

**TUSTIN LEGACY  
DISPOSITION AND DEVELOPMENT AGREEMENT  
FOR PORTIONS OF DISPOSITION PARCELS 2C AND 8**

by and between

**CITY OF TUSTIN**

and

**BROOKFIELD HOMES SOUTHERN CALIFORNIA LLC**

**DATED: December 17, 2019**

## TABLE OF CONTENTS

1.	Subject and Purpose of Agreement; Parties; Applicable Requirements .....	1
1.1	Background Regarding MCAS Tustin.....	1
1.2	Description of Development Parcels and Real Property.....	2
1.3	Purpose of Agreement.....	4
1.4	Parties to the Agreement.....	5
1.5	Federal Requirements Applicable to Tustin Legacy.....	6
1.6	Local Requirements Applicable to Tustin Legacy.....	6
1.7	Not a Development Agreement. ....	6
1.8	DDA Transaction Expenses and Independent Contract Consideration. ....	6
1.9	Definitions; Attachments. ....	8
2.	Prohibition Against Transfers and Transfer of Control .....	9
2.1	Importance of Developer Qualifications.....	9
2.2	Transfers and Transfers of Control.....	9
2.3	Remedies for Improper Transfers or Transfers of Control.....	14
2.4	Changes.....	15
3.	Representations and Warranties.....	15
3.1	Developer’s Representations and Warranties.....	15
3.2	Developer Covenants Regarding Representations and Warranties.....	18
3.3	City Representations and Warranties.....	18
3.4	City Covenants Regarding Representations and Warranties.....	20
4.	Conveyance of Property from City to Developer.....	20
4.1	Conveyance of Property.....	20
4.2	Purchase Price.....	21
4.3	Payment of Base Purchase Price.....	21
4.4	Escrow and Joint Escrow Instructions.....	22
4.5	Investigation; Property Conveyed and License of License Areas “As-Is”.....	23
4.6	Developer Covenants; Preconditions to Transfers, Transfer of Control and Close of Escrow.....	30
4.7	Guarantor Illiquidity Event.....	40
5.	Developer’s Due Diligence Investigation.....	41
5.1	Due Diligence Period.....	41
5.2	No Financing Contingency.....	41
5.3	Termination of Agreement.....	41
5.4	Limited License.....	42
5.5	Indemnity.....	42

5.6	Review of Certain Records and Materials.....	43
5.7	Communications with City and Third Parties.....	43
6.	Title; Survey.....	44
6.1	Survey by Developer.....	44
6.2	Permitted Exceptions.....	44
6.3	Supplemental Title Reports.....	45
6.4	ALTA Policy; Endorsements; Close of Escrow and Developer Final Tract Map.....	46
6.5	City Title Policies.....	46
7.	Closing.....	46
7.1	Time and Place of Closing.....	46
7.2	Conditions Precedent to Close of Escrow.....	48
7.3	Additional Close of Escrow Conditions.....	55
7.4	Procedures for Conveyance.....	55
8.	Development of the Property and Additional Covenants of Developer and City.....	58
8.1	Scope of Development.....	58
8.2	Timing and Conditions of Project Development.....	61
8.3	Land Use Matters.....	62
8.4	Design Approval.....	63
8.5	Financial Status.....	66
8.6	Project Budget Statement.....	66
8.7	District Fees and Other Fees and Exactions.....	67
8.8	Recording of Developer Final Tract Map and Subdivision Improvement Agreement.....	70
8.9	Construction of Improvements by Developer.....	70
8.10	City Improvements.....	73
8.11	Outside Date of Completion of Construction.....	75
8.12	Development Covenants.....	75
8.13	City Rights of Access.....	76
8.14	Disclaimer of Responsibility by City and Exculpation.....	77
8.15	Local, State and Federal Laws.....	78
8.16	Liens, Taxes and Assessments.....	79
8.17	License Agreements for Construction.....	79
8.18	City Additional Covenants.....	81
9.	Certificate of Compliance.....	82
9.1	Completion; Schedule of Performance.....	82
9.2	Certificate of Compliance Defined.....	82

9.3	Conditions Precedent for Certificate of Compliance .....	82
9.4	Conclusive Presumption .....	83
9.5	Not Evidence.....	83
9.6	City Obligations.....	83
9.7	Effect of Certificate of Compliance; Termination of Agreement.....	84
10.	Indemnification and Environmental Provisions.....	85
10.1	Developer’s Indemnification for Non-Environmental Matters.....	85
10.2	Environmental Indemnity .....	87
10.3	Duration of Indemnities.....	87
10.4	Claim Response.....	88
10.5	Release Notification and Remedial Actions.....	88
10.6	Conflict with Section 330 and Other Federal Government Obligations.....	89
10.7	Insurance and Indemnification.....	89
10.8	Selection of Counsel and Defense Obligations.....	90
10.9	Settlement Procedures.....	90
10.10	Assignment of Rights.....	90
11.	Insurance.....	90
11.1	Required Insurance.....	90
11.2	General Insurance Requirements.....	94
12.	Covenants and Restrictions.....	95
12.1	Use Covenant.....	95
12.2	Maintenance Covenant.....	95
12.3	Duration of Covenants.....	98
12.4	Profit Participation Price.....	98
12.5	Obligation to Refrain from Discrimination.....	98
12.6	Deed Restrictions/Covenants Running with the Land.....	98
12.7	Priority of DDA and Special Restrictions.....	99
12.8	Landscape and Water Treatment Installation and Maintenance Agreement.....	99
12.9	Public Access Easement.....	100
12.10	Required Dedications and Irrevocable Offer to Dedicate Water Treatment Areas.....	100
13.	CC&Rs and Homeowners’ Association.....	100
13.1	City Approval of CC&Rs.....	100
13.2	Homeowners’ Association and Sub-Association.....	102
14.	Potential Defaults and Material Defaults.....	102

14.1	Potential Defaults.....	102
14.2	Material Defaults.....	102
14.3	Due Diligence Information; Products.....	104
15.	Remedies Prior to Close of Escrow; Nonoccurrence of a Condition at Close of Escrow.....	105
15.1	Failure of a Condition Absent a Default.....	105
15.2	Failure of Close of Escrow For Reasons Other than Deposit Return Event.....	106
15.3	Failure to Close; Default of City.....	107
15.4	Failure to Close Escrow, Deposit Return Event.....	109
15.5	Termination of Agreement.....	109
16.	Remedies for Defaults After the Close of Escrow.....	109
16.1	General Remedies.....	109
16.2	Lien Rights.....	110
16.3	Right of Purchase.....	110
16.4	The Right of Reversion.....	114
16.5	Access and Inspection.....	118
16.6	Obligations and Release Following Repurchase or Reversion.....	119
16.7	Cooperation of Developer.....	123
17.	General Provisions.....	123
17.1	Applicable Law; Consent to Jurisdiction; Service of Process.....	123
17.2	Legal Fees and Costs.....	124
17.3	Memorandum of DDA; Modifications or Amendments.....	124
17.4	Further Assurances.....	125
17.5	Rights and Remedies Are Cumulative; Limitation on Damages.....	125
17.6	Notices, Demands and Communications between the Parties.....	126
17.7	Delay.....	127
17.8	Conflict of Interest.....	130
17.9	Non-liability of City Officials and City or Developer Employees.....	130
17.10	Inspection of Books and Records.....	130
17.11	Consents and Approvals.....	130
17.12	No Real Estate Commissions.....	131
17.13	Date and Delivery of Agreement.....	132
17.14	Constructive Notice and Acceptance.....	132
17.15	Survival of Covenants, Representation and Warranties.....	132
17.16	Construction and Interpretation of Agreement.....	133
17.17	Time of Essence.....	133
17.18	Fees and Other Expenses.....	133
17.19	No Partnership.....	133

17.20 Binding Effect ..... 134  
17.21 No Third-Party Beneficiaries ..... 134  
17.22 Counterparts ..... 134  
17.23 Duplicate Originals, Entire Agreement and Waivers. .... 134  
17.24 Confidentiality. .... 135  
17.25 Proprietary and Governmental Roles; Actions by Parties. .... 136  
17.26 Performance of Acts on Business Days. .... 136

**DISPOSITION AND DEVELOPMENT AGREEMENT  
FOR PORTIONS OF DISPOSITION PARCELS 2C AND 8  
(TUSTIN LEGACY)**

This **DISPOSITION AND DEVELOPMENT AGREEMENT FOR PORTIONS OF DISPOSITION PARCELS 2C AND 8 (TUSTIN LEGACY)** (“**Agreement**”) is entered into as of December 17, 2019 (“**Effective Date**”) by and between the CITY OF TUSTIN (as more fully defined in Section 1.4.1, “**City**”) and BROOKFIELD HOMES SOUTHERN CALIFORNIA LLC, a Delaware limited liability company (as more fully defined in Section 1.4.2, “**Developer**”). The City and Developer are sometimes referred to in this Agreement individually as a “**Party**” and collectively as the “**Parties**”. The Parties agree as follows:

1. **Subject and Purpose of Agreement; Parties; Applicable Requirements.**

1.1 **Background Regarding MCAS Tustin.**

1.1.1 Pursuant to the Defense Base Closure and Realignment Act of 1990 (Part A of Title XXXIX of Public Law 101-510; 10 U.S.C. Section 2687 Note), as amended, the Federal Government (defined below) determined to close the Marine Corps Air Station-Tustin (“**MCAS Tustin**”) located substantially in the City of Tustin. In 1992, the City was designated as the Lead Agency or Local Redevelopment Authority for preparation of a reuse plan for MCAS Tustin in order to facilitate the closure of MCAS Tustin and its reuse in furtherance of the economic development of the City and surrounding region. The MCAS Tustin Reuse Plan developed in accordance with this procedure was adopted by the City Council of the City of Tustin (“**City Council**”) on October 17, 1996 and amended in September 1998 (“**Reuse Plan**”).

1.1.2 A Final Joint Environmental Impact Statement/Environmental Impact Report for the Disposal and Reuse of MCAS Tustin and Mitigation Monitoring and Reporting Program for the Final EIS/EIR were adopted by the City on January 16, 2001. In March 2001, a record of decision was issued by the Department of the Navy (hereinafter, “**Navy**”) approving the Final EIS/EIR and the Reuse Plan with several subsequent supplements and addenda approved by the City (the original EIS/EIR, as so amended, “**Final EIS/EIR**”).

1.1.3 In May 2002, the Navy approved an “Economic Development Conveyance of Property at MCAS Tustin” and agreed to convey approximately 1,153 acres of MCAS Tustin to the City. On May 13, 2002, a total of approximately 977 acres, including the Development Parcels (defined below) which are the subject of this Agreement were conveyed by the Navy to the City by quitclaim deed, as further described below, in accordance with the provisions of that certain Memorandum of Agreement by and between The United States of America (through the Secretary of the Army or designee) and the City dated May 13, 2002 (“**Memorandum of Agreement**”). The additional approximately 177 acres were made subject to a ground lease by the City from the Navy and portions thereof have subsequently been conveyed by the Navy to the City pursuant to subsequent quitclaim deeds. The approximately 1,153 acres of MCAS Tustin located within the City of Tustin and either conveyed by the Navy to the City or

subject to ground lease between the Navy and the City are referred to in this Agreement as “**Tustin Legacy**”.

1.1.4 On February 3, 2003, the City adopted an ordinance approving the MCAS Tustin Specific Plan/Reuse Plan setting forth the zoning and entitlement framework for future development of Tustin Legacy. Since its initial adoption, the City has approved numerous Specific Plan amendments. All references in this Agreement to the “**Specific Plan**” shall be deemed to refer to the MCAS Tustin Specific Plan/Reuse Plan, as the same may have been previously or may be subsequently amended. The Specific Plan in effect as of the Effective Date incorporates the provisions of the Reuse Plan and is denominated as the “Tustin Legacy Specific Plan”. The Specific Plan conforms to and implements the Reuse Plan and the City’s General Plan.

1.1.5 Tustin Legacy shall be developed in accordance with all City requirements, including, without limitation, the Specific Plan.

1.1.6 The City desires to effectuate development of Tustin Legacy through the sale and development of such property in accordance with applicable federal and local requirements. The City Council has previously adopted a Disposition Strategy for the Master Development Footprint dated April 2011 (“**Disposition Strategy**”) to address sale and redevelopment of land within Tustin Legacy consistent with all City requirements, including the Specific Plan. Pursuant to its Disposition Strategy, the City is authorized to enter into a controlled disposition strategy allowing the location of uses and placement of products to provide an incremental, logical, orderly and planned phasing of development of the former military base. Specifically, the Disposition Strategy authorizes the City, among other things, to establish a short list of vertical developers to which to sell property at Tustin Legacy, to enter into negotiations with developers who have demonstrated success on initial development opportunities and to provide rolling take down options on future phases or segments to those developers.

1.1.7 In February 2012, the City issued a Request for Proposals (“**RFP**”) seeking residential developers of for-sale residences in connection with development of certain for-sale residential communities at Tustin Legacy. Developer submitted a proposal pursuant to the RFP for purchase and development of the property and was one of three developers selected for further negotiations. Developer subsequently successfully constructed and conveyed homes within the Greenwood development (Disposition Packages 1B and 6A).

1.1.8 Consistent with the Disposition Strategy, the City and Developer entered into that certain Exclusive Negotiating Agreement (Tustin Legacy Portion of Disposition Packages 2C and 8) (“**ENA**”) with Developer contemplating the sale of certain real property comprising a portion of Disposition Packages 2C and 8, and development thereon of the Project (defined below) and the City intends to continue development of for-sale single family attached and detached product on that property as further described in this Agreement.

## 1.2 **Description of Development Parcels and Real Property.**

1.2.1 **Definition of Development Parcels.** The City is the owner of approximately 25.44 net acres of land located in the City of Tustin, County of Orange, California,

legally described and depicted on Attachment 2 (“**Development Parcels**”). As of the Effective Date, the Development Parcels are owned in fee by the City. The Development Parcels comprise a portion of the land conveyed by the Navy to the City in Navy quitclaim deed D dated May 13, 2002 and Recorded on May 14, 2002 as Instrument No. 20020404594 (“**Federal Deed**”). The Development Parcels are located in Specific Plan Neighborhood D, Planning Areas 8, 13 and 14 and are referred to in the Navy Reuse Plan as a portion of Parcels 8, 14 and 40 and in the Federal Deed as Parcels I-D-3 and I-D-4.

1.2.2 **Definition of Real Property.** The “**Real Property**” comprises the real property component of the Property to be conveyed to Developer pursuant to this Agreement and is specifically comprised of the Development Parcels excluding the following rights and interests of the City which shall be reserved to the City in the Quitclaim Deed:

(a) Any and all oil, oil rights, minerals, mineral rights, natural gas, natural gas rights and other hydrocarbons by whatsoever name known, geothermal steam and all products derived from any of the foregoing, that may be within or under the Development Parcels together with the perpetual right of drilling, mining, exploring for and storing in and removing the same from the Development Parcels or any other land, including the right to whipstock or directionally drill and mine from lands other than the Development Parcels, oil or gas wells, tunnels and shafts into, through or across the subsurface of the Development Parcels and to bottom such whipstocked or directionally drilled wells, tunnels and shafts under and beneath or beyond the exterior limits thereof, and to re-drill, re-tunnel, equip, maintain, repair, deepen and operate any such well or mines; but without, however, the right to enter upon or use the surface of the Development Parcels in the exercise of such rights or otherwise adversely affect the use or operation of the Development Parcels as anticipated by this Agreement or the structural integrity of any improvements on the Development Parcels; and

(b) Any and all water, water rights or interests therein appurtenant or relating to the Development Parcels or owned or used by the City in connection with or with respect to the Development Parcels no matter how acquired by the City, whether such water rights shall be riparian, overlying, appropriative, littoral, percolating, prescriptive, adjudicated, statutory or contractual, together with the perpetual right and power to explore, drill, re-drill and remove the same from or in the Development Parcels, to store the same beneath the surface of the Development Parcels and to divert or otherwise utilize such water, rights or interests on any other property owned or leased by the City; but without, however, the right to enter upon or use the surface of the Development Parcels in the exercise of such rights or otherwise adversely affect the use or operation of the Development Parcels as anticipated by this Agreement or the structural integrity of any improvements on the Development Parcels.

Reservation by the City of the rights and interests in clauses (a) and (b) of this Section 1.2.2 shall not be deemed to limit Developer’s right to construct foundations, utilities and other subsurface improvements for the purpose of constructing the Project, and otherwise engage in subsurface construction activity in order to construct the Project.

1.2.3 **Mapping.** Although the City has the legal authority under the Subdivision Map Act to convey the Real Property to Developer using a metes and bounds legal

description, Developer and the City have agreed that, prior and as a condition precedent to the Close of Escrow, Developer shall process a tentative tract map (Tract Map No. 19103) for the Development Parcels pursuant to the Subdivision Map Act and the City Code (“**Developer Tentative Tract Map**”) which shall be generally consistent with the Site Plan attached as Attachment 3 (as the same may be modified from time to time with the consent of the City in its sole discretion, “**Site Plan**”) and shall process and cause the Recording of the Developer Final Tract Map (defined below). The City is currently causing preparation of Tract Map (No. 18197) for Specific Plan Neighborhood D, for financing and conveyancing purposes, which includes the Real Property and intends to convey the Real Property following the Recording of the Final City Map and satisfaction of the various other conditions to Close of Escrow established in this Agreement. Among other things, Recording of the Final City Map will precede and is a necessary condition precedent to the City’s approval of the Developer Final Tract Map and the Close of Escrow. The Developer Tentative Tract Map shall further subdivide seven of the Blocks (comprising Blocks 2, 5, 6, 7, 8, 9, and 10) created by the City Tract Map. The Developer Final Tract Map shall provide for the division of the Real Property into approximately 73 numbered Lots (defined below) for the development of four hundred (400) Homes and approximately 10 lettered Lots for Common Area (defined below). As part of the transactions contemplated herein, Developer shall process the Developer Final Tract Map for the Real Property pursuant to the Subdivision Map Act and the City Code as generally depicted on the Site Plan attached as Attachment 3, for the development of four hundred (400) Homes, which is anticipated to be approved by the City prior and as a condition to Close of Escrow for the benefit of the City, but Recorded following the Close of Escrow.

### 1.3 **Purpose of Agreement.**

1.3.1 **Purpose.** The purpose of this Agreement is to (a) effectuate the Specific Plan (including the Reuse Plan incorporated therein), in accordance with the terms and conditions set forth therein and in the Memorandum of Agreement and the Federal Deed, through disposition and development of portions of Tustin Legacy as further described in this Agreement and (b) to provide for the sale and conveyance of the Property (defined below), for the maintenance and use of the Property and certain related improvements by Developer and for the construction of the Project (defined below) by Developer on the Development Property (defined below) in accordance with the Disposition Strategy and the terms and conditions of this Agreement.

1.3.2 **Project and Improvements Definitions.** This Agreement further provides for development by Developer of: (a) the Horizontal Improvements (defined below) to be developed on the Development Property and which are further described in the Scope of Development attached hereto as Attachment 8 and depicted on Attachment 9, and (b) the Phase Improvements and the Vertical Improvements (each defined below) to be developed on the Real Property. The Horizontal Improvements, Phase Improvements and Vertical Improvements are referred to collectively in this Agreement as the “**Improvements**” and the proposed development of the Improvements as further described in this Agreement is referred to herein as the “**Project**”. The Project generally comprises a residential condominium project on the Real Property of four hundred (400) Homes for sale to Homeowners (each defined below) in three product types at an average density of approximately 15 dwelling units per gross acre and a complete accompanying set of amenities all as further described attached hereto as Attachment 8. The Homes shall consist

of one hundred and seventeen (117) single family detached units, one hundred and twenty-nine (129) townhomes in forty-three (43) Buildings (defined below), and one hundred and fifty-four (154) motor court flats in seven (7) Buildings. The Improvements shall be designed and constructed by Developer in a manner consistent with the Specific Plan, the Reuse Plan, the Approved Plans, the Entitlements and all Governmental Requirements (each defined below).

1.3.3 **Benefits.** The disposition of the Property, the development and Completion of the Project pursuant to this Agreement, and the fulfillment generally of this Agreement, are in the vital and best interests of the citizens of the City and the health, safety and welfare of its residents, and are in accord with the public purposes and provisions of applicable federal, State, and local laws and requirements.

