencing the insurance coverage required under paragraphs (a), (b), (c), and (e) above, duly executed endorsements evidencing the Indemnitees' status as additional insured, and all other endorsements and coverage required hereunder pertaining to such coverage. Prior to commencement of Project construction, Developer shall furnish City with certificates of insurance in form acceptable to City evidencing the insurance coverage required under paragraph (d) above. Prior to City's issuance of a final certificate of occupancy or equivalent for the Project, Developer shall furnish City with certificates of insurance in form acceptable to City evidencing the insurance coverage required under paragraph (f) above.

All insurance certificates shall contain a statement of obligation on the part of the carrier to notify City of any material adverse change, cancellation, termination or non-renewal of the coverage at least thirty (30) days in advance of the effective date of any such material adverse change, cancellation, termination or non-renewal. Upon City's request, Developer shall, within thirty (30) days of the request, provide or arrange for the insurer to provide to City, complete certified copies of all insurance policies required under this Agreement. City's failure to make such request shall not constitute a waiver of the right to require delivery of the policies in the future.

(i) Additional Insured Endorsements. The additional insured endorsements for the general liability coverage shall use Insurance Services Office (ISO) Form No. CG 20 09 11 85 or CG 20 10 11 85, or equivalent, including (if used together) CG 2010 10 01 and CG 2037 10 01; but shall not use the following forms: CG 20 10 10 93 or 03 94.

(j) Reinstatement. If any insurance policy or coverage required hereunder is canceled or reduced, Developer shall, within five (5) days after receipt of notice of such cancellation or reduction in coverage, but in no event later than the effective date of cancellation or reduction, file with City a certificate showing that the required insurance has been reinstated or provided through another insurance company or companies. Upon failure to so file such certificate, City may, without further notice and at its option, procure such insurance coverage at Developer's expense, and Developer shall promptly reimburse City for such expense upon receipt of billing from City.

(k) Primary Coverage; Waiver of Subrogation; Annual Aggregate Limits. All coverage shall be primary insurance and shall not be contributing with any insurance, or self-insurance maintained by City, and the policies shall so provide. Each insurance policy shall



contain a waiver of subrogation for the benefit of City. If any of the required insurance is provided under a form of coverage that includes an annual aggregate limit or provides that claims investigation or legal defense costs are included in such annual aggregate limit, such annual aggregate limit shall be three times the occurrence limits specified above.

(l) Deductibles/Retentions. Any deductibles or self-insured retentions shall be declared to, and be subject to approval by, City's Risk Manager. At the option of and upon request by City's Risk Manager if the Risk Manager determines that such deductibles or retentions are unreasonably high, either the insurer shall reduce or eliminate such deductibles or self-insurance retentions as respects the Indemnitees or Developer shall procure a bond guaranteeing payment of losses and related investigations, claims administration and defense expenses.

(m) Adjustments. The limits of the liability coverage and, if necessary, the terms and conditions of insurance, shall be reasonably adjusted from time to time (not less than every five (5) years after the Effective Date nor more than once in every three (3) year period) to address changes in circumstance, including, but not limited to, changes in inflation and the litigation climate in California. City shall give written notice to Developer of any such adjustments, and Developer shall provide City with amended or new insurance certificates or endorsements evidencing compliance with such adjustments within thirty (30) days following receipt of such notice.

(n) Additional Insured Coverage; Liability Limits. For all liability insurance required by this Agreement, Developer (and Developer's contractors, as applicable) shall obtain endorsements that name the Indemnitees as additional insured in the full amount of all applicable policies, notwithstanding any lesser minimum limits specified in this Agreement. This Agreement requires Developer (and Developer's contractors) to obtain and provide for the benefit of the Indemnitees, additional insured coverage in the same amount of insurance carried by Developer (or Developer's contractors, as applicable), but in no event less than the minimum amounts specified in this Agreement. In the event that Developer (or Developer's contractors as applicable) obtains insurance policies that provide liability coverage in excess of the amounts specified in this Agreement, the actual limits provided by such policies shall be deemed to be the amounts required under this Agreement. Without limiting the foregoing, the limits of liability coverage specified in this Agreement are not intended, nor shall they operate, to limit City's ability to recover amounts in excess of the minimum amounts specified in this Agreement.