1.4 **Parties to the Agreement.**

1.4.1 **City.** The City is a municipal corporation of the State. The City has been recognized as the Local Redevelopment Authority by the Office of the Secretary of Defense for the former Marine Corps Air Station, Tustin, for purposes of the Base Closure Law. The term “City” as used in this Agreement shall mean the City of Tustin and each assignee or successor to the City’s rights, powers and responsibilities, provided that when in this Agreement the term “City and its Governmental Successors” is used, the term “City” shall be deemed to mean solely the City of Tustin. The City Council shall have the right, in its sole discretion, to assign its rights and obligations to any agency or instrumentality of the City. The principal office of the City and mailing address is 300 Centennial Way, Tustin, California 92780.

1.4.2 **Developer.** As of the Effective Date, Developer is Brookfield Homes Southern California LLC, a Delaware limited liability company. Whenever the term “Developer” is used in this Agreement, such term shall have the meaning set forth in Attachment 1. The sole member of Developer is Brookfield Southern California Holdings LLC, a Delaware limited liability company. The principal office of Developer and its mailing address is 3200 Park Center Drive, Suite 1000 Costa Mesa, California 92626. Brookfield Homes Southern California LLC, a Delaware limited liability company, specifically excluding any Transferee or successor or assignee thereof, is referred to in this Agreement as the “Initial Developer”.

1.4.3 **Relationship of City and Developer.** The Parties acknowledge and agree that the relationship of the City and Developer is neither that of a partnership nor that of a joint venture. Notwithstanding any provision of this Agreement, Developer is not, and shall not be deemed to be, the agent of the City for any purpose, and shall not have the power or the authority to bind the City to any contractual or other obligation. Prior to the Close of Escrow, Developer may only characterize itself to third parties as the prospective purchaser and/or developer of the Property. Developer shall not at any time hold itself out to the City or to any other third party as an agent of the City, and shall not, by any act or omission, mislead any third party into believing, or allow any third party to continue in the mistaken belief, that Developer is an agent of the City or has the power or authority to bind the City to any contractual or other obligation.

1.5 **Federal Requirements Applicable to Tustin Legacy.**

1.5.1 **Federal Economic Development Conveyance.** The Parties acknowledge and agree that this Agreement is entered into as part of an economic development conveyance of Tustin Legacy to the City pursuant to the Base Closure Law, the Memorandum of Agreement and the terms and conditions of the Federal Deed, including the environmental restriction pursuant to California Civil Code Section 1471 contained therein. Notwithstanding any provision to the contrary contained in this Agreement, this Agreement is and shall be subject to the terms and conditions of the Memorandum of Agreement and the Federal Deed and the rights, obligations and remedies of the Federal Government under the Federal Deed, and nothing contained in this Agreement shall be construed in a manner that is inconsistent with the rights, obligations and remedies of the Federal Government under the Federal Deed.

1.5.2 **Memorandum of Agreement and Federal Deed.** Notwithstanding anything in this Agreement to the contrary, if any provision of this Agreement contradicts, modifies or in any way changes the terms of the Memorandum of Agreement or the Federal Deed, the terms of the Memorandum of Agreement and Federal Deed shall prevail and govern.

1.6 **Local Requirements Applicable to Tustin Legacy.**

This Agreement is subject to all Governmental Requirements, including the General Plan, the Specific Plan, the City Code, and any redevelopment plan applicable to the Development Property, provided, however, that the City acknowledges that, substantially concurrently with the execution of this Agreement, City and Developer are entering into a statutory development agreement pursuant to Government Code Section 65864 et seq. (“DA”) relating to the Property and that any provisions of this Agreement requiring Developer or the Property to comply with any Governmental Requirements imposed by the City relating to entitlements or development of the Real Property shall be subject to the terms of the DA and in the event of any inconsistency between such Governmental Requirements and the DA, the Governmental Requirements required to be imposed pursuant to the DA shall control.

1.7 **Not a Development Agreement.**

This Agreement is not a development agreement as provided in Government Code Section 65864 and, as further set forth in Section 8.3.4, is not a grant of any entitlement, permit, land use approval, or vested right in favor of Developer, the Project or the Property. The City shall use good faith efforts, within applicable legal constraints and consistent with applicable City policies, to take such actions as may be necessary or appropriate to effectuate and carry out this Agreement in a timely and commercially reasonable manner.

1.8 **DDA Transaction Expenses and Independent Contract Consideration.**

1.8.1 **ENA Deposits and Transaction Expenses.** Pursuant to the ENA, Developer has paid to the City deposits totaling **Three Hundred and Seventy Five Thousand Dollars (\$375,000.00)** (“ENA Deposit”) to be used by the City to pay “City Transaction Expenses” as defined therein. Upon the execution of this Agreement by the Parties and satisfaction

of the conditions thereto set forth in Section 4.3 of the ENA, the funds remaining in the ENA Deposit, if any, shall be refunded to Developer.

1.8.2 **City Costs Deposit; Independent Consideration.** Upon the Effective Date and as a condition precedent to the effectiveness of this Agreement, Developer shall deliver to the City a new deposit of Fifty Thousand Dollars (\$50,000.00) ("**City Costs Deposit**"). The City Costs Deposit shall be deposited by the City in an account in a bank or trust company selected by the City. If any interest is paid on such account, such interest shall accrue to any balances in the account for the benefit of Developer and as additional security for Developer obligations under this **Section 1.8**. One Hundred Dollars (\$100.00) of the City Costs Deposit shall be retained by the City as "**Independent Contract Consideration**". The remaining amounts of the City Costs Deposit may be used by the City to pay the City's DDA Transaction Expenses and the City Costs Deposit will be depleted accordingly. If at any time prior to earlier of the Recording by the City of the Certificate of Compliance or the termination of this Agreement the amount of funds in the City Costs Deposit account (including interest accrued thereon) is depleted below Twenty-Five Thousand Dollars (\$25,000.00), Developer shall be required to pay to the City each time an additional Twenty-Five Thousand Dollars (\$25,000.00) which shall be credited to the City Costs Deposit. Each such payment shall be deposited by the City into the City Costs Deposit account to be applied to DDA Transaction Expenses in accordance with the provisions of **Section 1.8.3**.

1.8.3 **Payment of Transaction Expenses.** Developer shall pay all DDA Transaction Expenses incurred by the City during the term of this Agreement, whether arising with respect to matters or incurred by the City prior to or following the Close of Escrow. The City Costs Deposit has been established to fund the DDA Transaction Expenses and may be used by the City for such purpose and shall be depleted accordingly. Immediately upon incurring any DDA Transaction Expenses or receipt of an invoice from third parties for same, subject to complying with the requirements of **Section 1.8.4**, the City shall have the right to deduct the amounts due it on account thereof from the City Costs Deposit. In addition, at the Close of Escrow the City shall be entitled to deduct from the City Costs Deposit the payment of all DDA Transaction Expenses then unpaid and if such amounts are insufficient to cover all DDA Transaction Expenses incurred by the City to the Closing Date, Developer shall, as a condition to Close of Escrow, pay the full amount of DDA Transaction Expenses incurred by the City to and including the date of such Close of Escrow and then remaining unpaid and such additional amount as is required to maintain a City Costs Deposit held by the City of Fifty Thousand Dollars (\$50,000.00). Within ninety (90) calendar days following the earliest of (a) the termination of this Agreement prior to the Close of Escrow, (b) the Outside Closing Date, or (c) the issuance of the Certificate of Compliance, and provided that after application of such funds by the City to reduce the DDA Transaction Expenses arising or incurred by the City to such date, there is any City Costs Deposit amount held by the City, the City shall return any remaining amounts to Developer. If the amount of the City Cost Deposit is not sufficient to fund all DDA Transaction Expenses arising or incurred prior to such date, Developer shall pay the outstanding amounts due with respect to DDA Transaction Expenses to the City within thirty (30) calendar days following receipt of an invoice from the City therefore, provided that the City shall first apply the amount of the City Cost Deposit, if any, then held by it in satisfaction of such invoice, and shall reflect the amount of such credit on the invoice.

1.8.4 **Payment of DDA Transaction Expenses.** Absent manifest error, the determination of costs, expenses, and fees constituting DDA Transaction Expenses shall be made by the City in its sole discretion, and Developer shall receive written notices from the City setting forth amounts constituting DDA Transaction Expenses and related non-confidential documents evidencing such expenses. If Developer reasonably objects to any such amounts and the City agrees, in its sole discretion, that such objection is reasonable, the City shall cooperate with Developer to investigate such amounts and to seek an appropriate adjustment or reduction in such amounts. The determination of the City Manager shall be final with respect to any amounts due.

1.8.5 **Exclusions from DDA Transaction Expenses.** Notwithstanding anything to the contrary in this Agreement, the City and Developer hereby acknowledge and agree that the DDA Transaction Expenses do not include: (a) any fees or deposits required of Developer for processing Entitlements applications; (b) any fees or costs for complying with provisions of CEQA or its State CEQA implementing regulations or other matters identified in Sections 8.3.5 or 8.3.7; (c) any costs to review or approve any applications or submittals by Developer to the City in connection with the Project; (d) the Development Costs, Project Fair Share Contribution or any other development impact fees, exactions or other costs imposed as conditions of approval with respect to the Entitlements or pursuant to the Other Agreements; (e) the marketing fees set forth in Section 8.7.4; or (f) any other matters in this Agreement that expressly require Developer to pay, at its sole cost, for expenses incurred in connection with this Agreement that are not otherwise duplicative of other fees to be paid to the City in connection with the Project. The obligation of Developer to pay for the DDA Transaction Expenses pursuant to this Section 1.8 shall not diminish or limit Developer's obligation to pay for any of the costs in the preceding sentence.

## 1.9 **Definitions; Attachments.**

1.9.1 **Definitions.** Capitalized terms used in this Agreement, including in the Attachments attached hereto, unless otherwise defined in this Agreement, shall have the respective meanings specified in the Glossary of Defined Terms attached hereto as Attachment 1. Unless otherwise indicated, references in this Agreement to articles, sections, paragraphs, subsections, clauses, exhibits, attachments and schedules are to the same contained in or attached to this Agreement and all attachments and schedules referenced in this Agreement are incorporated in this Agreement by this reference as though fully set forth in this Section.

1.9.2 **"Substantially in the Form and Substance."** Wherever used in this Agreement, the term "substantially in the form and substance" shall mean that the referenced document, when compared to the previously approved form of document, is consistent in all material respects, and none of the modifications in the referenced document materially diminish a Party's rights or materially increase such Party's obligations under this Agreement, as determined by the Party for whose benefit the condition is written, in its sole discretion.

1.9.3 **Includes and Including.** As used in this Agreement the words "include" and "including" mean, respectively, "include, without limitation" and "including, without limitation".

2. **Prohibition Against Transfers and Transfer of Control.**

Any purported Transfer or Transfer of Control that does not comply with the requirements of Article 2 shall, at the election of the City, be null and void and such Transfer or Transfer of Control shall be a Material Default under this Agreement as of the Transfer Date by the violating party, in accordance with the provisions of Section 14.2.3.

2.1 **Importance of Developer Qualifications.**

Developer represents and agrees that its undertakings pursuant to this Agreement are for the purpose of development of the Project and not for speculation in land holding. Developer further recognizes and agrees that the qualifications and identity of Initial Developer and its Controlling Person, Brookfield Southern California Holdings LLC, a Delaware limited liability company, and Initial Developer's agreement (a) to construct the Project without encumbering the Property in any way, including, prior to the issuance of a Certificate of Compliance, with a Mortgage, and (b) to remain fully liable under this Agreement and the Other Agreements unless specifically released by the City pursuant to Section 2.2.3(b), Article 9 or Section 16.6 of this Agreement are of particular concern to the City and community and in light of the following:

(i) The importance of the development of the Real Property and Tustin Legacy to the general welfare of the community;

(ii) The fact that a Transfer of Control is for practical purposes a transfer of rights and obligations under this Agreement or the Property; and

(iii) That it is because of the qualifications and identity of Initial Developer and its Key Employees and Initial Developer's Controlling Persons that the City is entering into this Agreement with Developer.

2.2 **Transfers and Transfers of Control.**

2.2.1 **Restrictions on Transfers and Transfers of Control.**

(a) For the reasons set forth in Section 2.1, Developer, on behalf of itself, each Successor Owner and each and every Person claiming by, through or under Developer or any Successor Owner (but specifically excluding any End Users), acknowledges and agrees that, prior to the execution and Recording by the City of the Certificate of Compliance:

(b) Any Transfer or Transfer of Control in contravention of this Article 2 shall be a Material Default under this Agreement in accordance with Section 14.2.3 and no Person shall acquire any rights or powers under this Agreement except as set forth in this Article 2.

(i) Except as set forth in Section 2.2.2, no Transfer or Transfer of Control shall be valid or have any force or effect unless the City shall have provided its prior written consent thereto in the City's sole discretion and such Transfer shall have been carried out in accordance with the requirements of this Article 2.

(ii) No Person shall acquire any rights or powers under this Agreement except as set forth in this Article 2.

(c) Notwithstanding any Transfers and/or Transfers of Control, Initial Developer on behalf of itself, each Successor Owner and each and every Person claiming by, through or under Developer or any Successor Owner (but specifically excluding any End Users) agrees that: (i) neither Initial Developer nor any subsequent Developer shall be released with respect to the Ongoing Matters, and (ii) unless it is released by the City as set forth in Section 2.2.3(b) or otherwise agreed to by the City in writing, Initial Developer and each subsequent Developer shall remain fully liable for the obligations of Developer under this Agreement and the Other Agreements for such period as it is Developer under this Agreement and for such longer period as may be applicable to it during the Additional Liability Period and also shall remain liable with respect to each and every term of this Agreement expressly surviving termination of this Agreement for the period described herein.

(d) Notwithstanding any other provision of this Agreement to the contrary, with respect to any Transfer occurring following the Close of Escrow, the Transferee shall assume the obligation to pay all sums due under the Profit Participation Agreement not yet paid and accordingly shall include in the calculation of Gross Sales Price (as defined in the Profit Participation Agreement) all consideration received by any Developer or any Transferee for sale of Homes to members of the home-buyer public, including any Premiums and prices for Options and Upgrades (each as defined in the Profit Participation Agreement), whether such consideration was received by Developer or any Transferee prior to or following the Transfer Date.

2.2.2 **Permitted Transfers**. The following Transfers are “**Permitted Transfers**” and shall not be subject to the City’s prior written consent or otherwise subject to the requirements of Section 2.2.3:

(a) Subject to Section 2.2.1(c), any Transfer by a Responsible Developer to a Developer Affiliate of the entirety of Developer’s interest in the Project; provided that:

(i) the City shall be entitled to look to the Person that is the Responsible Developer prior to such Transfer to fully comply with this Agreement as though there had not been a Transfer (and each such Person shall remain fully liable under this Agreement) and to cause the Developer Affiliate to comply with this Agreement and such Responsible Developer shall remain fully liable under this Agreement and shall not be released from its obligations under this Agreement and shall cause the Developer Affiliate to comply with this Agreement;

(ii) there shall be no Transfer of Control and Brookfield Southern California Holdings LLC (the sole member of the Initial Developer) shall be, directly or indirectly, the Controlling Person of the Developer Affiliate that is the Transferee;

(iii) neither Transferor nor the then Responsible Developer shall be in Potential Default or Material Default under this Agreement at the Transfer Date;

(iv) the Responsible Developer or the Responsible Developer's Controlling Person shall provide the City with written notice of such transaction not less than thirty (30) calendar days prior to the proposed Transfer and

(v) no later than the Transfer Date, all of the applicable conditions set forth in Section 4.6.1, 4.6.2 and 4.6.5 and the conditions set forth in Section 4.6.6 shall have been satisfied.

(b) Any Transfer described by Section 2.2.7 to a Homeowner or a Homeowners' Association;

(c) Any Transfer of portions of the Property to the City and/or grants of easements affecting the Real Property to the City, to any public or quasi-public entity or to any utility, as necessary or desirable for the development thereof, or to a homeowners' association in accordance with the CC&Rs, except that the CC&Rs shall be subject to review and approval by the City as set forth in Article 13; and

(d) Any temporary license or other temporary grant of access rights to the Real Property to the City and/or to any other third party, as necessary or desirable for the development of the Real Property.

**2.2.3 Provisions Applicable to Transfers and Transfers of Control Other than Permitted Transfers.** Prior to Recording of a Certificate of Compliance, with respect and as a condition precedent to every Transfer and/or Transfer of Control that is not a Permitted Transfer pursuant to Section 2.2.2, Developer shall comply with the requirements of this Section 2.2.3 and the provisions of Section 4.6 applicable to such Transfer or Transfer of Control. Prior to any Transfer or Transfer of Control governed by this Section 2.2.3, Developer shall obtain the prior written consent of the City to such Transfer or Transfer of Control, which consent shall be granted or denied in the City's sole discretion. The City's right of consent shall include the right of the City to approve the Transferee and the Controlling Person of Transferee with respect to a Transfer, and the Controlling Person of Developer or Developer Affiliate, in the case of a Transfer of Control and the right to approve the proposed Equity Investor, if any, and the proposed Guarantor as further described in Section 4.6. Notwithstanding any other provision of this Agreement, Developer shall not, except for Permitted Transfers described in Section 2.2.2(b), (c) and (d), Transfer any portion of its interest in the Property, the Project, the Improvements or this Agreement or Developer's rights and obligations under this Agreement less than the entirety thereof. The following shall apply with respect to Transfers of the entirety of Developer's interest in this Agreement, the Project, the Improvements and the Property and to Transfers of Control by Developer:

(a) In order to provide the City with information necessary to inform its right to consent to a Transfer or Transfer of Control pursuant to this Section, Developer shall provide to the City at least twenty (20) Business Days prior to the date of any proposed Transfer

or Transfer of Control:

(i) the name(s) of the proposed Transferee and its Key Employees and principals and the new Controlling Person, if applicable;

(ii) all of the material proposed terms of the Transfer or Transfer of Control;

(iii) in the case of a Transfer, (A) current audited financial statements of the proposed Transferee (or financial statements certified by the chief financial officer or other appropriate authorized officer or authorized representative of the proposed Transferee, if the proposed Transferee does not have audited financial statements) and (B) a certificate of the proposed Transferee describing other similar residential real estate projects developed and leased by, or sold by the proposed Transferee in California over the preceding five (5) year period, the dates of involvement by the proposed Transferee with such projects and the success of the projects, such certificate to be made by the manager, president or other Person with appropriate authority from the proposed Transferee to do so;

(iv) in the case of a Transfer of Control, (A) current audited financial statements of the proposed new Controlling Person (or financial statements certified by the chief financial officer or other appropriate authorized officer or authorized representative of the proposed new Controlling Person, if the proposed new Controlling Person does not have audited financial statements); and (B) a certificate by the proposed new Controlling Person describing other similar residential real estate projects developed and sold or leased by the proposed new Controlling Person in California over the preceding five (5) year period, the dates of involvement by the proposed new Controlling Person with such projects and the success of the projects, such certificates to be made by the manager, president or other Person with appropriate authority from the proposed new Controlling Person to do so;

(v) the names of all Persons who Control the proposed Transferee or the new Controlling Person, as applicable, the proposed Equity Investor, if any, and the proposed Guarantor;

(vi) such other relevant information as the City may request in its sole discretion in connection with its consent rights under this Agreement (including information analogous to the information described in Sections 4.6.1 through 4.6.6, 4.7, 8.5.1 through 8.5.4 and 8.6 of this Agreement), which may include evidence that the proposed Transferee, proposed new Controlling Person, proposed Equity Investor, if any, and proposed Guarantor each has sufficient financial capacity to perform, fund or guaranty, as applicable the obligations of Developer under this Agreement and the Other Agreements, without utilizing a Mortgage and to meet the other requirements of this Agreement and the Other Agreements; and

(vii) no later than the Transfer Date, all of the applicable conditions set forth in Section 4.6.5 and the conditions set forth in Section 4.6.6 shall have been satisfied.