## ARTICLE XI

### MISCELLANEOUS PROVISIONS

11.1 No Brokers. Each Party warrants and represents to the other that no person or entity can properly claim a right to a real estate commission, brokerage fee, finder's fee, or other compensation with respect to the transactions contemplated by this Agreement. Each Party agrees to defend, indemnify and hold harmless the other Party from any claims, expenses, costs or liabilities arising in connection with a breach of this warranty and representation. The terms

of this Section shall survive the close of escrow and the expiration or earlier termination of this Agreement.

11.2 Enforced Delay; Extension of Times of Performance. The time for performance of provisions of this Agreement by either Party shall be extended for a period equal to the period of any delay directly affecting the Project or this Agreement which is caused by war, insurrection, strikes, lockouts, riots, floods, earthquakes, fires, casualties, acts of God, acts of a public enemy, epidemics, pandemics or public health emergency, quarantine restrictions, freight embargoes, inability to attain services, Labor or materials or reasonable substitutes therefore, governmental actions, civil commotions, lack of transportation, acts of terrorism and terrorist activities, suits filed by unrelated third parties concerning or arising out of this Agreement, unseasonable weather conditions ,or other caused beyond the reasonable control of party obligated to perform, except with respect to the obligations to either party which can be satisfied by the payment of money (“**Force Majeure**”). An extension of time for any of the above-specified causes will be deemed granted only if written notice by the Party claiming such extension is sent to the other Party within twenty (20) calendar days from the commencement of the cause.

Times of performance under this Agreement may also be extended in writing by the mutual agreement of Developer and City (acting in the discretion of the Authorized Representative unless he or she determines in his or her discretion to refer such matter to the City Council). City and Developer acknowledge that, notwithstanding any contrary provision of this Agreement, adverse changes in economic conditions, either of the affected Party specifically or the economy generally, changes in market conditions or demand, and/or inability to obtain financing to complete the Project shall not constitute grounds of enforced delay pursuant to this Section. Each Party expressly assumes the risk of such adverse economic or market changes and/or financial inability, whether or not foreseeable as of the Effective Date.

11.3 Notices. Except as otherwise specified in this Agreement, all notices to be sent pursuant to this Agreement or any other City Document shall be made in writing and sent to the Parties at their respective addresses specified below or to such other address as a Party may designate by written notice delivered to the other Parties in accordance with this Section. All such notices shall be sent by: (i) personal delivery, in which case notice is effective upon delivery; (ii) certified or registered mail, return receipt requested, in which case notice shall be deemed delivered on receipt if delivery is confirmed by a return receipt; or (iii) nationally recognized overnight courier, with charges prepaid or charged to the sender’s account, in which case notice is effective on delivery if delivery is confirmed by the delivery service.

City: City of Daly City  
Attn: Director of Economic and Community Development  
333 90<sup>th</sup> Street  
Daly City, CA 94015

Copy: City of Daly City  
Attn: City Attorney  
333 90<sup>th</sup> Street, Third Floor

Daly City, CA 94105

Developer: 1837 Junipero Serra Hotel Development, LLC.

and:

Copy:

11.4 Attorneys' Fees. If either Party fails to perform any of its obligations under this Agreement, or if any dispute arises between the Parties concerning the meaning or interpretation of any provision hereof, then the prevailing Party in any proceeding in connection with such dispute shall be entitled to the costs and expenses it incurs on account thereof and in enforcing or establishing its rights hereunder, including, without limitation, court costs and reasonable attorneys' fees and disbursements.