(b) Upon a Transfer approved by the City pursuant to this Section 2.2.3 of all of Developer's interests in this Agreement, the Project, the Improvements and the Property to a Transferee approved by the City in its sole discretion and with the satisfaction of all of the conditions to such Transfer set forth in this Section 2.2.3 pursuant to an Assignment Agreement in which Transferee has assumed in writing all of all Developer's obligations under this Agreement and the Other Agreements in accordance with pursuant to an Assignment Agreement meeting the requirements of Section 4.6.6(b)(i), Developer shall be released from any of its obligations under this Agreement and the Other Agreements arising from and after the date of such Transfer; provided that, in no event shall Developer be released with respect to the Ongoing Matters and further, the Transfer of any Home to a Homeowner shall not release Developer from any of its obligations under this Agreement. If Transferor and Transferee satisfy the requirements of this Section 2.2.3 with respect to a Transfer as determined by the City in its sole discretion, the City shall execute a consent to assignment and release in the form of the consent attached to the Assignment attached as Attachment 17A of this Agreement.

2.2.4 **No Mortgages or Sale Leasebacks without Consent.** Prior to Recording by the City of the Certificate of Compliance, neither Developer nor the Homeowners' Association shall encumber the Property with any Mortgage without the prior written consent of the City as set forth in Section 2.2.1 which approval may be granted or withheld in the sole and absolute discretion of the City. Any encumbrance of the Real Property, or any portion thereof, in violation of this Article 2 shall be a prohibited Transfer or Transfer of Control and a Material Default by Developer, subject to the provisions of Section 14.2.3. The City shall have no right to approve or disapprove a Mortgage after the issuance of the Certificate of Compliance. Developer shall not assign the Property or the Real Property or any portion thereof to a third party for purposes of a sale-leaseback transaction. Developer shall not obtain or utilize Mezzanine Financing without the prior consent of the City in its sole discretion. The provisions of this Section shall not apply with respect to any Home that has been sold by Developer to a Homeowner.

2.2.5 **Bankruptcy.** The following shall be considered Transfers or Transfers of Control which are prohibited without consent from the City, which may be granted or withheld in the City's sole discretion (herein, a "**Developer Insolvency Event**"):

(a) If Developer is or becomes bankrupt or insolvent or if any involuntary proceeding is brought against Developer (unless, in the case of a petition filed against Developer, the same is dismissed within ninety (90) calendar days), or Developer makes an assignment for the benefit of creditors, or institutes a proceeding under or otherwise seeks the protection of federal or State bankruptcy or insolvency laws, including the filing of a petition for voluntary bankruptcy or instituting a proceeding for reorganization or arrangement;

(b) If a writ of attachment or execution is levied on this Agreement or on the Development Parcels, or on any portion thereof, where such writ is not discharged within ninety (90) calendar days; or

(c) If, in any proceeding or action in which Developer is a party, a receiver is appointed with authority to take possession of the Development Parcels, or any portion thereof, where possession is not restored to Developer within ninety (90) calendar days.

2.2.6 **City Estoppel.** From time to time (but in no event more often than annually or in connection with a Permitted Transfer, or a Transfer or Transfer of Control consented to by the City in accordance with this Agreement) within twenty (20) calendar days of the City's receipt of a written request therefor, the City shall execute and deliver to Developer and any Transferee, a City Estoppel, substantially in the form and substance of the City Estoppel attached hereto as Attachment 5 but with such modifications as are necessary in the City's sole discretion to ensure the accurateness of the statements made therein.

2.2.7 **Restrictions and Permitted Sale of Homes and Transfer of Property to Homeowners and Homeowners' Association.** Notwithstanding anything to the contrary set forth in this Agreement, recognizing that the Real Property will be developed with the intent to sell individual residential Homes to Homeowners and to Transfer the Common Area and the Common Area Improvements to a homeowners' association created pursuant to Section 13.2 established pursuant to the laws and regulations of the State for the management of a common area development on the Real Property (and excluding any sub-associations which may be formed) ("**Homeowners' Association**"), the general prohibition against Transfer outlined herein shall not be applicable to (a) the sale of individual Homes to Homeowners, or (b) the Transfer to the Homeowners' Association of the Common Area and Common Area Improvements; provided, however, that sale or transfer of any Home to a Homeowner or the conveyance of any Common Area to a Homeowners' Association shall not be permitted unless and until such Home is authorized for sale or such Lot and/or portion thereof is authorized for transfer pursuant to State law, including regulations promulgated by the California Department of Real Estate ("**DRE**") and the Transfer of any Block or Lot or any other portion of the Property, including any Common Area to a Homeowners' Association, shall not be permitted unless and until the Improvements proposed to be constructed thereon pursuant to the Scope of Development, the Approved Plans and the CC&Rs have been Completed.

2.2.8 **City Costs.** Developer shall promptly pay to the City all of the City's actual out of pocket third party expenses, including legal fees, and staff costs incurred with respect to the review, consideration, analysis and response to any of the matters required to be reviewed or consented to by the City pursuant to this Section 2.2 or Section 2.4, including with respect to (a) any request for consent or approval of a Guarantor, Transferee, Transfer or Transfer of Control, and (b) review, consideration, preparation and delivery of each City Estoppel; provided that with respect to this clause (b) only, such expenses, fees and costs shall not exceed Five Thousand (\$5,000.00) with respect to any single City Estoppel.

### 2.3 **Remedies for Improper Transfers or Transfers of Control.**

Without limiting the generality of the foregoing, a failure (a) by Developer to comply with the requirements of this Article 2 with respect to any Transfer or Transfer of Control or (b) by any Transferee to execute the Assignment Agreement required by Section 2.2, if applicable, or to execute and deliver, or cause a Transferee, its Approved Equity Investor, if applicable, or

Guarantor to execute and deliver, each of the certificates and other documents required by Section 2.2 and Section 4.6 required in connection with a Transfer shall in each case be a Material Default under this Agreement, subject to the provisions of Section 14.2.3, but with no extension on account of Force Majeure Delay and, in such event, the City shall have all remedies available to it at law and in equity, including those specified in this Agreement and specifically including the right to terminate this Agreement or following Close of Escrow, to exercise the Right of Purchase and/or the Right of Reversion, as applicable, in accordance with Article 16 of this Agreement.

## 2.4 Changes.

Developer shall promptly notify the City in the event that any of the following Persons cease to be involved with the development of the Project: (a) any of the Key Employees, (b) Robert Hidey Architects and JZMK Partners, the Project Architect, (c) C2 Collaborative, the landscape architect, or (d) Fuscoe Engineering, Inc., the Project engineer. Following any Transfer or Transfer of Control, Transferee shall provide the City with a list of its Key Employees and the City shall have the right to notify Developer if it considers any of such individuals unsatisfactory, in which event such individual(s) shall be removed as Key Employees.

## 3. Representations and Warranties.

### 3.1 Developer's Representations and Warranties.

As an inducement to the City to enter into to enter into and perform its obligations under this Agreement, Developer represents and warrants to the City as follows as of the Effective Date:

3.1.1 Developer has the necessary expertise, experience, financial experience, financial capacity, qualifications and legal status necessary to perform as Developer pursuant to this Agreement and to construct and Complete the Project as contemplated by this Agreement, and, without limiting the foregoing, Developer is experienced in the development, management, and sale of residential condominium projects of the size and type described in this Agreement and understands the process and requirements associated with projects such as the Project described herein.

3.1.2 Developer's acquisition of the Property, development of the Project and its other undertakings pursuant to this Agreement are for the purpose of timely development of the Project upon the Development Areas in accordance with the Schedule of Performance attached to this Agreement and not for speculation or land holding.

3.1.3 Developer is a limited liability company, duly organized, and validly existing and in good standing under the laws of the State of Delaware, is duly qualified to do business and in good standing in the State and in each other jurisdiction where the operation of its business or its ownership of property or the performance of Developer's obligations under this Agreement make such qualification necessary.

3.1.4 Subject to all of the conditions set forth in this Agreement for the benefit of Developer, Developer has (or will have prior to the date by which a particular step is required

to be taken or performance of a particular obligation is required to be commenced pursuant to this Agreement or any Other Agreements) all requisite power and authority required to enter into this Agreement and the instruments referenced in this Agreement, to consummate the transaction contemplated hereby and to take any steps contemplated thereby or hereby, and to perform its obligations under this Agreement or the other instruments referenced in this Agreement.

3.1.5 Developer has obtained (or will have obtained prior to the date by which a particular step is required to be taken or performance of a particular obligation is required to be commenced pursuant to this Agreement or any Other Agreements) all required consents in connection with entering into this Agreement and the instruments and documents referenced in this Agreement to which Developer is or shall be a party and the consummation of the transactions contemplated hereby.

3.1.6 The individuals executing this Agreement and the individuals that will execute the instruments referenced in this Agreement on behalf of Developer have, or will have upon execution thereof, the legal power, right and actual authority to bind Developer to the terms and conditions hereof and thereof.

3.1.7 This Agreement has been duly authorized, executed and delivered by Developer and all documents required in this Agreement to be executed by Developer pursuant to this Agreement shall be, at such time as they are required to be executed by Developer, duly authorized, executed and delivered by Developer and are or shall be, at such time as the same are required to be executed pursuant to this Agreement, valid, legally binding obligations of and enforceable against Developer in accordance with their terms, except as enforceability may be limited by bankruptcy laws or other similar laws affecting creditors' rights.

3.1.8 Neither the execution nor delivery of this Agreement or the documents referenced in this Agreement, nor the incurring of the obligations set forth in this Agreement and the certificates, declarations and other documents referenced in this Agreement, nor the consummation of the transactions contemplated in this Agreement, nor compliance with the terms of this Agreement and the documents referenced in this Agreement, will violate any provision of law or any order of any court or Governmental Authority to which Developer is subject or conflict with or result in the breach of any terms, conditions, or provisions of, or constitute a default under any bond, note, or other evidence of indebtedness or any contract, indenture, mortgage, deed of trust, loan, partnership agreement, lease or other agreements or instruments to which Developer, one of its owners, members or partners are a party and which affect the Property or the transactions contemplated by this Agreement.

3.1.9 No attachments, execution proceedings, assignments of benefit to creditors, bankruptcy, reorganization or other insolvency proceedings are pending or, to the best of Developer's Knowledge, threatened against Developer, or any of its owners, members or partners.

3.1.10 Except for those representations and warranties of the City expressly set forth in in Sections 3.3 and 17.12.2, Developer is relying solely upon its own inspections and investigations in proceeding with this Agreement and the transactions contemplated in this

Agreement, and is not relying on the accuracy or reliability of any information provided to it by the City, on any oral or written representation or on any facts or conclusions of law made by the City, or any of its elected and appointed officials, officials, employees, agents, attorneys or representatives made in connection with this Agreement. In making such investigation and assessment, Developer has been provided access to any persons, records or other sources of information which it has deemed appropriate to review and it has thereafter completed such investigation and assessment. Without limiting the generality of the foregoing provisions, Developer acknowledges that the City has not made and will not make any representations or warranties concerning the condition of the Development Areas, the compliance or non-compliance of the Development Areas or any portion thereof with Environmental Laws or the existence or non-existence of Hazardous Materials in relation to the Development Areas or any portion thereof or otherwise, except for those representations and warranties of the City set forth in Sections 3.3 and 17.12.2.

3.1.11 Except as described on Attachment 4, there are no adverse conditions or circumstances existing and no litigation or governmental action either pending or, to the knowledge of any of the Developer Representatives, threatened, to which Developer or any Controlling Person of Developer is or may be a party or to which the Development Areas are or may become subject, which would reasonably be expected to prevent or materially impair Developer's ability to carry out its obligations under this Agreement or to develop the Development Areas and the Project or carry out its other obligations under this Agreement, and upon Close of Escrow, the Other Agreements then in effect, as contemplated by the terms of this Agreement.

3.1.12 Except as set forth in this Agreement, the DA and the ENA, Developer has not paid or given, and will not pay or give, any third Person any money or other consideration for obtaining this Agreement, other than the normal cost of conducting business and cost of professional services such as architects, engineers and attorneys.

3.1.13 All reports, documents, instruments, information and forms of evidence delivered by Developer to the City concerning or related to this Agreement and the transactions contemplated hereby are, to Developer's Knowledge, accurate and correct and sufficiently complete at the time of submission to give the City true and accurate knowledge of the subject matter, and do not contain any material misrepresentation or omission.

3.1.14 As of the Close of Escrow, Developer will have the equity capital and financial capacity required for Completion of the Development without requirement of third-party financing.

3.1.15 Developer does not have any contingent obligations or any other contracts the performance or nonperformance of which could adversely affect the ability of Developer to fund the Project or to carry out its obligations under this Agreement. Developer has not and shall not undertake such additional projects as could reasonably be expected to jeopardize the sufficiency of such equity, capital and firm and binding commitments for the purposes expressed in the preceding sentence.

Subject to Section 7.2.2(b)(xii), Developer's representations and warranties set forth in this Section 3.1 shall be deemed to be restated at the Close of Escrow and shall survive the Close of Escrow until the earlier to occur of the following (a) termination of this Agreement or (b) issuance of the Certificate of Compliance, and shall not be merged with the Quitclaim Deed. As used in Section 3.1 and 3.2, "**Developer's Knowledge**" and similar phrases means the actual present knowledge of the Developer Knowledge Parties as of the Effective Date, in each case without any duty of inquiry; provided, however, that in the event any of the Developer Knowledge Parties are unavailable at the time these representations and warranties set forth in this Section 3.1 are restated at the Close of Escrow, Developer may specifically identify different Developer's Knowledge Parties, subject to the City's reasonable approval. Notwithstanding anything to the contrary contained herein, (i) none of the Developer Knowledge Parties shall be personally liable for any inaccuracy or breach by Developer of the representations and warranties contained in this Section 3.1 or elsewhere in this Agreement and/or any of the Other Agreements, and (ii) the City shall not be entitled to make a claim for a breach of Developer's representations and warranties if Developer had disclosed in writing facts to the then-current City Manager or the then-current Economic Development Director indicating that the applicable representation and warranty was incorrect prior to (A) the execution of this Agreement and the City proceeded with the execution of this Agreement, or (B) the Close of Escrow and the City proceeded with the Close of Escrow, in either case in spite of such inaccuracy.

### 3.2 Developer Covenants Regarding Representations and Warranties.

Developer shall promptly advise the City in writing if any of the Developer Knowledge Parties becomes aware (without any duty of inquiry) that any representation or warranty made by Developer in Section 3.1 or in any Assignment Agreement is or becomes untrue in any material respect prior to the Close of Escrow.

### 3.3 City Representations and Warranties.

As an inducement to Developer to enter into and perform its obligations under this Agreement, the City represents and warrants to Developer as follows:

3.3.1 The City is a municipal corporation incorporated within and existing pursuant to the laws of the State.

3.3.2 Subject to all of the conditions set forth in this Agreement for the benefit of the City, the City has (or will have prior to the date by which a particular step is required to be taken or performance of a particular obligation is required to be commenced pursuant to this Agreement or any Other Agreements) all requisite power and authority required to enter into this Agreement and the instruments referenced in this Agreement, to consummate the transaction contemplated hereby and to take any steps contemplated thereby or hereby, and to perform its obligations under this Agreement and the instruments referenced in this Agreement.

3.3.3 The City has obtained (or will have obtained prior to the date by which a particular step is required to be taken or performance of a particular obligation is required to be commenced pursuant to this Agreement or any Other Agreements) all required consents in

connection with entering into this Agreement and the instruments and documents referenced in this Agreement to which the City is or shall be a party and the consummation of the transactions contemplated in this Agreement.

3.3.4 The individuals executing this Agreement and the individuals that will execute the instruments referenced in this Agreement on behalf of the City have, or will have upon execution thereof, the legal power, right and actual authority to bind the City to the terms and conditions hereof and thereof.

3.3.5 This Agreement has been duly authorized, executed and delivered by the City and all documents required in this Agreement to be executed by the City pursuant to this Agreement shall be, at such time as they are required to be executed by the City, duly authorized, executed and delivered by the City and are or shall be, at such time as the same are required to be executed under this Agreement, valid, legally binding obligations of and enforceable against the City in accordance with their terms, except as enforceability may be limited by bankruptcy laws or other similar laws affecting creditors' rights.

3.3.6 Neither the execution or delivery of this Agreement or the documents referenced in this Agreement, nor the incurring of the obligations set forth in this Agreement, and the certificates, declarations and other documents referenced in this Agreement, nor the consummation of the transactions contemplated in this Agreement, nor compliance with the terms of this Agreement and the documents referenced in this Agreement, will violate any provision of law, any order of any court or Governmental Authority to which the City is subject or conflict with or result in the breach of any terms, conditions, or provisions of, or constitute a default under any bond, note or other evidence of indebtedness or any contract, indenture, mortgage, deed of trust, loan, partnership agreement, lease or other agreements or instruments to which the City is a party and which affect the Property, the ability of Developer to develop the Real Property or the Project or to carry out the License Area Grading Work upon the Development Areas or the transactions contemplated by this Agreement, except as set forth on Attachment 4.

3.3.7 Except as described in Attachment 4, there is no litigation or governmental action either pending or, to the knowledge of the City Representatives, threatened, to which the City is or may be made a party, or to which the Development Areas are or may become subject, which has not been disclosed in the documents submitted to Developer and which would reasonably be expected to prevent or materially impair Developer's ability to carry out its obligations under this Agreement or to develop the Real Property and the Project or to carry out the License Area Grading Work upon the Development Areas or carry out its other obligations under this Agreement, and upon Close of Escrow, the Other Agreements then in effect, as contemplated by the terms of this Agreement.

Subject to Section 7.2.1(a)(xi), the City's representations and warranties set forth in this Section 3.3 shall be deemed to be restated at the Close of Escrow, and shall survive the Close of Escrow until the earlier to occur of the following: (a) termination of this Agreement or (b) issuance of the Certificate of Compliance and shall not be merged with the Quitclaim Deed. As used in Section 3.3 and 3.4, "**City's Knowledge**" and similar phrases means the actual present knowledge of Matthew West (or, if he is not then City Manager, the then-current City Manager), David Kendig

(or, if he is not then City Attorney, the then-current City Attorney) and John Buchanan (or if he is not then Director of Economic Development, the then-current Director of Economic Development), Ryan Swiontek and Ken Piguee (the “**City Representatives**”) without any duty of inquiry. Notwithstanding anything to the contrary contained herein, (i) none of the City Representatives shall be personally liable for any inaccuracy or breach by the City of the representations and warranties contained in Section 3.3 or elsewhere in this Agreement or in any of the Other Agreements, and (ii) neither Developer nor any other Person shall be entitled to make a claim for a breach of the City’s representations and warranties if the City had disclosed in writing facts to Developer indicating that the applicable representation and warranty was incorrect prior to (A) the execution of this Agreement and Developer proceeded with the execution of this Agreement, or (B) the Close of Escrow and Developer proceeded with the Close of Escrow, in either case in spite of such inaccuracy.

3.4 **City Covenants Regarding Representations and Warranties.**

City shall promptly advise Developer in writing if any of the City Knowledge Parties becomes aware (without any duty of inquiry) that any representation or warranty made by City in Section 3.3 is or becomes untrue in any material respect prior to the Close of Escrow.

4. **Conveyance of Property from City to Developer.**

4.1 **Conveyance of Property.**

4.1.1 **Definition of Property.** Subject to the terms and conditions set forth in this Agreement, including the satisfaction of the Closing Conditions set forth in Article 7 in this Agreement, the City agrees to sell to Developer and Developer agrees to purchase from the City the Real Property, together with (a) all existing improvements, if any, located on the Real Property as of the Effective Date; (b) all appurtenances pertaining to the Real Property or such improvements; (c) all permits, licenses, approvals and authorizations issued prior to the Close of Escrow by any Governmental Authority in connection with the Real Property for development of the Improvements; and (d) the right to construct four hundred (400) Homes on the Real Property as further described in Section 4.1.2, and (e) all of City’s right, title and interest in, to and arising out of the Intangible Property (excluding the matters described in Section 4.1.2, collectively, “**Property**”), subject to all Permitted Exceptions; provided, however that City’s assignment of its rights to enforce the Navy Responsibilities against the Navy shall be made to Developer on a non-exclusive basis and the City and Developer may each enforce the Navy Responsibilities as their interests may appear. Notwithstanding the foregoing, nothing set forth in this Agreement shall preclude the City or any insurer, on a non-exclusive basis, from enforcing the Navy Responsibilities against the Navy with respect to Tustin Legacy other than the Property or, with respect to the Property for matters Accruing prior to Close of Escrow. At the Close of Escrow, the City shall convey to Developer by Quitclaim Deed fee title to the Property.

4.1.2 **Reservation of Development Rights by City.** Notwithstanding any other provision of this Agreement, the City hereby reserves from the definition of Property and shall reserve from the conveyance of the Property in the Quitclaim Deed all those excess development rights remaining within Specific Plan Neighborhood D, Planning Areas 8, 13 and 14

after deducting the number of residential units allocated to the Real Property (anticipated to be four hundred (400) Homes) or such lesser number of units as are described on the Recorded Condominium Plan and actually constructed by Developer prior to Recording of the Certificate of Compliance, and, except to the extent any of such rights were conveyed by the City to third parties prior to the Effective Date, the City shall retain all residential units and all development rights associated with Specific Plan Neighborhood D, Planning Areas 8, 13 and 14 in excess of the units shown on the Recorded Condominium Plan and constructed prior to Recording of the Certificate of Compliance, and the units and development rights retained by the City shall be freely transferable by the City throughout Tustin Legacy.

#### 4.2 Purchase Price.

4.2.1 **Base Purchase Price and Project Fair Share Contribution.** As consideration for the sale of the Property by the City to Developer, Developer shall pay to the City at the Close of Escrow, the sum of (a) Sixty-One Million Five Hundred Thousand Dollars (\$61,500,000.00) (“**Base Purchase Price**”) as the initial purchase price in consideration for the Property, and (b) in payment of the fees applicable to the Real Property under the Tustin Legacy Backbone Infrastructure Program, the Project Fair Share Contribution shall be paid at a rate of Eight Million Thirteen Thousand Two Hundred Eighteen Dollars and Forty Cents (\$8,013,218.40) which is equal to a rate of Three Hundred Fourteen Thousand Nine Hundred Eighty-Five Dollars (\$314,985.00) per acre (“**Project Fair Share Contribution**”) payable at the Close of Escrow.

4.2.2 **Profit Participation Price.** As additional consideration for the sale of the Property by the City to Developer, in addition to the Base Purchase Price, Developer shall pay a percentage of the profits from the sale of the Homes (“**Profit Participation Price**”) upon the terms and conditions as set forth in that certain Profit Participation Agreement attached hereto as Attachment 25 (“**Profit Participation Agreement**”). Unless otherwise agreed by the City in its sole discretion, the Profit Participation Price shall be secured by the City Deed of Trust to be Recorded at Close of Escrow against the Model Collateral, which Model Collateral shall be Block 2 as shown on the Final City Map until such time as the Developer Final Tract Map is Recorded and thereafter, shall be Lot 6 and Lot 11 on the Developer Tentative Tract Map (which Lots shall be reflected with the same Lot numbers on the Developer Final Tract Map) as further described in the Profit Participation Agreement.

#### 4.3 Payment of Base Purchase Price.

4.3.1 **Deposit.** As a condition to execution of this Agreement by the City, Developer shall deliver an earnest money deposit, of Three Million Dollars (\$3,000,000.00) as the same may be increased by addition of the Additional Purchase Price Deposit, the “**Purchase Price Deposit**”) to Escrow Holder not later than five (5) Business Days after approval by the City Council of this Agreement. The Purchase Price Deposit plus accrued interest shall constitute security to the City for the Close of Escrow and shall be credited against the Base Purchase Price at the Close of Escrow. Immediately following notification to Developer that the City has executed a construction contract for the City Improvements and as a condition precedent to execution and delivery by the City of the Horizontal Improvements License Agreement and delivery by the City of the construction contract for the City Improvements to the contractor thereunder, Developer

shall deliver an additional earnest money deposit of Five Million Dollars (\$5,000,000.00) (“**Additional Purchase Price Deposit**”) to Escrow Holder which amount, upon delivery shall become part of the Purchase Price Deposit, thereby increasing the Purchase Price Deposit to Eight Million Dollars (\$8,000,000.00). The City shall have no obligation to execute and deliver the Horizontal Improvements License Agreement to Developer or to deliver the construction contract for the City Improvements to the contractor thereunder until the Additional Purchase Price Deposit is received by Escrow Holder. To facilitate delivery of the Additional Purchase Price Deposit, the City shall provide notice to Developer (email notification being sufficient) upon its execution (and prior to delivery) of the construction contract for the City Improvements and Developer shall deposit the Additional Purchase Price Deposit in Escrow within two (2) Business Days following receipt of such notice. Escrow Holder shall provide notice to City and Developer (email notification being sufficient) of its receipt of the Additional Purchase Price Deposit. In addition, failure of Developer to timely deliver the Additional Purchase Price Deposit shall be a Potential Default by Developer. The Purchase Price Deposit shall be held by Escrow Holder in Escrow in an interest-bearing account approved by the City and Developer and disposed of in accordance with the terms of this Agreement. The Purchase Price Deposit shall constitute security to the City for the Close of Escrow.

4.3.2 **Application of Purchase Price Deposit.** Unless Developer has timely provided a Diligence Termination Notice in accordance with Section 5.1, after expiration of the Due Diligence Period, the Purchase Price Deposit shall be nonrefundable except as otherwise expressly provided in Sections 15.3 and 15.4 and shall be applied to the Base Purchase Price as set forth in Section 4.3.3, or shall be liquidated damages to the City in the event of certain Defaults by Developer as further set forth in Articles 14 and 15 of this Agreement.

4.3.3 **Payment of the Balance of the Base Purchase Price and Other Amounts Due at Close of Escrow.** No later than one (1) Business Day prior to the Close of Escrow, Developer shall deposit with Escrow Holder an amount (“**Developer Closing Payment**”) which shall, be equal to: (a) the Base Purchase Price less the Purchase Price Deposit (*plus* accrued interest) *plus* (b) the Project Fair Share Contribution, *plus* (c) such additional amount as is necessary to cover all outstanding DDA Transaction Expenses and all closing costs to be paid by Developer pursuant to Section 7.4.1(b) and (c) and Section 7.4.4 for the Close of Escrow, as adjusted for any net credits or debits to the City for closing costs and/or prorations in accordance with Section 7.4.1(a) and (c) and Section 7.4.4 for the Close of Escrow.

4.3.4 **Payments in Immediately Available Funds.** Funds delivered to the City or Escrow Holder under this Agreement shall be in the form of cash, wire transfer (to such account of the City or Escrow Holder as Escrow Holder notifies Developer in writing), or by cashier’s check drawn on good and sufficient funds on a federally chartered bank and made payable to the order of City or Escrow Holder, as the case may be.

#### 4.4 **Escrow and Joint Escrow Instructions.**

Developer shall have delivered to the City, prior to the City Council hearing at which this Agreement is considered for adoption, three (3) fully executed counterparts of this Agreement. Within five (5) Business Days following City Council approval of this Agreement, Developer

shall: (a) deliver the initial Purchase Price Deposit of Three Million Dollars (\$3,000,000.00) to Escrow Holder, and (b) deliver to the City (i) the declarations and information required by Section 4.6.2(a) and such other information as City may reasonably request as further described in Section 4.6, (ii) the City Costs Deposit and (iii) the insurance binder(s) required by Section 4.6.4. Upon delivery by Developer of the items described in clauses (a) and (b) of this Section 4.4, the City shall deliver to Escrow Holder three (3) originals of this Agreement which have been executed in counterparts by City and Developer and the “**Opening of Escrow**” shall be the date that Escrow Holder receives such executed originals from the City. Escrow Holder shall promptly sign the joinders and transmit one (1) original of this Agreement to City and one (1) original to Developer. Upon the written acceptance of the executed Agreement by Escrow Holder, this Agreement shall constitute the joint escrow instructions of Developer and the City to Escrow Holder to open an escrow (“**Escrow**”) and Escrow Holder is thereafter authorized to act in accordance with the terms of this Agreement. Developer and the City shall execute Escrow Holder’s general escrow instructions upon request, with such modifications thereto as Developer and the City may reasonably require; provided, however, if there is any conflict or inconsistency between such general escrow instructions and this Agreement, this Agreement shall control. Escrow Holder shall not prepare any further escrow instruction restating or amending this Agreement unless specifically so instructed by the City and Developer in writing. Any supplemental escrow instructions must be in writing and signed by the City and Developer and accepted by the Escrow Holder to be effective.

#### 4.5 Investigation; Property Conveyed and License of License Areas “As-Is”.

##### 4.5.1 Investigation.

(a) Due Diligence Review. Developer shall have the right to conduct Developer’s own investigation of the Property pursuant to Section 5.1 of this Agreement. If Developer proceeds to the Close of Escrow, Developer represents and warrants to the City that Developer will have satisfied itself that it has determined that all matters related to the Development Areas and the Project are acceptable to Developer, including the state of title (subject only to the Permitted Exceptions), the physical condition thereof, the physical condition of structures, if any, located upon the Development Areas and, as applicable, the accessibility and location of utilities, and all mechanical, plumbing, sewage, and electrical systems located therein, suitability of soils, environmental and other investigations regarding the Development Areas. Prior to the expiration of the Due Diligence Period, Developer will have reviewed all items that in Developer’s sole judgment affect or influence Developer’s purchase and use of the Property and grading and use for construction purposes of the License Areas and Developer’s willingness to consummate the transactions described by this Agreement.

(b) Opportunity to Evaluate. Developer acknowledges and agrees that, as of the Close of Escrow:

(i) Its determination to enter into this Agreement constitutes Developer’s agreement that Developer, in consummating the transactions described in this Agreement: (A) has been given the opportunity to inspect the Development Areas and to review the information and documentation provided by the City to Developer and affecting

the Development Areas, including the environmental condition of the Development Areas, or otherwise obtained by Developer in connection with its due diligence of the Development Areas, and is relying solely on its own investigation of the Development Areas, including such investigation prior to execution of this Agreement, and review of such information and documentation in determining the physical, environmental, economic and legal condition of the Development Areas, and except as provided in Sections 3.3 and 17.12.2, not on any information, representation or warranty provided by the City or any agents or representatives of the City; (B) has performed its own assessment of the Development Areas, including the physical and environmental condition of the Development Areas, the presence of Hazardous Materials on the Development Areas, the suitability of the soil for improvements to be constructed, the implications of land use restrictions on the development plan for the Project and the Development Areas and the consequences of any subsequently discovered contamination on or adjacent to the Development Areas, and (C) has been provided with access to all information in the possession of the City which it has requested.

(ii) Information provided to Developer by or on behalf of the City with respect to the Development Areas was obtained from a variety of sources and that the City has not made any independent investigation or verification of such information and makes no representations as to the accuracy or completeness of such information; and Developer is satisfied with the nature and extent of its permissible investigation of the physical and environmental condition and other matters relating to the Development Areas and is willing to consummate the transactions described by this Agreement.

(iii) Without limiting the generality of the foregoing, Developer acknowledges and agrees that:

(A) in addition to use, Investigation and Remediation of the Development Areas the Navy, there has been grading, other uses, Investigation and Remediation of the Development Areas subsequent to the date of the Federal Deed, and that the AS-IS conveyance of the Property and the waivers, releases, and indemnities provided by Developer in this Agreement with respect to the Development Areas apply to the current condition of the Property, the Development Areas taking into account the grading, other uses, Investigation and Remediation at Tustin Legacy, including at the Development Areas, whether occurring before or following conveyance to the City pursuant to the Federal Deed;

(B) Developer has been provided with access to (1) all environmental reports and statements listed on Attachment 10 and all reports either attached to or referenced in the Memorandum of Agreement and Federal Deed, (2) the FOST and (3) the Environmental Baseline Survey (“EBS”) which is incorporated into the FOST by reference;

(C) it shall perform its own assessment of the environmental condition of the Development Areas, the presence of Hazardous Materials on the Development Areas, the suitability of the soil for improvements to be constructed,

the implications of the land use restrictions on the development plan for the Project and the Development Areas and the consequences of any subsequently discovered contamination on the Development Areas; and

(D) it shall review the City and Navy produced or identified documentation, including that listed on Attachment 10, reflecting the Navy's and the City's knowledge of the environmental condition of the Development Areas.

4.5.2 **AS-IS; WHERE-IS.**

(a) **No Representations or Warranties.** Developer recognizes that the City would not sell the Property or provide a license for the License Areas except on an "AS, IS, WHERE IS, WITH ALL FAULTS" basis, and Developer acknowledges that the City has made no representations or warranties of any kind whatsoever (excepting only those representations and warranties of the City expressly set forth in Sections 3.3 and 17.12.2 of this Agreement), either express or implied in connection with any matters with respect to the Development Areas or any portion thereof.

(b) **Acknowledgement.** Developer's determination to enter into this Agreement constitutes Developer's agreement that Developer, in consummating the transactions described in this Agreement is buying the Property and receiving the licenses granted by the License Agreements for the License Areas in an "AS IS, WHERE IS, WITH ALL FAULTS" condition, in its present state and condition and with all faults, if any. Without limiting the generality of the foregoing provisions, Developer further acknowledges and agrees that, except as otherwise specifically provided in Sections 3.3 and 17.12.2, City makes no representations, warranties, assurances or guaranties of any kind or character in connection with the transaction contemplated by this Agreement, whether express or implied, oral or written, past, present or future, whether by the City or any of its agents, elected or appointed officials, representatives or employees, of concerning or with respect to:

(i) the value of the Property or the income to be derived from the Property;

(ii) the existence or non-existence of any liens, easements, covenants, conditions, restrictions, claims or encumbrances affecting the Development Areas (including any of the foregoing arising from or related to the Entitlements or any of the Other Agreements);

(iii) the suitability of the Development Areas for any and all future development, and the uses and activities which Developer or any Homeowner or Homeowners' Association may conduct upon the Real Property and Improvements, including the development of the Project described in this Agreement and the Other Agreements;

(iv) the ability of the City or any third party to complete, or likelihood of the completion of, any of the improvements and infrastructure described by

the General Plan, the Specific Plan, the Tustin Legacy Backbone Infrastructure Program or any other plan or policy of the City or any other Governmental Authority;

(v) the compliance with or enforcement by the City or any third party of the General Plan, the Specific Plan, the Special Restrictions applicable to the Development Areas or the special restrictions or other covenants and agreements applicable to other property at Tustin Legacy, the CC&Rs, the Tustin Legacy Backbone Infrastructure Program or any other agreement or governmental restriction or plan affecting Tustin Legacy;

(vi) the habitability, merchantability or fitness for a particular purpose of the Development Areas;

(vii) the manner, quality, state of repair or lack of repair of the Development Areas;

(viii) the nature, quality or condition of the Development Areas including water, soil and geology;

(ix) the compliance of or by the Development Areas and/or its operation in accordance with any of the Entitlements or any Governmental Requirement, including the National Environmental Policy Act, CEQA and the Americans with Disabilities Act of 1990;

(x) the manner or quality of the construction or materials, if any, incorporated into the Development Areas;

(xi) the presence or absence of Hazardous Materials, including asbestos or lead paint at, on, under, or adjacent to the Development Areas or in other locations at Tustin Legacy;

(xii) the content, completeness or accuracy of the information, documentation, studies, reports, surveys and other materials delivered to Developer in connection with the review of the Development Areas and the transactions contemplated in this Agreement and the Other Agreements;

(xiii) the conformity of the existing improvements on the Development Areas and/or at Tustin Legacy, if any, to any plans or specifications therefor;

(xiv) compliance of the Development Areas with past, current or future Governmental Requirements relating to zoning, subdivision, planning, building, fire, safety, health or Environmental Matters and/or covenants, conditions, restrictions or deed restrictions;

(xv) the deficiency of any undershoring or of any drainage to on or from the Development Areas or any other portion of Tustin Legacy;

(xvi) the condition of any adjoining land owned by the City, including any property and improvements covered by the Landscape and Water Treatment Installation and Maintenance Agreement;

(xvii) the fact that all or a portion of the Development Areas may be located on or near an earthquake fault line or falls within an earthquake fault zone established under the Alquist-Priolo Earthquake Zone Act, California Public Resources Code Sections 2621-2630 or within a seismic hazard zone established under the Seismic Hazards Mapping Act, California Public Resources Code Sections 2690-2699.6 and Sections 3720-3725;

(xviii) the existence or lack of vested land use, zoning or building entitlements, permits or approvals affecting the Development Areas;

(xix) the construction or lack of construction of Tustin Legacy or if constructed, the construction of Tustin Legacy in accordance with design guidelines, plans and specifications previously or to be prepared therefor;

(xx) the conditions, covenants and restrictions imposed or to be imposed upon the Development Areas or any portion thereof under this Agreement, the Other Agreements or the Entitlements;

(xxi) the contents of the Memorandum of Agreement, the Federal Deed, the Base Closure Law and the FOST; and

(xxii) any other matters.

(c) Environmental Condition of the Development Areas; Restrictions.

Without limiting the generality of the foregoing provisions, the City makes no representation or warranty as to the environmental condition of the Development Areas or any portion thereof, the Navy's obligations with respect to the environmental condition of the Development Areas or the adequacy or accuracy of any environmental report that has been rendered. Developer acknowledges and agrees that (i) there may be some residual contamination on the Development Areas as a result of Navy historic activities; (ii) the Navy has agreed to accept certain limited responsibility for any contamination it caused, including any contamination discovered after transfer from the Navy, in accordance with existing Governmental Requirements including the National Defense Authorization Act For Fiscal Year 1993 as amended (Public Law No. 102-434) Section 330 and Section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9620(h) ("Navy Responsibilities"); and (iii) the deed restrictions contained in the Federal Deed are binding upon the City and its successor and assigns (and therefore, shall be binding upon Developer with respect to the Property upon its acquisition of the Property).

(d) Federal Deed and Memorandum of Agreement. Developer acknowledges and agrees that the purchase of the Property and use of the License Areas is subject to the terms and conditions expressly set forth in the Memorandum of Agreement, the Federal

Deed and the Permitted Exceptions. From and after the Close of Escrow, Developer agrees to assume and faithfully perform any covenants running with the land acquired and all obligations set forth in the Federal Deed as obligations to be performed by “Grantee or its successors or assigns” with respect to the Property acquired by Developer and such obligations shall run with the land and be binding upon Developer and each Successor Owner for the period of their respective ownerships and for the Additional Liability Period applicable to each.

(e) No Unauthorized Representations. No Person acting on behalf of the City is authorized to make, and by execution hereof, Developer acknowledges that no Person has made, any representation, agreement, statement, warranty, guarantee or promise regarding the Development Areas, the Project or the transactions contemplated in this Agreement or the past, present or future zoning, land use entitlements or approvals, including the Entitlements or the Development Permits, construction, physical condition, presence or extent of Hazardous Materials or other status of the Development Areas except as may be expressly set forth in this Agreement or in any of the Other Agreements. No representation, warranty, agreement, statement, guarantee or promise, if any, made by any Person acting on behalf of the City that is not contained in this Agreement or in any of the Other Agreements will be valid or binding on the City. Nothing in this Section is intended to affect in any manner the validity of the Entitlements and Development Permits obtained by Developer with respect to the Development Areas.

The provisions of this Section 4.5.2 shall survive the Close of Escrow and the termination of this Agreement and shall not be merged with the Quitclaim Deed and shall be binding upon Developer, its successors and assigns under the DDA and each and every Person claiming by, through or under Developer or any Successor Owner of the Real Property or portion thereof including each Homeowner and all other End Users, for the benefit of the City and its Governmental Successors, and from and after the Close of Escrow, shall run with the land and shall be binding upon and burden the Real Property.