11.5 Waivers; Modification. No waiver of any breach of any covenant or provision of this Agreement shall be deemed a waiver of any other covenant or provision hereof, and no waiver shall be valid unless in writing and executed by the waiving Party. An extension of time for performance of any obligation or act shall not be deemed an extension of the time for performance of any other obligation or act, and no extension shall be valid unless in writing and executed by the Party granting the extension. This Agreement may be amended or modified only by a written instrument executed by the Parties.

11.6 Binding on Successors. Subject to the restrictions on Transfers set forth in Article VII, this Agreement shall bind and inure to the benefit of the Parties and their respective permitted successors and assigns. Any reference in this Agreement to a specifically named Party shall be deemed to apply to any permitted successor and assign of such Party who has acquired an interest in compliance with this Agreement or under law.

11.7 Survival. All representations made by Developer hereunder, Developer's obligations pursuant to Sections 5.11, 5.14, 5.15, 6.1, 6.5, 6.7, 10.1 and 11.1, and City's rights under Section 9.8 and 9.9, and all other provisions that expressly so state, shall survive the expiration or termination of this Agreement.

11.8 Headings; Interpretation; Statutory References. The section headings and captions used herein are solely for convenience and shall not be used to interpret this Agreement. The Parties acknowledge that this Agreement is the product of negotiation and compromise on the part of both Parties, and the Parties agree, that since both Parties have participated in the negotiation and drafting of this Agreement, this Agreement shall not be construed as if prepared by one of the Parties, but rather according to its fair meaning as a whole, as if both Parties had prepared it. All references in the City Documents to statutes, regulations, ordinances or resolutions of the United States, the State of California, or the City of Daly City shall be deemed

to include the same statute, regulation, ordinance or resolution as hereafter amended or renumbered, or if repealed, to such other provisions as may thereafter govern the same subject.

11.9 Action or Approval. Whenever action and/or approval by City is required under this Agreement, the City's Authorized Representative or his or her designee may act on and/or approve such matter unless specifically provided otherwise, or unless the Authorized Representative determines in his or her discretion that such action or approval requires referral to the City Council for consideration.

11.10 Entire Agreement. This Agreement, including Exhibits A through G attached hereto and incorporated herein by this reference, together with the other City Documents contains the entire agreement between the Parties with respect to the subject matter hereof, and supersedes all prior written or oral agreements, understandings, representations or statements between the Parties with respect to the subject matter hereof.

11.11 Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be an original and all of which taken together shall constitute one instrument. The signature page of any counterpart may be detached therefrom without impairing the legal effect of the signature(s) thereon provided such signature page is attached to any other counterpart identical thereto having additional signature pages executed by the other Party. Any executed counterpart of this Agreement may be delivered to the other Party by facsimile and shall be deemed as binding as if an originally signed counterpart was delivered.

11.12 Severability. If any term, provision, or condition of this Agreement is held by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Agreement shall continue in full force and effect unless an essential purpose of this Agreement is defeated by such invalidity or unenforceability.

11.13 No Third-Party Beneficiaries. Except as expressly set forth herein, nothing contained in this Agreement is intended to or shall be deemed to confer upon any person, other than the Parties and their respective successors and assigns, any rights or remedies hereunder.

11.14 Parties Not Co-Venturers; Independent Contractor; No Agency Relationship. Nothing in this Agreement is intended to or shall establish the Parties as partners, co-venturers, or principal and agent with one another. The relationship of Developer and City is and shall remain solely that of a seller and buyer of real property, and shall not be construed as a joint venture, equity venture, partnership or any other relationship. City neither undertakes nor assumes any responsibility or duty to Developer (except as expressly provided in this Agreement) or to any third party with respect to the Project or City financing described herein. Developer and its employees are not, and shall at no time hold themselves out as employees or agents of City. Except as City may specify in writing, Developer shall not have any authority to act as an agent of City or to bind City to any obligation. Likewise, City and its employees are not, and shall at no time hold themselves out as employees or agents of Developer. Except as Developer may specify in writing, City shall not have any authority to act as an agent of Developer or to bind Developer to any obligation.