4.5.3 Release. Developer, on behalf of itself, and its successors and assigns under this Agreement, each Successor Owner and each and every Person claiming by, through or under Developer or any Successor Owner and including each End User (each, including Developer, a “**Developer Releasing Party**”), hereby waives, as of the Effective Date, and agrees to waive, as of the Close of Escrow, the right of each Developer Releasing Party to recover from, and fully and irrevocably releases, the City Released Parties from any and all Claims that any Developer Releasing Party may now have or hereafter have, suffer, acquire or incur arising from or related to: (a) any Due Diligence Information, (b) any condition of the Development Areas or any current or future improvement thereon, known or unknown by any Developer Releasing Party or any City Released Party, including the extent or effect of any grading of the Development Areas; (c) the extent or effect of any of the matters identified in Section 4.5.2; (d) any construction defects, errors, omissions or other conditions, latent or otherwise; (e) economic and legal conditions on or affecting the Development Areas or any improvements thereon; (f) Environmental Matters, including the existence, Release, threatened Release, presence, storage, treatment, transportation or disposal of any Hazardous Materials at any time on, in, under, or from, the Development Areas or any current or future improvement thereon or any portion thereof; (g) Claims of or acts or omissions to act of any Governmental Authority or any other third party arising from or related to any actual, threatened, or suspected Release of a Hazardous Material on,

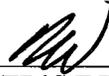
in, under, or from about, or adjacent to the Development Areas or any current or future improvement thereon, including any Investigation or Remediation at or about the Development Areas or any current or future improvement thereon; and/or (h) arising from the Tustin Legacy Backbone Infrastructure Program, any community facilities district, service district or assessment district the cost or extent thereof, or the amount of the Project Fair Share Contribution or any community facilities district, service district or assessment district assessment against the Development Areas described in this Agreement or the DA; (i) the actions or inaction of the Navy with respect to any agreements between the City and the Navy; (j) the ability of the City or any third party to complete, or the likelihood of the completion or actual completion of, any of the improvements and infrastructure related to the Project described by the General Plan, the Specific Plan, the Tustin Legacy Backbone Infrastructure Program, the agreements, environmental reports and statements listed on Attachment 10 or any other plan or policy of the City or any other governmental entity; (k) the compliance or non-compliance by the City or any third party, including without limitation, the Navy, with the City's General Plan, the Specific Plan, the Federal Deed and the Environmental Documents, or any special restrictions or other covenants and agreements applicable to other property at Tustin Legacy, or any other agreement or governmental restriction or plan affecting Tustin Legacy; and/or (l) any action or inaction of the City or the City Parties in connection with any of the foregoing (including, without limitation, the exercise by the City of its discretion, decision or judgment with respect to the foregoing); provided that the foregoing release by the Developer Releasing Parties shall not extend to the extent of (i) any uncured Material Default by the City with respect to any of the representations or warranties of the City set forth in Sections 3.3 or 17.12.2 or any of the covenants or obligations set forth in this Agreement, in either case provided that the Material Default is directly related to the Claim, (ii) any uncured material default by the City with respect to any of the covenants or obligations set forth in any Other Agreement then in effect that is directly related to the Claim, (iii) any Claim that is the result of the gross negligence, willful misconduct or fraud of the City Released Parties, (iv) any actions of the City Released Parties affecting a portion of the Property which occur following the Close of Escrow, or (v) any other Claims against City relating to or arising out of tort Claims brought by third parties against Developer, to the extent such claims are based upon the gross negligence of the City Released Parties and Accruing prior to the Close of Escrow; provided that the exceptions in clauses (iii) and (iv) of this Section 4.5.3 shall not apply with respect to any matter for which the City is indemnified pursuant to either of Section 5.5 or Section 10.2. This release includes Claims of which Developer is presently unaware or which Developer does not presently suspect to exist which, if known by Developer, would materially affect Developer's release of the City Released Parties. Developer specifically waives the provision of California Civil Code Section 1542, 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.”

In this connection and to the extent permitted by law, Developer on behalf of itself, and the other Developer Releasing Parties hereby agrees that (x) it realizes and acknowledges that factual matters now unknown to it may have given or may hereafter give rise to Claims or controversies which are presently unknown, unanticipated and unsuspected; (y) the waivers and releases in this Section 4.5.3 have been negotiated and agreed upon in light of that realization and (z) Developer, on behalf of itself and the other Developer Releasing Parties, nevertheless hereby intends to release, discharge and acquit the City Released Parties from any such unknown Claims and controversies to the extent set forth above.

BY INITIALING BELOW, DEVELOPER ACKNOWLEDGES THAT (A) IT HAS READ AND FULLY UNDERSTANDS THE PROVISIONS OF THIS SECTION, (B) IT HAS HAD THE CHANCE TO ASK QUESTIONS OF ITS COUNSEL ABOUT ITS MEANING AND SIGNIFICANCE, AND (C) IT HAS ACCEPTED AND AGREED TO THE TERMS SET FORTH IN THIS SECTION.

  
CITY'S INITIALS

no   
DEVELOPER'S INITIALS

From and after the acquisition of the Property by Developer, this release shall be an equitable servitude and a covenant running with the land for the benefit of the City and its Governmental Successors and burdening the Real Property and Developer, its successors and assigns under the DDA and each and every Successor Owner and each and every Person claiming by, through or under Developer or any Successor Owner including each Homeowner and all other End Users. To further evidence its effectiveness with respect to Developer and the Successor Owners of the Real Property, this release shall be included in its entirety in the Quitclaim Deed; provided that nothing herein limits or releases Claims by Developer against the United States Government, including but not limited to the Department of the Navy, regarding the environmental condition of the Real Property. The provisions of this Section 4.5.3 shall survive the Close of Escrow and the termination of this Agreement and shall not be merged with the Quitclaim Deed.

**4.6 Developer Covenants; Preconditions to Transfers, Transfer of Control and Close of Escrow.**

The provisions of this Section 4.6 are covenants of Developer for the benefit of the City, are conditions precedent to Transfers, Transfers of Control and to the Close of Escrow as further described in this Section 4.6 and Sections 2.2 and 7.2.2, and shall, for the benefit of the City, be satisfied by Developer not later than the times specified for such conditions below or in the Schedule of Performance.

**4.6.1 Financing Plan.**

(a) As of the Effective Date, Developer has provided the City with a financing plan (“**Financing Plan**”) that has been approved by the City demonstrating the financial feasibility of the Project and that includes: (a) revised overall cost and revenue estimates,

(b) Project cost and revenue data including information on Project's financial return adequate to enable the City to evaluate Developer's business offer and economic feasibility of the proposed development; (c) an updated comprehensive Project proforma demonstrating the feasibility of the Project, including a static analysis and a cash flow analysis by quarter that shall reflect City comments to the preliminary site plan; (d) a sources and uses table identifying the proposed use of each source of funding for the Project; and (e) evidence reasonably satisfactory to the City that Developer has sufficient additional funds available and is able to commit such funds to cover the difference, if any, between costs of development of the Project and the amount available to Developer from internal sources.

(b) At least forty-five (45) Business Days prior to Close of Escrow, and as a condition precedent for the benefit of the City to Close of Escrow, Developer shall provide an update to the Financing Plan identifying revisions to the information previously provided and providing actual sources and uses of funds ("**Updated Financing Plan**") for the purposes of confirming that Developer has the financial capacity and capability to perform its obligations under this Agreement and shall certify for the benefit of the City as to the accuracy of the Updated Financing Plan and the truth and completeness of each of the following (and shall deliver to the City evidence demonstrating that):

(c) the Financing Plan as modified by the Updated Financing Plan reflects Developer's expectation as to available funding and costs and demonstrates sufficient funding to pay through issuance of the Certificate of Compliance, all Development Costs;

(d) Developer has available funds, without third-party financing or Mortgage of any kind, sufficient to pay all Development Costs, including sufficient equity capital to design, construct and operate the Project consistent with the terms of this Agreement;

(e) there has been no material adverse change in the financial capacity or condition of Developer or its financial or organizational relationships from that presented to the City as of the Effective Date;

(f) the Project budget for the Improvements remains a reasonable budget.

(g) The City shall have the right, in its sole discretion, to approve or disapprove any material modifications between the Financing Plan previously approved by the City and the Updated Financing Plan. If the City is not reasonably satisfied with the financial status of Developer or any of the other contents of the Updated Financing Plan following review of the certification, the above materials, the City shall be entitled to obtain such other information and assurances from Developer and such other financial information as the City may request of Developer and its members, owners and/or partners, if any, and their respective members, partners, shareholders and/or other owners at each tier until substantial assets acceptable to the City in its sole discretion are identified. Such information shall be subject to the confidentiality provisions of Section 17.24.

4.6.2 Additional Assurances.

(a) Declaration of Ownership; Documentation at Effective Date. Prior to or concurrently with the execution of this Agreement, Developer shall:

(i) deliver to the City a declaration, dated as of or prior to the Effective Date, certified by Richard T. Whitney, the chief financial officer of Developer, attaching and certifying the following as true and correct (“**Developer Original Certificate**”):

(A) a certificate of formation or incorporation, California foreign entity registration, and a fully executed copy of the bylaws (including any amendments thereto) of Developer and copies of any applicable operating agreements, joint venture agreements or equivalent instruments governing the entity;

(B) certificates of good standing and tax good standing, of Developer and its sole managing member issued by the Secretary of State and the applicable taxing authority of the state of Delaware and by the California Secretary of State within thirty (30) calendar days prior to the Effective Date; and

(C) copies of all resolutions or other necessary actions, if any, taken by Developer to authorize the execution of this Agreement, the Evidence of Equity and, if applicable, the Equity Commitment;

(D) evidence of authority of the individual(s) executing the Developer Original Certificate to bind Developer to and to execute, this Agreement, the Developer Original Certificate and, if applicable, the Equity Commitment; and

(E) a copy of any Fictitious Business Name Statement, if any, as published and filed with the County Clerk Recorder of Orange County, California;

(ii) provide evidence and written assurances to the City that (A) Developer has the financial capacity, Liquid Assets and Net Worth in each case satisfactory to the City in its sole discretion, to provide sufficient equity, when combined with the other sources and uses set forth in the Financing Plan or Updated Financing Plan, as applicable, to fund the Development Costs, including by provision to the City of resolutions or other documentation evidence the availability and authorizing the expenditure of such funds (“**Evidence of Equity**”); or (B) Developer has an identified Equity Investor approved by the City in its sole discretion and which has the financial capacity, Liquid Assets and Net Worth as determined by the City in its sole discretion sufficient when combined with the other sources and uses set forth in the Financing Plan or Updated Financing Plan, as applicable, to fund the Development Costs (“**Approved Equity Investor**”), which Approved Equity Investor has provided Developer with a binding and effective contractual commitment to fund the required equity for the Project (“**Equity Commitment**”) (it being agreed by City that Initial Developer shall provide Evidence of Equity and shall not obtain funds from an Equity Investor);

(iii) provide to the City a copy of the Evidence of Equity or Equity Commitment, as applicable, which shall be subject to the approval of the City in its sole discretion and shall be and remain in full force and effect through the issuance of the Certificate of Compliance; and

(iv) if Developer proposes to obtain funding from an Equity Investor, cause an Approved Equity Investor to deliver a declaration dated as of or prior to the Effective Date in favor of the City certified by the chief financial officer or other appropriate authorized officer of the Approved Equity Investor in substantially the form and substance of the certificate attached as Attachment 15A or in such other form and substance approved by the City in its sole discretion (“**Original Equity Investor Certificate**”), certifying, among other things:

(A) that the Approved Equity Investor has provided Developer with the Equity Commitment in form approved by the City and that such Equity Commitment is in full force and effect and has not been modified, and will not be modified, amended or terminated without the prior consent of the City, in its sole discretion;

(B) that Approved Equity Investor’s officer has the authority to bind Equity Investor and authorization to execute the Original Equity Investor Certificate and the Equity Commitment;

(C) as to the truth and completeness of and attaching the following:

(1) a certificate of formation or incorporation, California foreign entity registration, and a fully executed copy of the bylaws (including any amendments thereto) of Approved Equity Investor (or if Approved Equity Investor is not a limited liability company, provide comparable documents for entity type proposed) and copies of any applicable operating agreements, joint venture agreements or equivalent instruments governing the entity;

(2) certificates of good standing and tax good standing for Approved Equity Investor and, if applicable, its managing members or general partners, issued by the Secretary of State of the state of incorporation and the applicable taxing authority of the state if other than California and by the California Secretary of State within thirty (30) calendar days prior to the effective date of the Equity Commitment;

(3) copies of all resolutions or other necessary actions, if any, taken by Approved Equity Investor to authorize the funding of the Development Costs and the Project and the execution of the Equity Commitment;

(4) evidence of authority of the individual(s) executing the Original Equity Investor Certificate and the Equity Commitment to bind Approved Equity Investor to, and to execute, the Original Equity Investor Certificate and the Equity Commitment, as applicable; and

(5) a copy of any Fictitious Business Name Statement, if any, as published and filed with the County Clerk Recorder of Orange County, California.

(b) Additional Condition Precedent to Close of Escrow and Transfer. Prior and as a condition to the Close of Escrow and, where specified below in connection with each Transfer or Transfer of Control occurring prior to or following the Close of Escrow, Developer, or where applicable, Transferee, shall:

(i) deliver a declaration dated as of the Closing Date dating down the Developer Original Certificate or if previously delivered, the Transferee Certificate, in each case substantially the form and substance of the certificate attached as Attachment 19 or in such other form and substance approved by the City in its sole discretion (“**Developer Date Down Certificate**”) or if applicable and not previously delivered, a Transferee Certificate which shall be in substantially the form and substance of the certificate attached as Attachment 17B or in such other form and substance approved by the City in its sole discretion and each such certificate shall be certified for the benefit of the City by the chief financial officer or other appropriate authorized officer of Developer or Transferee, as applicable, to which shall be attached (A) either Evidence of Equity (if there is not then an Approved Equity Investor) or an Equity Commitment from the Approved Equity Investor and (B) certificates of good standing and tax good standing, if separately available, issued within thirty (30) calendar days of the Closing Date. Each declaration shall include a certification that: (1) the representations and warranties made by Developer in this Agreement (or if a Transferee, in the Assignment Agreement) remain true and correct as of the Closing Date; (2) if applicable, the Approved Equity Investor remains the Equity Investor, or identifying a new Approved Equity Investor; (3) that the Approved Equity Investor, if any, has provided Developer (or Transferee, as applicable) with an Equity Commitment which, if previously provided, remains in full forth and effect and unmodified, or if modified, for which Developer (or Transferee, as applicable) has provided the City with any and all modifications, or if new, which Developer (or Transferee, as applicable) has provided to the City, in each case in form and substance approved by the City in its sole discretion and in each case certifying as to the truth, correctness and completeness thereof as of the Closing Date or Transfer Date, as applicable;

(ii) if Developer will utilize an Equity Investor, the Approved Equity Investor shall have, prior to the Closing Date or Transfer Date, as applicable, delivered to the City an Original Equity Investor Certificate and executed and delivered an Equity Commitment, cause its Approved Equity Investor:

(A) to deliver a certification dated as of the Closing Date or Transfer Date, as applicable, in favor of the City from the chief financial officer or other appropriate authorized officer of the Approved Equity Investor providing a date down of the Original Equity Investor Certificate, which shall be in substantially the form and substance of the certificate attached as Attachment 15B or in other form and substance approved by the City in its sole discretion (“**Equity Investor Date Down Certificate**”)

and which shall include certificates of good standing and tax good standing for the Approved Equity Investor and its managing members or general partners, as applicable, issued within thirty (30) calendar days of the Closing Date; and

(B) to provide certification and evidence that the Equity Commitment previously provided remains in full force and effect and unmodified, or if modified, to provide the City with any and all modifications, which shall have been approved by the City in its sole discretion, and to provide certification as to the truth and completeness of Developer's Equity Commitment as of the Closing Date or Transfer Date, as applicable.

(iii) if as a result of a Transfer or for any other reason Developer has identified a new Equity Investor which has not previously delivered an Original Equity Investor Certificate or entered into an Equity Commitment, City shall have the right to approve such Equity Investor in its sole discretion and to confirm in its sole discretion that such proposed Equity Investor has sufficient Net Worth and Liquid Assets, as determined by the City in its sole discretion, to fund all Development Costs for the Project as described in the Financing Plan or Updated Financing Plan as applicable and in connection with such approval Developer shall cause the Equity Investor to deliver to the City those items set forth in Section 4.6.2(a)(ii), (iii) and (iv), and the form of Equity Commitment, which shall be subject to approval of the City in its sole discretion (and only upon City approval in its sole discretion of each of the foregoing shall the proposed Equity Investor be deemed an Approved Equity Investor).

4.6.3 **City Approvals.** Developer shall have applied for and obtained all Entitlements. Developer's application for the Entitlements shall be consistent with the Scope of Development and the terms and conditions of this Agreement.

4.6.4 **Insurance.** Within the time period required by Section 11.2.3, Developer shall have obtained and delivered to the City a binder or certificate evidencing the insurance required by Section 11.

4.6.5 **Guaranty of Developer Obligations.**

(a) Prior to the Close of Escrow and upon each subsequent Transfer to a Developer prior to the issuance of a Certificate of Compliance for which a Guaranty is required or for which Developer desires to replace its existing Guaranty or Guarantor, and as a condition to the City's review and approval, in its sole discretion, of the proposed guarantors and proposed Guaranty, Developer shall cause the proposed guarantors to deliver evidence of the financial capacity of the proposed guarantors, authority of the proposed guarantors to provide the Guaranty, and copies of all documents evidencing formation, good standing and authority requested by the City, including providing information regarding Guarantor's then-current Net Worth to assure that the Guarantor meets the Minimum Asset Standards (provided that if the proposed Transfer takes place prior to Close of Escrow, Developer or Transferee shall provide information regarding the Net Worth anticipated at the time at which the Guaranty would be given and the City's review of such information shall not be deemed to be City's approval of Guarantor, which shall be provided

if at all, as a condition for the benefit of the City at the Close of Escrow). The proposed guarantor shall have assets meeting the requirements of this Section 4.6.5 and Section 4.7.1(a) and sufficient, in the determination of the City in its sole discretion, to secure the development, construction and maintenance obligations of Developer under this Agreement. If the City is not satisfied with the financial status of the proposed guarantor, then the City shall be entitled to obtain the financial information of other members and/or partners of the proposed development entity (and their respective members, partners, shareholders and/or other owners at each tier until substantial assets are identified) and such other financial information as the City may request to demonstrate such guarantor's and Developer's financial capacity and capability to perform its obligations under this Agreement. The City shall have the right to approve the Guarantor in its sole discretion.

(b) As a condition precedent to the Close of Escrow for the benefit of the City and as a condition precedent to each subsequent Transfer, Developer shall:

(i) cause the Guarantor to deliver to the City fully executed originals of:

(A) a Guaranty, in accordance with and meeting the requirements of this Section 4.6.5 and Section 4.7.1 which shall remain in effect until Recording by the City of the Certificate of Compliance and which shall guarantee, among other things: (1) payment for all Development Costs for the Completion of the Improvements, the faithful performance and completion (within the respective times provided in this Agreement) of the respective portions of the Project and the Improvements, or components thereof, and the other matters described herein in accordance with this Agreement, the indemnities and other obligations of Developer, including pursuant to Sections 5.5, 8.12(e), 8.15, 8.16, 10.1, 10.2, 11.1 (including payment of all deductible amounts) and Section 17.12.1 of this Agreement and the Ongoing Matters; (2) the costs and expenses incurred by the City, if any, in enforcement by the City of its rights and/or remedies under this Agreement with respect to non-performance by Developer of its obligations of Developer under this Agreement and the Other Agreements, including the exercise by the City of the Right of Purchase or Right of Reversion with respect thereto (but excluding the Repurchase Price applicable to any Reacquired Property actually acquired by the City pursuant to the Right of Purchase; provided that the City shall be entitled to retain the Reacquired Property so acquired in its entirety, notwithstanding any contribution or payment made by Developer, or by any Guarantor); and (3) attorneys' fees and costs incurred by the City in connection with the enforcement of the Guaranty; and

(B) A declaration certified by the chief financial officer or other appropriate authorized officer of the applicable Guarantor in the form and substance of the certificate attached as Attachment 14B or in other form and substance approved by the City in its sole discretion ("**Guarantor Certificate**"), certifying among other things that that the Guaranty is in full force and effect and as to the truth and completeness of and attaching the following:

(1) a certificate of formation or incorporation, California foreign entity registration, and a fully executed copy of the bylaws (including

any amendments thereto) of Guarantor, (or if Guarantor is not a limited liability company, provide comparable documents for entity type proposed) and copies of any applicable operating agreements, joint venture agreements or equivalent instruments governing the entity;

(2) certificates of good standing and tax good standing, for Guarantor, and if applicable, its managing members or general partners, issued by the Secretary of State of the state of incorporation and the applicable taxing authority of the state if other than California and by the California Secretary of State within thirty (30) calendar days prior to the effective date of the Guaranty;

(3) copies of all resolutions or other necessary actions, if any, taken by Guarantor to authorize the execution of the Guaranty;

(4) that the individual(s) executing the Guaranty have the authority to bind Guarantor and to execute the Guaranty and providing evidence of the authority of such individual(s) to so act; and

(5) a copy of any Fictitious Business Name Statement, if any, as published and filed with the County Clerk Recorder of Orange County, California; and

(ii) a legal opinion in the form and substance of the Legal Opinion attached hereto as Attachment 14C executed by legal counsel to the Guarantor as the same may be required to be modified to reflect the state of formation of Guarantor (“**Legal Opinion**”).

#### 4.6.6 **Requirements for Transfer and Transfer of Control.**

(a) In the event of a Transfer by Developer or a Transfer of Control occurring at or following the Close of Escrow, and as a condition to such Transfer or Transfer of Control, Transferee shall, or shall cause an Approved Equity Investor to, satisfy the requirements of Section 4.6.2 and shall cause its Guarantor to satisfy the requirements of Sections 4.6.5 and 4.7 and the obligations imposed upon each of Developer, Equity Investor and Guarantor as a result of this Agreement and any Equity Commitment and Guaranty shall, as a condition to such Transfer or Transfer of Control, be either affirmed by the original Approved Equity Investor and the original Guarantor or shall be assumed by, as applicable, a new Equity Investor or a new Guarantor, in each case meeting the requirements of this Agreement and approved by the City in its sole discretion;

(b) Prior to or concurrently with, and as a condition to the proposed Transfer or Transfer of Control, whether pursuant to Section 2.2.2(a) or 2.2.3 or otherwise approved by the City in its sole discretion:

(i) The proposed Transferor and Transferee shall execute and deliver to each other and the City an Assignment and Assumption Agreement in substantially the form and substance of the Assignment Agreement attached hereto as

Attachment 17A, or in other form and substance approved by the City in its sole discretion (“**Assignment Agreement**”), acknowledged and Recorded pursuant to which Transferor shall assign and Transferee shall expressly assume for itself and its Successor Owners (and prior to Close of Escrow, its successors and assigns), and for the benefit of the City, all the rights and obligations of Developer under this Agreement (and, if then executed, the Other Agreements) arising from and after the Transfer Date and the proposed Transferee shall agree to be subject to all the conditions and restrictions to which Developer is subject by reason of this Agreement and the Other Agreements and to provide the representations and warranties for the benefit of the City contained in the Assignment Agreement;

(ii) Transferee shall deliver to the City a declaration certified by the chief financial officer or other appropriate authorized officer of the Transferee in the form and substance of the certificate attached as Attachment 17B or in other form and substance approved by the City in its sole discretion (“**Transferee Certificate**”) and dated as of the Transfer Date: (A) certifying that the then City-approved Financing Plan (or if previously delivered, the then City-approved Updated Financing Plan), remains in full force and effect and unmodified, or if modified, that Developer has provided the City with an Updated Financing Plan approved by the City and certifying as to the truth, correctness and completeness as of the Transfer Date of the specified Financing Plan reviewed and approved by the City; (B) if Transferee intends to fund the Project equity, attaching Evidence of Equity approved by the City and certifying as to the truth, correctness and completeness of Evidence of Equity as of the Transfer Date; (C) if an Approved Equity Investor shall fund the Project equity, attaching an updated or new Equity Commitment, approved by the City in its sole discretion and certifying as to the truth, correctness and completeness of the Equity Commitment as of the Transfer Date; certifying that as of Transfer Date, and taking into account the equity provided pursuant to the Equity Commitment, if applicable, that Transferee has sufficient funds to fund the development of the Project, including all Development Costs; and attaching and certifying as true, complete and correct, as of the Transfer Date:

(1) a certificate of incorporation, California foreign entity registration, and a fully executed bylaws (including any amendments thereto) of Transferee (or if Transferee is not a limited liability company, provide comparable documents for entity type proposed) and copies of any applicable operating agreements, joint venture agreements or equivalent instruments governing the entity;

(2) Evidence of authority of the individual(s) executing the Certificate to bind Transferee and to execute the Assignment Agreement;

(3) Copies of all resolutions or other necessary actions, if any, taken by Transferee to authorize the execution of the Assignment Agreement and the entry into the transaction described by this Agreement and the Other Agreements; and

(4) Certificates of good standing and tax good standing, with respect to Transferee and if applicable, its managing members or general partners issued within thirty (30) calendar days of the date of delivery of the Assignment Agreement

to the City, by the Secretary of State of the state of incorporation if other than California and the applicable taxing authority of the state in which Transferee is formed and by the California Secretary of State and the California Secretary of State (if registration is required by applicable law);

(5) a copy of any Fictitious Business Name Statement if any, as published and filed with the Clerk of Orange County.

(iii) certify in writing for the benefit of the City as to the truth, correctness and completeness as of the Transfer Date of the representations and warranties set forth in the Assignment Agreement to the knowledge of its specified Developer Knowledge Parties as further set forth in the Assignment Agreement;

(c) Unless Transferee certifies to the City that the Financing Plan previously delivered remains true and complete and that no modifications are required to address Developer's expectations as to available funding of Development Costs through issuance of a Certificate of Compliance for the Project and sources and uses of funds, Transferee shall submit to the City an Updated Financing Plan meeting the requirements of Section 4.6.1(b) and the City shall have approved the Updated Financing Plan in its sole discretion, but with the City's rights of approval set forth therein applicable at the time and as a condition precedent to the proposed Transfer (and such approval rights shall not negate the rights of the City to review and approve an Updated Financing Plan as a condition to Close of Escrow).

(d) Transferee shall provide information to the City demonstrating that it meets the requirements of Section 4.6.2 and this Section 4.6.6, including by providing Evidence of Equity or if applicable, by providing an Equity Commitment pursuant to which Approved Equity Investor is committed to invest sufficient equity to fund the entire amount identified as the equity contribution of Developer shown under the Financing Plan (or Updated Financing Plan, if applicable) approved by the City, including the amounts described in Section 4.6.1.

(e) if applicable, Transferee shall cause an Approved Equity Investor to deliver to the City an Original Equity Investor Certificate or, if previously delivered, an Equity Investor Date Down Certificate from the chief financial officer or other appropriate authorized officer of the Approved Equity Investor meeting the requirements of Section 4.6.2(a)(iv) or Section 4.6.2(b)(ii), respectively, and an Equity Commitment.

(f) in the event of a Transfer of Control, provide evidence to the City that each previously approved Evidence of Equity, Equity Commitment and Guaranty remain in full force and effect following such Transfer of Control and have not been modified and that there are no defaults thereunder and that there have been no modifications thereto other than modifications that have been consented to by the City in its sole discretion.

(g) In connection with a Transfer pursuant to Section 2.2.2(a), the Transferor shall provide a declaration certified by the chief financial officer or other appropriate authorized officer of the Transferor, and if Transferor is not a Responsible Developer, of the Responsible Developer, that the conditions set forth in Section 2.2.2(a) have been satisfied and

reaffirming the ongoing obligations of Transferor and, if applicable, Responsible Developer under this Agreement and the Other Agreements, notwithstanding such Permitted Transfer.

4.7 **Guarantor Illiquidity Event.**

4.7.1 **Net Worth.** Developer shall cause each Guarantor, as may be required by this Agreement, to maintain sufficient Net Worth to fully discharge its obligations under the Guaranty executed by such Guarantor and to provide replacement financial assurances in the event Guarantor's Net Worth fails to meet the Minimum Asset Standards required by the Guaranty. Without limiting the foregoing, Developer shall cause Guarantor to agree, in writing, to the following Net Worth standards for the benefit of the City:

(a) Unless otherwise agreed by the City in its sole discretion, Guarantor shall maintain, until execution and Recording by the City of the Certificate of Compliance, a Net Worth of not less than Three Hundred Million Dollars (\$300,000,000.00) ("**Minimum Asset Standards**");

(b) Developer, Guarantor and the City shall enter into a written agreement upon terms approved by City, in its reasonable discretion, establishing the procedures by which Guarantor shall furnish specified financial reports to the City on a regular basis, but not more often than quarterly, to assure that the Minimum Asset Standards are met and that none of the events or actions described in Section 2.2.5 with respect to the Guarantor have occurred (the failure of any such standard being, a "**Guarantor Illiquidity Event**"); and

(c) In the event of a Guarantor Illiquidity Event, within thirty (30) calendar days following the notice from the City of a Guarantor Illiquidity Event to Developer and Guarantor, Guarantor shall supplement its Net Worth to meet the Minimum Asset Standards or Developer shall be required to provide the City with additional security satisfactory to the City by (i) providing the City with a Guaranty from a replacement or supplemental guarantor or guarantors acceptable to the City in its sole discretion, or (ii) furnishing the City with another form of security such as a pledge of specified assets or completion bond, in each case in a manner meeting the requirements of the City in its sole discretion. The City shall have the right, but not the obligation, to provide written notice to Developer of the occurrence of a Guarantor Illiquidity Event and the provision of such notice shall constitute a declaration by the City of a Developer Potential Default.

4.7.2 **DDA Amendment to Address Minimum Asset Covenants.** Any amendment of this Agreement required to facilitate establishment of the procedures and process described in Section 4.7.1 shall be an administrative amendment to the DDA, approval of which is hereby delegated to the City Manager or designee.

4.7.3 **Default.** The failure of Developer to deliver or cause others to timely deliver the financial reporting information to the City as required by Section 4.7.1(b) when due shall be a Potential Default of Developer under this Agreement. Notwithstanding any other provision of this Agreement, the failure of Developer to provide (a) evidence of meeting the Minimum Asset Standards; (b) a Guaranty from a replacement or supplemental Guarantor or Guarantors approved by the City in its sole discretion, or (c) substitute security for the Guaranty

within the time period set forth in Section 4.7.1(c), without extension for Force Majeure Delay, shall constitute a Material Default under this Agreement.

5. **Developer's Due Diligence Investigation.**

5.1 **Due Diligence Period.**

(a) Developer acknowledges that while the City has been negotiating this Agreement with Developer, Developer has had extensive access to the Development Areas within which to undertake such physical inspections and other investigations of, and inquiries concerning, the Development Areas as may be necessary to allow Developer to evaluate the environmental and physical characteristics of the Development Areas, as well as such other matters as may be deemed by Developer to be reasonably necessary to generally evaluate the Development Areas and determine the feasibility and advisability of Developer's purchase of the Property and redevelopment of the Development Areas with the Project, including performance of Grading Work and construction of Improvements on the Development Areas. In addition to the due diligence investigation previously conducted by Developer, Developer shall have an additional period of time as identified herein to undertake specific additional inspections and investigations as are necessary and specifically permitted herein to allow Developer to continue to evaluate the feasibility and advisability of Developer's purchase of the Property and performing work on the Development Areas. Developer's obligation to consummate this transaction shall be contingent upon Developer's satisfaction, in Developer's sole discretion, of the results of such inspection, examination and other due diligence with regard to the Development Areas and its suitability for construction of the Project and the feasibility and advisability of Developer's purchase of the Property and development of the Development Areas as Developer may elect to conduct during the period commencing on the Effective Date and ending on the date which is sixty (60) calendar days following the Effective Date at 4:00 P.M. Pacific Time ("**Due Diligence Period**"). Developer acknowledges and agrees that the Due Diligence Period is adequate time to complete such investigation. As further described in Section 5.3 of this Agreement, Developer may give City written notice ("**Diligence Termination Notice**") on or before the end of the Due Diligence Period stating whether Developer elects to terminate this Agreement or waive its due diligence contingency and proceed to the Close of Escrow with respect to the Project and the Property, subject to the other terms and conditions set forth in this Agreement.

5.2 **No Financing Contingency.**

Developer represents and warrants that it has examined its ability to purchase the Property and to develop the Project, including Developer's ability to finance such construction without the requirement for any Mortgage. Accordingly, Developer acknowledges and agrees that Developer's purchase of the Property is subject to no financing contingency whatsoever with respect to either private or public financing and that its acquisition of third-party financing for the Project is not a condition precedent to Developer's obligation to purchase the Property or of its ability to fund construction of the Project.

5.3 **Termination of Agreement.**

If Developer fails to give the Diligence Termination Notice on or before the end of the Due Diligence Period, then Developer will be deemed to have disapproved the Due Diligence matters and shall be deemed to have elected to terminate this Agreement pursuant to Section 5.1. If Developer elects to terminate this Agreement (a) on or before the end of the Due Diligence Period (or is deemed to have elected to terminate this Agreement upon the expiration of the Due Diligence Period) pursuant to its termination rights set forth in Section 5.1 or (b) prior to the Close of Escrow pursuant to its termination rights set forth in Section 6.3, this Agreement shall automatically terminate on the date of such election or deemed election, as applicable, and thereafter, and in accordance with Section 15.1.3, neither Party shall have any further obligations under this Agreement (subject to the provisions that expressly survive the termination of this Agreement); provided that Escrow Holder shall return to Developer the portion of the Purchase Price Deposit then held by Escrow Holder, less Developer's share of any title and escrow cancellation fees of Escrow Holder and outstanding DDA Transaction Expenses to the extent not covered by the City Costs Deposit, if any, and less the Independent Contract Consideration, which shall be retained by the City.

#### 5.4 Limited License.

The City grants to Developer for use by Developer and its officers, directors, employees, agents, representatives, consultants, contractors, and other Persons accessing the Development Areas by, through or with the permission or under the direction or auspices of Developer (“**Developer Representatives**”) a limited and revocable license to enter upon the Development Areas for purposes of (a) conducting Developer's due diligence inspection and/or (b) obtaining data and making surveys and tests necessary to carry out this Agreement, provided that, prior to the effectiveness of such license, Developer shall: (i) deliver to the City written evidence that Developer has procured the insurance required under Sections 11.1 and 11.2; (ii) give the City twenty-four (24) hours telephonic, electronic mail or written notice of any intended access which involves work on the Development Areas or may result in any impairment of the use of the Development Areas or any portion thereof or any adjacent property by any then-current owners, occupants, or contractors; (iii) access the Development Areas in a safe manner; (iv) conduct no environmental testing, sampling, invasive testing, or boring without the written consent of the City (and, in all cases, Developer shall not carry out any environmental testing, sampling, invasive testing, or boring on the Development Areas prior to the effective date of the environmental insurance policy described in Section 11.1.4); (v) allow no dangerous or hazardous condition to be created or caused on the Development Areas; (vi) comply with all Governmental Requirements and obtain all permits required in connection with such access; (vii) conduct inspections and testing during normal business hours and only after obtaining the City's prior consent, which shall not be unreasonably withheld. The City shall have the right to have a City representative present on the Development Areas during any testing under clause (iv) above. This limited license shall commence on the Effective Date, may be revoked by the City during the continuation of any Default by Developer, or upon termination of this Agreement by any Party, and shall be automatically revoked and terminated upon the earlier to occur of a delivery by Developer of a Diligence Termination Notice, termination of this Agreement pursuant to Article 15 or the Close of Escrow.

#### 5.5 Indemnity.

Developer, on behalf of itself and its successors and assigns under this Agreement, each Successor Owner and each and every Person claiming by, through or under Developer or any Successor Owner but excluding End Users, hereby agrees to protect, indemnify, defend and hold harmless the City Indemnified Parties from and against any and all Claims to the extent arising from or related to: (a) the acts or omissions to act of Developer and/or the Developer Representatives arising from or related to the presence, activities or work on or use of the Development Parcels or from the exercise of the license provided in Section 5.4 by Developer or the Developer Representatives, including with respect to any inspections, surveys, tests, Investigations and studies carried out by Developer or the Developer Representatives on the Development Parcels or on adjacent properties as part of the work plan or investigation prior to Close of Escrow, (b) entry onto the Development Parcels by Developer or the Developer Representatives in connection with this Agreement, (c) bodily injury to or death of any person (including any employee or contractor of the City Indemnified Parties) or damage to or loss of use of property resulting from such acts or omissions of Developer or any of the Developer Representatives in connection with this Agreement, and (d) a Release of Hazardous Materials existing on the Development Parcels prior to Close of Escrow caused by the acts of Developer or any Developer Representatives, in each case whether occurring prior to or following the Effective Date; provided that the foregoing indemnity shall not apply to the extent of (i) the gross negligence, willful misconduct or fraud of City or any City Indemnified Party, or (ii) Hazardous Materials existing on the Development Parcels prior to Close of Escrow unless such Hazardous Materials condition is exacerbated by, or any Release caused by, acts of Developer or any of the Developer Representatives, Developer shall keep the Development Areas free and clear of any and all Construction Liens related to Developer's inspection and/or Investigation of the Development Areas. Subject to Section 9.7 of this Agreement, the indemnification by Developer set forth in this Section 5.5 shall survive (A) the Close of Escrow and shall not be merged into the Quitclaim Deed, and (B) any termination of this Agreement prior to Close of Escrow.

#### **5.6 Review of Certain Records and Materials.**

The City shall, within ten (10) Business Days of the Effective Date, provide Developer with copies of all City-produced plans, reports, studies, investigations and other materials the City may have in its possession that are pertinent to the Development Areas and/or development of the Project and not previously delivered; provided that the City makes no representation, warranty or guaranty regarding the completeness or accuracy of such plans, reports, studies, investigations and other materials. Developer shall also have the right to enter the City's offices to review files and materials, including the right to examine those books, records and files of the City relating to the environmental and other condition of the Development Areas which the City determines based upon the advice of counsel are not subject to attorney-client privilege or other privilege or disclosure rules. The City agrees to make all such books, records, and files available to Developer and Developer's attorneys, accountants, and other representatives at City Hall any time during business hours on Business Days upon reasonable notice from Developer.

#### **5.7 Communications with City and Third Parties.**

From and after the Effective Date, communications with the City by Developer and the Developer Representatives shall be directly with the City Manager, who shall be the administrator

of this Agreement on behalf of the City, and such other employees, consultants, and attorneys of the City from time to time as the City Manager may designate. In addition, Developer shall have the right to communicate with staff of other public agencies; and with third parties to all agreements affecting the Development Areas in connection with Developer's proposed purchase of the Property and development of the Project. The City staff shall have the right, but not the obligation, to attend and participate in any and all meetings with other public agencies, with regard to the Project. Upon request of the City, Developer shall promptly provide the City with a copy of each material item of correspondence (including emails, letters, facsimiles, and any enclosures and attachments) sent to or received by Developer from third parties in connection with entitlements or approval required for the Project or with respect to community or governmental approval of the Project, provided, however, that Developer shall not be obligated to deliver any such materials that based upon advice of counsel are determined to be subject to attorney-client or other privilege.

6. **Title; Survey.**

6.1 **Survey by Developer.**

Developer, prior to the end of the Due Diligence Period and at Developer's sole cost and expense, shall have obtained a survey for the Property ("**Survey**") prepared by a licensed surveyor ("**Surveyor**"), which Survey shall be certified by the Surveyor to the City, Developer and the Title Company. The Survey shall depict: (a) the boundaries of the Real Property, (b) the location of all existing improvements (if any), existing perimeter improvements (if any), and easements, roads, rights-of-way and encroachments located within twenty (20) feet of the boundary of the Real Property, (c) all other Permitted Exceptions susceptible to depiction on a map or survey identified by reference to the recording information applicable to the documents creating them, and (d) any portion of the Real Property lying within a flood hazard area.

6.2 **Permitted Exceptions.**

Developer, at Developer's sole cost and expense, has caused the Title Company to prepare and deliver to Developer and the City with respect to the Property the Preliminary Report attached as Attachment 4 (the "**Preliminary Report**") based upon which the Title Company may issue an extended American Land Title Association Owner's Policy for the Property (collectively "**ALTA Policy**") to Developer in the amount of the Base Purchase Price and such additional amounts as Developer may request of Title Company. Prior to the Effective Date, Developer has reviewed the Preliminary Report and the other relevant documents referenced below and hereby approves matters set forth in the Preliminary Report. "**Permitted Exceptions**" to title shall include the following: (a) as of the last day of the Due Diligence Period, all matters set forth on the Preliminary Report attached as Attachment 4, or set forth on the Survey, and not otherwise deleted (or agreed to be deleted) from the Preliminary Report attached as Attachment 4 nor endorsed over (or agreed to be endorsed over) by the Title Company; (b) the License Agreements entered into by the Parties prior to the Close of Escrow; (c) the Other Agreements that are to be executed, and if applicable, Recorded pursuant to Section 7.4.6(b); (d) the District; (e) the Federal Deed; (f) the Memorandum of Agreement; and (g) all covenants, restrictions and encumbrances, liens, exceptions, leases, restrictions, deed restrictions and qualifications expressly set forth in or permitted or contemplated

by this Agreement or the Other Agreements. Notwithstanding anything to the contrary in this Agreement, the City shall deliver the Property to Developer free and clear of all monetary liens other than (i) liens for real property taxes that are not yet delinquent and (ii) Construction Liens and/or other liens or costs caused by or arising from or in connection with (A) the limited license granted pursuant to Section 5.4; (B) the License Agreements and/or (C) the acts or omissions to act of Developer or the Developer Representatives with respect to work on or use of the Development Areas pursuant to the License Agreements prior to the Close of Escrow.