11.15 Time of the Essence; Calculation of Time Periods. Time is of the essence for each condition, term, obligation and provision of this Agreement. Unless otherwise specified, in computing any period of time described in this Agreement, the day of the act or event after which the designated period of time begins to run is not to be included and the last day of the period so computed is to be included, unless such last day is not a business day, in which event the period shall run until the next business day. The final day of any such period shall be deemed to end at 5:00 p.m., local time at the Property. For purposes of this Agreement, a “business day” means a day that is not a Saturday, Sunday, a federal holiday or a state holiday under the laws of the State of California.

11.16 Governing Law; Venue. This Agreement shall be governed by and construed in accordance with the laws of the State of California without regard to principles of conflicts of laws. Any action to enforce or interpret this Agreement shall be filed and heard in the Superior Court of San Mateo County, California or in the Federal District Court for the Northern District of California.

11.17 Intentionally Omitted

11.18 Political Activity. None of the materials, property or services provided by City to Developer under this Agreement shall be used for any partisan political activity or the election or defeat of any candidate for public office.

11.19 Non-Liability of City Officials, Employees and Agents. No member, official, employee or agent of City shall be personally liable to the Developer in the event of any default or breach by City or for any amount which may become due to the Developer or its successor or on any obligation under the terms of this Agreement.

11.20 Conflict of Interest.

(a) Except for approved eligible administrative or personnel costs, no person described in subsection (b) below who exercises or has exercised any functions or responsibilities with respect to the activities funded pursuant to this Agreement or who is in a position to participate in a decision-making process or gain inside information with regard to such activities, may obtain a personal or financial interest or benefit from the activity, or have an interest in any contract, subcontract or agreement with respect thereto, or the proceeds thereunder, either for themselves or those with whom they have family or business ties, during, or at any time after, such person’s tenure. The Developer shall exercise due diligence to ensure that the prohibition in this Section is followed.

(b) In accordance with Government Code Section 1090 and the Political Reform Act, Government Code Section 87100 *et seq.*, no person who is a director, officer, partner, trustee or employee or consultant of Developer, or immediate family member of any of the preceding, shall make or participate in a decision, made by City or a City board, commission or committee, if it is reasonably foreseeable that the decision will have a material effect on any source of income, investment or interest in real property of that person or the Developer. Interpretation of this Section shall be governed by the definitions and provisions used in the Political Reform Act,

Government Code Section 87100 *et seq.*, its implementing regulations manual and codes, and Government Code Section 1090.

*SIGNATURES ON FOLLOWING PAGES.*

DRAFT

IN WITNESS WHEREOF, the Parties have entered into this Agreement effective as of the date first written above.

**DEVELOPER:**

1837 Junipero Serra Hotel Development, LLC,  
a Delaware limited liability company

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

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

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

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

**CITY:**

City of Daly City, a municipal corporation

By: \_\_\_\_\_,  
City Manager

ATTEST:  
\_\_\_\_\_  
City Clerk

**APPROVED AS TO FORM:**

\_\_\_\_\_  
Rose Zimmerman, City Attorney

Exhibit A-1

**LEGAL DESCRIPTION OF THE PROPERTY**

(Attach legal description of the Property.)

Exhibit A-2

**SITE MAP**

(Attach diagram showing Property.)

Exhibit B

**PROJECT SCOPE**

(Attach description of Project.)

Exhibit C

**FORM OF PARKING EASEMENT AGREEMENT**

(Attach form of Parking Easement Agreement.)

Exhibit D

**FINANCING PLAN**

(Attach Financing Plan when approved.)

Exhibit E

**FORM OF CERTIFICATE OF COMPLETION**

(Attach form of Certificate.)

Exhibit F

**FORM OF MEMORANDUM OF OPTION**

(Attach form of Memorandum.)

Exhibit G

**FORM OF GRANT DEED**

(Attach form of Grant Deed.)