### 6.3 Supplemental Title Reports.

If, prior the Close of Escrow, the Title Company discloses additional matters that affect title to the Property not disclosed on the Preliminary Report, then within ten (10) calendar days after Developer's receipt of any report issued by the Title Company concerning the Property (a "**Supplemental Title Report**"), Developer shall cause to be provided to the City a copy of such Supplemental Title Report and shall specify in writing Developer's disapproval of any item or exception shown on such Supplemental Title Report not previously included in the Preliminary Report and that is not acceptable to Developer (each a "**Disapproved Exception**") together with Developer's suggested cure thereof (to the extent capable of being cured); provided, however, that Developer shall not have the right to disapprove any item or exception specifically consented to by Developer, including all exceptions arising pursuant to this Agreement and all Permitted Exceptions approved or deemed approved pursuant to Section 6.2. Failure of Developer to disapprove any item or exception shown on any such Supplemental Title Report on or before the expiration of such ten (10) calendar day period shall be deemed to be an approval of the matters set forth in such Supplemental Title Report. If Developer designates a Disapproved Exception, Developer shall specify in writing its reason for such disapproval, and the City shall have the right, but not the obligation, to (a) remove or cure the Disapproved Exception to the reasonable satisfaction of Developer, or (b) subject to the last sentence of Section 6.2, elect not to cure such Disapproved Exception. If the City fails to notify Developer of the City's election to remove or cure such Disapproved Exception within ten (10) Business Days after the City's receipt of Developer's notice of disapproval, the City shall be deemed to have elected not to cure such Disapproved Exception. If the City elects or is deemed to have elected not to cure any such Disapproved Exception then Developer's exclusive remedy shall be: (i) to accept such Disapproved Exception and proceed to take title to the Property in the manner set forth in this Agreement and without either deduction or offset to the Base Purchase Price or the Profit Participation Price, and waive such Disapproved Exception without cause of action under this Agreement against the City, (ii) if the Due Diligence Period has not then expired, to terminate this Agreement pursuant to Section 5.3, or (iii) to provide written notice to the City within five (5) Business Days after the City's election or deemed election, of Developer's election to terminate this Agreement and the Escrow, in which case the Purchase Price Deposit, to the extent previously paid by Developer, shall be refunded to Developer in accordance with Section 5.3; provided that Developer's failure to provide the City within said five (5) Business Days period with written notice of either Developer's acceptance of such Disapproved Exception or Developer's election to terminate this Agreement shall constitute Developer's election to terminate this Agreement. In the event Developer shall not have terminated or been deemed to have terminated this Agreement as set forth in this Section 6.3, then all matters and exclusions or exceptions from title insurance coverage shown in such Supplemental Title Report which Developer shall have accepted pursuant

to this Section 6.3 (other than those which the City has agreed to cure as provided in this Section 6.3), together with all Permitted Exceptions described in Section 6.2 shall be deemed "Permitted Exceptions".

6.4 **ALTA Policy; Endorsements; Close of Escrow and Developer Final Tract Map.**

It shall be a condition precedent to Developer's obligation to close Escrow that the Title Company issue the ALTA Policy with a policy amount equal to the Base Purchase Price and subject only to the Permitted Exceptions ("**Original ALTA Coverage**"). The City shall only be obligated to deliver to the Title Company an owner's affidavit regarding title in a form acceptable to the City in its reasonable discretion. Developer shall have the right, at its sole expense, to request and obtain additional ALTA coverage for the value of the development cost of the Project ("**Additional ALTA Coverage**") and any title endorsements as Developer deems necessary ("**Developer Title Endorsements**"); provided that the issuance of such Additional ALTA Coverage and the Developer Title Endorsements shall not delay the Close of Escrow and shall not be a condition precedent to the Close of Escrow. At the Close of Escrow, the City shall pay the City Premium and Developer shall pay all other costs associated with issuance of the ALTA Policy, including costs of the ALTA Policy and Developer Title Endorsements.

6.5 **City Title Policies.**

It shall be a condition precedent to the City's obligation to close Escrow that the Title Company issue the City Title Policies subject only to the Permitted Exceptions and with any title endorsements the City deems necessary and free and clear of all monetary liens, including Construction Liens, other than liens for real property taxes that are not yet delinquent. Developer shall only be obligated to deliver to the Title Company an owner's affidavit regarding title in a form acceptable to Developer in its reasonable discretion. At the Close of Escrow, Developer shall pay the premium for the City Title Policies and for all endorsements deemed necessary by the City. It shall be a condition precedent to Recording of the Developer Final Tract Map, if the same shall occur following Close of Escrow, that the Title Company issue date downs, at Developer's cost, of the City Title Policies with the same (and no additional) exceptions to title and endorsements shown on the City Title Policies issued at Close of Escrow and with any additional title endorsements the City deems necessary. The ALTA Owners Policy issued to the City shall insure the City with respect to its ownership interest in the Public Access Easement, all other easements made or dedicated and all other insurable interests contained in the Covenant, and the date down shall insure those same interests of City as granted and depicted on the Developer Final Tract Map which shall be of the same priority as was held by the City pursuant to the Covenant at the Close of Escrow.

7. **Closing.**

7.1 **Time and Place of Closing.**

7.1.1 **Close of Escrow.** Unless otherwise mutually agreed by the Parties in writing, the Close of Escrow shall take place on that date which is twenty (20) Business Days

following the last to occur of the satisfaction, or the waiver thereof by the Party for whose benefit the condition applies, of the Developer Closing Conditions set forth in Sections 7.2.1(d), (e), (f),(g) and (h) and the City Closing Conditions set forth in Sections 7.2.2(c), (d), (e), (f), (g), (h), (j), (k), (l) and (n) (“Closing Date”); provided that (a) in no event shall either City or Developer be obligated to close Escrow unless each has received at least five (5) Business Days’ advance written notice from the other party of the anticipated date for satisfaction of such City Closing Conditions, and (b) the Close of Escrow shall in no event be later than February 16, 2021, provided that the same may be extended for Force Majeure Delay on a day for day basis for each day of Force Majeure Delay approved pursuant to Section 17.7 with respect to the License Area Grading Work in the City Streets License Area or the Initial City Improvements (“Outside Closing Date”). The Close of Escrow shall be subject to the satisfaction (or waiver by the Party benefited by such condition) of all of the conditions set forth in Section 7.2 and shall take place at the offices of Escrow Holder, or at such other place that the City selects.

7.1.2 **City Right Extend Closing Dates.** Notwithstanding any other provision of this Agreement, the City shall have the right to extend the Closing Date and the Outside Closing Date in accordance with the following.

(a) If on or before the Outside Closing Date: (i) Tustin Unified School District (“TUSD”) has not provided the TUSD Lien Release Documentation, or (ii) the City has not formed a new improvement area of the District (to be denominated CFD 18-01 Improvement Area No. 2) with respect to the Real Property and Improvements (and to thereby annex the Real Property and Improvements into the District) and to adopt a rate and method of apportionment (“RMA”) for Improvement Area No. 2 and de-annexed the Real Property from any other City community facilities districts, with such formation, annexation and de-annexation Finally Approved, then in either case, the City shall have the right, in its sole discretion, but not the obligation, to extend the Closing Date and the Outside Closing Date for a period not to exceed three (3) months at no cost to the City; provided that the failure of TUSD to remove the lien of the TUSD CFD and/or the failure for any reason of the City to enter into the TUSD Lien Release Documentation or to form Improvement Area No. 2, adopt an RMA (with the effect of annexing the Real Property and Improvements into the District) and de-annex the Real Property from any other City community facilities districts (with such formation, approval, annexation and de-annexation Finally Approved) shall not be a Default by the City under this Agreement. In addition, notwithstanding any other provision of this Agreement, the City shall have the right to extend the Closing Date and the Outside Closing Date for a period of six months (6) months as the same may additionally be extended by Force Majeure Delay at no cost to the City, if on or before the Outside Closing Date, the City has not caused completion of the Initial City Improvements; provided that the failure of the City to cause completion of the Initial City Improvements shall not be a Default by the City under this Agreement.

(b) The City shall have the right in its sole discretion, but not the obligation, to extend the Closing Date and the Outside Closing Date on a day for day basis for each day of delay upon occurrence of any of the following: (i) if the Flight Way Component was not completed, certified by the engineer of record as complete in accordance with the Approved Plans and accepted by the Director of Public Works by June 16, 2020, or if the remainder of the Grading Work within the City Streets was not completed, certified by the engineer of record as

complete in accordance with the Approved Plans and accepted by the Director of Public Works by August 16, 2020, regardless of whether the City had at any time provided written notice to Developer of Default or such delay is a Force Majeure Delay, (ii) if the City has not completed the Initial City Improvements within Flight Way between Armstrong Avenue and Street "D" by November 16, 2020 or the remainder of the Initial City Improvements by January 16, 2021, due to delay by Developer in completing the License Area Grading Work or due to Force Majeure Delay, or (iii) provided the Initial City Improvements are completed by the dates specified in clause (ii) above, as extended thereby, if the Developer Closing Condition set forth in Section 7.2.1(f) has not been satisfied due to Force Majeure Delay including due to failure of IRWD or SCE to perform the required inspections or provide the required approvals.

(c) In no event shall the Outside Closing Date be extended beyond December 31, 2022.

7.1.3 **Other Closing Date Extensions By Mutual Agreement.** In addition to the extension periods provided to the City pursuant to Sections 7.1.2 and the additional extensions set forth in Sections 7.2.1(l) and 7.2.2(p) and Section 15.3.1, the Closing Date and Outside Closing Date may be extended upon mutual written agreement of the Parties. In the event that the Close of Escrow does not occur on or prior to the Outside Closing Date (as such date may be automatically extended pursuant to Section 7.1.1), then, subject to the provisions of Article 15 or any agreement by the Parties (in their sole and absolute discretion) to extend the Outside Closing Date, this Agreement shall terminate at the end of the Business Day on the Outside Closing Date.

7.1.4 **Recording of Developer Final Tract Map.** If at the Close of Escrow the County has received a form of Developer Final Tract Map approved by the City but the County has not approved the Developer Final Tract Map for Recording and therefore the Developer Final Tract Map is not Recorded, (a) to the extent the same cannot be described by parcels on the Final City Map, Developer shall cause to be prepared, at its sole cost and expense, a metes and bounds legal description for (i) the Real Property, (ii) the areas affected by the Public Access Easement and the Water Treatment Area, and (iii) all required easement and dedication areas shown on the Developer Tentative Tract Map, which such metes and bounds legal descriptions shall be used as legal descriptions for documents to be Recorded at the Close of Escrow, and (b) Developer shall promptly pursue the Recording of the Developer Final Tract Map, including making all revisions requested by the County for the authorization of the Recording of the Developer Final Tract Map (which revisions shall be approved by the City in its Governmental Capacity), and shall cause the Developer Final Tract Map to be Recorded on or before the date set forth for such Recording set forth in Section 8.8.

## 7.2 **Conditions Precedent to Close of Escrow.**

7.2.1 **Developer Closing Conditions.** Developer's obligation to purchase the Property and to complete all requirements for the Close of Escrow is subject to and conditioned upon the satisfaction of, or Developer's express written waiver of, each of the following conditions to the Close of Escrow ("**Developer Closing Conditions**") on or before the Closing Date.

(a) Document Deliveries. Not later than two (2) Business Days prior to the Close of Escrow, the City shall have executed and delivered to Escrow Holder the following documents, in each case (where applicable) substantially in the form and substance of the instruments attached as Attachments to this Agreement, unless otherwise agreed by the Parties, each in its sole discretion:

(i) if not previously executed and Recorded, the Memorandum of DDA, acknowledged and in Recordable form;

(ii) the Special Restrictions, acknowledged and in Recordable form;

(iii) the Quitclaim Deed for the Property, acknowledged and in Recordable form;

(iv) if not previously executed and Recorded, the DA (and provided that it is then effective as a matter of law), acknowledged and in Recordable form;

(v) the Profit Participation Agreement;

(vi) the Landscape and Water Treatment Installation and Maintenance Agreement acknowledged and in Recordable form;

(vii) the Covenant acknowledged and in Recordable form;

(viii) federal FIRPTA Affidavit;

(ix) California's Real Estate Withholding Exemption Certificate Form 593-C;

(x) A bill of sale for of all City-owned utility systems previously owned by the military on the Development Parcels and providing for removal and abandonment of those systems for construction of Improvements, which shall include an assignment by the City to Developer of all Intangible Property ("**Bill of Sale**");

(xi) a reaffirmation of the City's representations and warranties set forth in Sections 3.3 and 17.12.2 (as the same may be modified pursuant to Section 3.4) in substantially the form and substance of the certificate attached hereto as Attachment 18, which reaffirmation shall identify any representation or warranty which is not, or no longer is, true and correct and explaining the state of facts giving rise to the change.

(xii) such proof of the City's authority and authorization to enter into this Agreement and consummate the transactions contemplated hereby, and such proof of the power and authority of the individual(s) executing and/or delivering any instruments, documents or certificates on behalf of the City to act for and/or bind the City as may be reasonably required by Title Company and/or Developer; and

(xiii) if and only if the Developer Final Tract Map is not Recorded prior to or concurrently with the Close of Escrow, the Request for Partial Reconveyance, in substantially the form and substance of the instrument attached hereto as Attachment 30A, to which shall be attached the Partial Reconveyance in substantially the form and substance of the instrument attached hereto as Attachment 30B;

(xiv) such other documents or instruments as Escrow Holder may reasonably request to consummate the transaction contemplated in this Agreement.

(b) Title Policy. The Title Company shall be in a position to issue the ALTA Policy to Developer for the Property in the amount of the Base Purchase Price and subject only to the Permitted Exceptions.

(c) Pre-Existing Obligations. Except as approved by Developer in writing or constituting a Permitted Exception, there shall exist no leases, contracts or rights of occupancy or other agreements or contracts with respect to the Property that shall survive the Close of Escrow.

(d) Entitlements. Developer shall have timely applied for and shall have been granted all Entitlements required for development of the Project and all periods to challenge, review or appeal of the relevant approvals (including by litigation or referendum) shall have expired without any challenge, review or appeal, or if there is a challenge, review or appeal, a final non-appealable resolution of the challenge or appeal is issued upholding the approval of the relevant approvals without any material changes to the original conditions of such Entitlements approvals.

(e) Design Review. Developer shall have timely applied for and shall have been granted approval of the Basic Concept Plan for the Project, which shall be substantially in conformance with the Site Plan and the Scope of Development.

(f) Initial City Improvements: Flight Way from Armstrong to Street D. City to have (i) sewer, storm drain, domestic water and recycled water installed, (ii) domestic water and sewer inspected and testing completed by IRWD and available for Developer to connect, and (iii) street base paved and dry utility ducts, vaults, pull boxes and handholes installed and accepted by Southern California Edison (SCE) for cabling (collectively, "**Initial City Improvements**") and the Director of Public Works shall have approved such Initial City Improvements.

(g) City Map and Developer Tentative Tract Map. The Final City Map shall have been Recorded, and the Developer Tentative Tract Map shall have been Finally Approved.

(h) TUSD Lien Release Documentation. The City and TUSD shall have entered into the TUSD Lien Release Documentation in form and substance acceptable to the City in its sole discretion.

(i) No Casualty or Condemnation. There shall not have occurred any material casualty or condemnation with respect to the Property and no material condemnation shall be threatened with respect to the Property.

(j) No Litigation. No litigation shall be threatened or pending which seeks to prevent the development or operation of the Project, or any part thereof, according to the terms of this Agreement and the Other Agreements.

(k) Representations and Warranties. Subject to Section 7.2.1(a)(xi), the City's representations and warranties set forth in in Sections 3.3 and 17.12.2 shall be true and correct as of the Close of Escrow, provided, in no event shall the City be liable to Developer for, or be deemed to be in Default under this Agreement by reason of, breach of any such representation or warranty which results from a change that (i) occurs between the Effective Date and the date of the Close of Escrow, and (ii) is expressly permitted under the terms of this Agreement or is beyond the reasonable control of the City to prevent. The occurrence of a change in a representation and warranty shall, if materially adverse to Developer or the Property, as determined by Developer in Developer's reasonable business judgment, constitute the non-fulfillment of the condition set forth in this Section 7.2.1(k), unless such matter is cured at least one (1) Business Day prior to the Close of Escrow. If, despite changes or other matters described in the City's reaffirmation certificate, the Close of Escrow occurs, the City's representations and warranties set forth in Sections 3.3 and 17.12.2 shall be deemed to have been modified by all statements made in such certificate.

(l) Default. The City shall not be in Default of any covenant or agreement to be performed by the City under this Agreement or, if the City is in Default on the expected Closing Date, Developer shall have provided the City with written notice and the City shall have cured such Default within ten (10) Business Days of such notice, and, for one such extension only, the Closing Date and the Outside Closing Date shall be extended to allow such cure within such ten (10) Business Day period.

7.2.2 City Closing Conditions. The City's obligation to deliver the Quitclaim Deed for the Property and to complete all requirements for the Close of Escrow is subject to and conditioned upon the satisfaction of, or the City's express written waiver of, each of the following conditions to the Close of Escrow ("**City Closing Conditions**") on or before the Closing Date:

(a) Developer Closing Payment. Not later than one (1) Business Day prior to the Close of Escrow, Developer shall deliver to Escrow (i) the Developer Closing Payment and (ii) any other costs explicitly set forth in this Agreement as costs to be paid by Developer at the Close of Escrow, including the City Cost Deposit amounts described in Section 1.8.3 and the master marketing program fee described in Section 8.7.4.

(b) Document Deliveries. Not later than two (2) Business Days prior to the Close of Escrow, Developer shall have executed and delivered to Escrow Holder the following documents, in each case (where applicable) substantially in the form and substance of the instruments attached as Attachments to this Agreement, unless otherwise agreed by the Parties, each in its sole discretion:

- (i) if not previously executed and Recorded, the Memorandum of DDA, acknowledged and in Recordable form;
- (ii) an Acceptance of the Special Restrictions, acknowledged and in Recordable form;
- (iii) an Acceptance of the Quitclaim Deed, acknowledged and in Recordable form;
- (iv) if not previously executed and Recorded, the DA (and provided it is then effective as a matter of law), acknowledged and in Recordable form;
- (v) the Profit Participation Agreement;
- (vi) the Landscape and Water Treatment Installation and Maintenance Agreement, acknowledged and in Recordable form;
- (vii) the Bill of Sale;
- (viii) if not previously delivered, a water treatment covenant and agreement regarding operation and maintenance of the Water Treatment Improvements, acknowledged and in recordable form (“**Water Treatment Covenant**”);
- (ix) a Guaranty executed by the chief financial officer or other appropriate authorized officer of Guarantor;
- (x) a Guarantor Certificate executed by the chief financial officer or other appropriate authorized officer of Guarantor;
- (xi) a Legal Opinion executed by legal counsel to Guarantor;
- (xii) a declaration certified by an officer of Developer in the form and substance of the certificate attached hereto as Attachment 19, that the documentation submitted by Developer to the City pursuant to Section 4.6.2 prior to the Effective Date is true and correct as of the Close of Escrow together with certificates of good standing of Developer and its managing members or general partners, as applicable, issued by the State of Delaware and by the California Secretary of State within thirty (30) calendar days of the Closing Date and a reaffirmation of Developer’s representations and warranties set forth in Section 3.1 (as the same may be modified pursuant to Section 3.2) and Section 17.12.1 (or in the case where any Transfer occurs prior to the Close of Escrow, the representations and warranties made by the Transferee in the Assignment Agreement) which reaffirmation shall identify any representation or warranty which is not, or no longer is, true and correct and explaining the state of facts giving rise to the change;
- (xiii) If applicable, an Equity Investor Date Down Certificate or, if not previously delivered by the Approved Equity Investor, an Original Equity Investor

Certificate, in either case certified by the chief financial officer or other appropriate authorized officer of the Approved Equity Investor;

(xiv) such proof of Developer's authority and authorization to enter into this Agreement and consummate the transactions contemplated hereby, and such proof of the power and authority of the individual(s) executing and/or delivering any instruments, documents or certificates on behalf of Developer to act for and/or bind Developer as may be reasonably required by Title Company and/or the City;

(xv) the City Deed of Trust acknowledged and in recordable form in favor of the City and to be Recorded against the Model Collateral; and

(xvi) such other documents or instruments as Escrow Holder may reasonably request to consummate the transaction contemplated in this Agreement.

(c) Entitlements. Developer shall have timely applied for and shall have been granted all Entitlements required for development of the Project and all periods to challenge, review or appeal of the relevant approvals (including by litigation or referendum) shall have expired without any challenge, review or appeal, or if there is a challenge, review or appeal, a final non-appealable resolution of the challenge or appeal is issued upholding the approval of the relevant approvals without any material changes to the original conditions of such Entitlements approvals.

(d) Design Review. Developer shall have timely applied for and shall have been granted approval of the Basic Concept Plan for the Project, which shall be substantially in conformance with the Site Plan and the Scope of Development.

(e) City Tract Map, Developer Final Tract Map and Performance Bonds. The City and the County of Orange shall have approved the City Tract Map and the City Tract Map shall have been Recorded; the City shall have approved the Developer Tentative Tract Map, which shall have been Finally Approved; the Developer Final Tract Map shall have been approved by the City and submitted to the County of Orange for review and approval (but the Developer Final Tract Map need not have been approved by the County or Recorded); and if not previously delivered or required pursuant to then-effective Subdivision Improvement Agreement, Developer shall have provided one or more Performance Bonds in favor of the City as obligee securing Developer's obligations to construct the Horizontal Improvements.

(f) Horizontal Improvements and Model Building Permits. Developer shall have paid the Additional Purchase Price Deposit and the City shall be prepared to issue (or shall have previously issued): (i) the grading permit for the Grading Work; (ii) the building permits for all of the Models and (iii) permits for all of the Horizontal Improvements and all of the Phase Improvements.

(g) Formation of Improvement Area, Adoption of RMA and Annexation of Property into District. The City shall have formed the new improvement area, approved the RMA and caused the Property to be annexed into the District and de-annexed from

all other City community facility districts, in accordance with Section 8.7.3, and such formation, annexation, adoption and de-annexation shall each be Finally Approved.

(h) CC&Rs. Developer shall have submitted for City review a first draft of the CC&Rs as specified in Section 13.1, which shall have been approved by the City pursuant to Section 13.1.

(i) Insurance. Developer shall have provided to the City evidence of insurance as and to the extent required by Article 11.

(j) Financial Capability. Developer shall have satisfied the conditions precedent to Close of Escrow set forth in Section 4.6.1 to the satisfaction of the City in its sole discretion, including delivery to the City of evidence as required by such Section demonstrating: (i) the availability of funds to Developer, without third party financing or Mortgage of any kind, sufficient to pay all Development Costs, including sufficient equity capital to design, construct and operate the Project consistent with the terms of this Agreement; (ii) no material adverse change in the financial capacity or condition of Developer or its financial or organizational relationships from that presented to the City as of the Effective Date; (iii) that the Financing Plan remains in full force and effect, or as modified by the most recent Updated Financing Plan, is satisfactory to the City in its sole discretion, and (iv) that the Project budget for the Improvements remains a reasonable budget.

(k) Certification and Approval of License Area Grading Work. The License Area Grading Work on the City Streets Grading Area shall have been certified by the engineer of record as complete in accordance with the Approved Plans and the Director of Public Works shall have approved such License Area Grading Work.

(l) TUSD Lien Release Documentation. The City and TUSD shall have entered into the TUSD Lien Release Documentation in form and substance acceptable to the City in its sole discretion.

(m) City Title Policy. The Title Company shall be in a position to issue the City Title Policies to the City subject only to the Permitted Exceptions and without exception for liens, including Construction Liens.

(n) Additional Conditions. Developer shall have satisfied the conditions precedent to Close of Escrow set forth in Sections 4.6.1 through 4.6.6 of this Agreement and shall be in compliance with the requirements of Section 8.5.2.

(o) Representations and Warranties. Subject to Section 7.2.2(b)(xii), Developer's representations and warranties set forth in Sections 3.1 and 17.12.1 shall be true and correct as of the Close of Escrow (or in the case where any Transfer occurs prior to the Close of Escrow, the representations and warranties made by the Transferee in Assignment Agreement), shall be true and correct as of the Close of Escrow, provided, in no event shall Developer be liable to the City for, or be deemed to be in Default under this Agreement by reason of, breach of any such representation or warranty which results from a change that (i) occurs between the Effective

Date and the date of the Close of Escrow, and (ii) is expressly permitted under the terms of this Agreement or is beyond the reasonable control of Developer to prevent. The occurrence of a change in a representation and warranty shall, if materially adverse to City, as determined by City in City's reasonable business judgment, constitute the non-fulfillment of the condition set forth in this Section 7.2.2(o), unless such matter is cured at least one (1) Business Day prior to the Close of Escrow. If, despite changes or other matters described in Developer's reaffirmation certificate, the Close of Escrow occurs, Developer's representations and warranties set forth in Sections 3.1 and 17.12.1 (or in the case where a Transfer occurs prior to the Close of Escrow, the representations and warranties made by the Transferee in the Assignment Agreement) shall be deemed to have been modified by all statements made in such certificate.

(p) Default. Developer shall not be in Default of any covenant or agreement to be performed by Developer under this Agreement, or, if Developer is in Default on the expected Closing Date, City shall have provided Developer with written notice and Developer shall have cured such Default within ten (10) Business Days of such notice, and, for one such extension only, the Closing Date and the Outside Closing Date shall be extended to allow such cure within such ten (10) Business Day period.

### 7.3 Additional Close of Escrow Conditions.

In addition to the provisions of Section 7.2, the Close of Escrow shall be conditioned upon the following Closing Conditions, which shall be for the benefit of each Party:

(a) Closing Cost Statement. Escrow Holder shall have delivered at least seven (7) Business Days prior to the Close of Escrow a statement of costs to each Party and at least two (2) Business Days prior to the Close of Escrow each of the Parties shall have approved such statement as being consistent with the provisions of Section 7.4.

(b) Closing Certificate. Each Party shall submit to Escrow Holder a certificate stating that all Closing Conditions for its benefit have been satisfied or waived.

### 7.4 Procedures for Conveyance.

7.4.1 Costs and Expenses. The costs and expenses of the Close of Escrow shall be allocated as follows:

(a) City's Costs. The City shall pay (i) the City Premium; (ii) one-half (1/2) of all Escrow fees and costs; (iii) all documentary transfer taxes, if any; and (iv) the City's share of proration, if any.

(b) Developer's Costs. Developer shall pay (i) the entire cost of the ALTA Policy, along with the cost of any other title insurance coverage, in excess of the City Premium and all other costs associated with issuance of the ALTA Policy, Developer Title Endorsements and the cost of the City Title Policy; (ii) the entire cost of the Survey and any additional land surveys obtained by Developer in connection with the foregoing; (iii) document recording charges for the Special Restrictions, the Quitclaim Deed, the Memorandum of DDA and all other Recorded documents; (iv) one-half (1/2) of all Escrow fees and costs; (v) Developer's

share of prorations and (vi) the cost of any outstanding DDA Transaction Expenses as described in Section 1.8.3. Developer shall pay the fees of all consultants and employees (including lawyers and environmental, engineering and land use consultants) engaged by it.

(c) Other Costs. All costs and expenses related to the Close of Escrow and the transfer of the Property to Developer not otherwise allocated in this Agreement shall be allocated between the Parties in accordance with the customary practice in Orange County, California.

7.4.2 Possession. The City shall deliver exclusive possession of the Property at the Close of Escrow subject to any Permitted Exceptions and to any other matters disclosed on the ALTA Policy.

7.4.3 Deliveries to Developer Upon Close of Escrow. The City agrees to deliver to Developer, on or prior to the Close of Escrow, outside of Escrow, the following items with respect to the Property:

(a) Records and Plans. To the extent in the City's possession, originals or copies of records and plans that will affect the Property after the Close of Escrow.

(b) Licenses and Permits. To the extent in the City's possession, originals or copies of all licenses and permits affecting the Property other than the License Agreements.

7.4.4 Prorations.

(a) General. Rentals, revenues and other income, if any, from the Property conveyed shall be prorated on a cash basis as of 11:59 P.M. Pacific Time on the day preceding the Close of Escrow. Tax payments shall be prorated in accordance with Section 7.4.4(b).

(b) Taxes. Except as set forth in Section 7.4.4(c), Developer shall be responsible for all taxes, assessments, fees and charges imposed by any Governmental Authority with respect to the conveyed Property and all existing and future improvements thereon from and after the Close of Escrow. If, after the Close of Escrow, any real estate taxes or possessory interest taxes are assessed against any conveyed parcel pertaining to the period prior to the Close of Escrow, the City agrees to contact the applicable taxing authority and seek recognition and enforcement of its tax exemption. The provisions of this clause (b) shall survive the Close of Escrow and shall not merge into the Quitclaim Deed.

(c) TUSD CFD. At the Close of Escrow, and provided that TUSD and the City have entered into a TUSD Lien Release Documentation pursuant to which TUSD has agreed, upon receipt of payment in full of an agreed-upon sum from the City at the Close of Escrow, to either release the lien of the TUSD CFD or to provide other evidence demonstrating payment in full of the TUSD CFD as to the Property at Close of Escrow, City shall be responsible to pay in full the lien of the TUSD CFD upon the Property from the Base Purchase Price.

7.4.5 **Method of Proration.** All prorations shall be made in accordance with customary practice in Orange County, except as otherwise expressly provided in this Agreement. Developer and the City agree to cause a schedule of prorations to be prepared prior to the Close of Escrow. Such prorations, if and to the extent known and agreed upon as of the Close of Escrow, shall be paid by Developer to the City (if the prorations result in a net credit to the City) or by the City to Developer (if the prorations result in a net credit to Developer) by increasing or reducing the cash to be paid by Developer at the Close of Escrow. Any such prorations not determined or not agreed upon as of the Close of Escrow shall be paid by Developer to the City, or by the City to Developer, as the case may be, in cash as soon as practicable following the Close of Escrow (but in no event later than sixty (60) days after such Close of Escrow). A copy of the schedule of prorations as agreed upon by Developer and the City shall be delivered to Escrow Holder at least three (3) Business Days prior to the Close of Escrow. All prorations provided for in Section 7.4.4 and this Section 7.4.5 shall be on an “actual day” basis and a three hundred sixty-five (365) day year.

7.4.6 **Disbursements and Other Actions by Escrow Holder.** At the Close of Escrow, and subject to the satisfaction or waiver by the benefited party of the conditions to Close of Escrow described in Section 7.2, Escrow Holder shall promptly undertake all of the following in the manner indicated below:

(a) **Funds.** Debit or credit all matters addressed in Section 7.4.1 and prorate all matters addressed in Section 7.4.4 and disburse to the City the Base Purchase Price (as adjusted by the foregoing debits, credits and prorations).

(b) **Recording.** Cause to be Recorded against the Real Property, in the following order: the Memorandum of DDA, the Special Restrictions, the Quitclaim Deed, the Landscape and Water Treatment Installation and Maintenance Agreement, the City Deed of Trust, and thereafter, other documents that Developer and the City may mutually direct, or that may be required by the terms of this Agreement to be Recorded, obtain conformed copies thereof and distribute same to Developer and the City.

(c) **Title Policies.** Direct the Title Company to issue the ALTA Policy to Developer in the amount of the Base Purchase Price and subject only to the Permitted Exceptions. Direct the Title Company to issue to the City (i) an ALTA Lender’s policy in the amount of One Million Three Hundred Thousand Dollars (\$1,300,000.00) and(ii) an ALTA owner’s extended coverage policy to the City in the amount of One Million Dollars (\$1,000,000.00) insuring the City’s ownership interest in the easements, dedications, releases and offer to dedicate contained in the Covenant (collectively, “**City Title Policies**”) and subject only to the Permitted Exceptions. Concurrently with the issuance of the ALTA Policy, the Title Company shall provide the Developer Title Endorsements, provided that the issuance of such Developer Title Endorsements shall not be a condition to Close of Escrow, except for those endorsements that the City agreed to obtain in order to cure any disapproved title exceptions or survey matters. Concurrently with the issuance of the City Title Policies, the Title Company shall provide to the City the endorsements requested by City.

(d) Delivery of Documents to Developer and City. Deliver to each Party original counterparts (and conformed copies, if applicable) of the DA (if not previously recorded), the Special Restrictions, the Memorandum of DDA (if not previously recorded), the Quitclaim Deed, the Profit Participation Agreement, the Landscape and Water Treatment Installation and Maintenance Agreement, the City Deed of Trust, the Bill of Sale, the Water Treatment Covenant, the FIRPTA Affidavit, the California Form 593-W, and any other documents (or copies thereof) deposited into Escrow by Developer or the City pursuant hereto, and deliver to the Parties a certified copy of their respective Escrow closing statements.

(e) City Deed of Trust Partial Reconveyance. If the same is delivered by the City, retain the Request for Partial Reconveyance and the Partial Reconveyance with respect to the City Deed of Trust until such time as Escrow Holder is instructed by the terms of the Request for Partial Reconveyance and Section 7.4.8 of this Agreement to Record the Partial Reconveyance, and then, and only then, to cause the Title Company to execute the Partial Reconveyance and to cause the Partial Reconveyance to be Recorded.

(f) Other Actions. Take such other actions as the Parties direct pursuant to mutually executed supplemental Escrow instructions.

7.4.7 Notice. All communications from the Escrow Holder shall be directed to the addresses and in the manner established in Section 17.6 for notices, demands and communications between the Parties.

7.4.8 Partial Reconveyance. In the event the Developer Final Tract Map is not Recorded prior to or concurrently with the Close of Escrow, the executed Request for Partial Reconveyance delivered to Escrow by the City in accordance with Section 7.2.1(a)(xiii) shall be held by Escrow Holder until such time as the Developer Final Tract Map is Recorded. Immediately following the Recordation of the Developer Final Tract Map, but in no other circumstance, First American Title Insurance Company, as trustee of the City Deed of Trust, shall execute and deliver to Escrow Holder the Partial Reconveyance, in substantially the form and substance attached hereto as Attachment 30B, and Escrow Holder shall immediately Record such Partial Reconveyance, without further instruction from the Parties. This provision shall survive the Close of Escrow.

## 8. Development of the Property and Additional Covenants of Developer and City.

### 8.1 Scope of Development.

8.1.1 Requirement to Develop the Project. The Scope of Development attached to this Agreement as Attachment 8 sets forth the overall conceptual plan for the Project and development of the Development Property, including design, development, and construction of the Improvements as may be required by the Entitlements and Development Permits. The Project shall be designed and constructed in a manner consistent with the Site Plan attached as Attachment 3 (as the same may be modified with approval of the City Manager in his or her Proprietary Capacity and otherwise in compliance with the City Code), the Scope of Development, the Entitlements, the Approved Plans, the Design Guidelines and all Governmental Requirements.

Until the issuance of the Certificate of Compliance and except as otherwise permitted by Section 2.2, no Person shall be permitted or authorized to undertake the construction of any improvements on the Development Property or any portion thereof (including the Improvements) unless such Person: (a) is the Initial Developer, (b) is a Transferee pursuant to a Permitted Transfer and has met the requirements of Section 2.2.2, or (c) has been approved by the City as a Transferee pursuant to Section 2.2.3 and has met the requirements of Section 2.2.3, and in the case of clauses (a) and (b) of this Section 8.1.1, such Person has assumed in writing all obligations of Developer under this Agreement and the Other Agreements, pursuant to an Assignment Agreement. The provisions of this Section shall survive termination of this Agreement.

8.1.2 **Control of Site Development.** Developer shall have control over the design and layout of the Improvements (including height, shape and location of the Vertical Improvements and special landscaping and art features) and over the special uses to be incorporated therein, subject to (a) the Approved Plans, the Design Guidelines, Development Permits, Entitlements and Governmental Requirements including any conditional use permit necessitated by particular proposed uses or design features and (b) the design approval provisions set forth in Section 8.4.5 and 8.4.6 for the benefit of the City, which are undertaken by the City in its Proprietary Capacity.

8.1.3 **Development Costs.** Within the time set forth in the Schedule of Performance, Developer shall design and construct the Project upon the Development Property at Developer's sole cost and expense and without public subsidy of any kind, unless otherwise agreed in writing by the City in its sole discretion. Without limiting the generality of the foregoing, Developer hereby agrees that the following costs and expenses (collectively "**Development Costs**") incurred by Developer during the term of this Agreement and to the date of issuance of the Certificate of Compliance shall be the responsibility of Developer without any cost or liability to the City:

(a) all costs and expenses to perform and satisfy all the covenants of Developer with respect to the Development Property contained in this Agreement and the Other Agreements;

(b) all costs and expenses associated with planning, designing, developing and constructing the Project, preparing the Development Property and constructing all Improvements (whether on-site or off-site) required in connection with the Project, including all hard costs, soft costs, the cost of services, fees, exactions, dedications, cost overruns, profit, overhead, Entitlements costs (including costs to perform conditions of approval thereunder), warranties, consultants' fees, legal fees;

(c) all costs and expenses of marketing and sale of all Homes as further described in the Scope of Development, including marketing fees, sales incentives, insurance, overhead, and brokerage fees incurred in the sale of Homes;

(d) all costs and expenses costs and expenses necessary to obtain the Entitlements and Development Permits and to comply with the other obligations of Developer under this Agreement required to be satisfied prior to the Close of Escrow;

(e) all costs and expenses associated with acquisition of the Property, payment of the Purchase Price and brokerage fees incurred in the acquisition of the Property and, if applicable, sale of the Property or the Project by Developer;

(f) all costs and expenses comprising DDA Transaction Expenses of the City;

(g) all wages and benefits required to be paid to any person employed by Developer, and by persons employed by the Developer Representatives;

(h) the costs of the Project Fair Share Contribution and Tax B assessments; and

(i) the costs of all in-tract improvements, including those identified for the Property on Attachment 9.

**8.1.4 Compliance with Governmental Requirements and Other Requirements.** Developer shall develop the Project and the Development Property in the manner described in and consistent with the Scope of Development, the Site Plan, and in accordance with the Schedule of Performance, the Approved Plans and all Governmental Requirements, as further described below, including the Specific Plan, the Entitlements, the Development Permits, the Memorandum of Agreement and the Federal Deed.

**8.1.5 Construction of Specific Project Components.**

(a) Horizontal Improvements. Developer acknowledges and agrees that it shall be responsible for design and construction of certain infrastructure to support the development of the Project to the extent described in the Scope of Development attached to this Agreement as Attachment 8 and in the depiction of Horizontal Improvements attached to this Agreement as Attachment 9 and as otherwise required by the Approved Plans, the Entitlements, the Development Permits, the Design Guidelines, all Governmental Requirements and all requirements of private utility purveyors. The Horizontal Improvements shall be commenced and diligently prosecuted to Completion in accordance with the Schedule of Performance as further described in Section 8.2.1. It is the intent of the Parties that the order of construction pursuant to the License Agreements be as follows: (i) promptly following the Grading Work Initial Satisfaction Date, Developer and City shall execute the Grading License Agreement pursuant to which Developer shall perform the License Area Grading Work within the City Streets Grading Area within the time period set forth therein and in the Schedule of Performance; (ii) concurrently with or following completion by Developer of the work described in clause (i) of this Section 8.1.5(a), Developer shall perform the License Area Grading Work on the Real Property pursuant to the Grading License Agreement; (iii) promptly following the Water Treatment Improvements Initial Satisfaction Date, Developer and the City shall execute the Water Treatment Improvements License Agreement pursuant to which Developer shall commence and perform construction of the Water Treatment Improvements upon the Real Property within the time period set forth therein and in the Schedule of Performance; (iv) following certification of the License Area Grading Work on the City Streets Grading Area by the engineer of record as complete in

accordance with the Approved Plans and approval of such License Area Grading Work by the Director of Public Works, the City shall use good faith efforts to execute a construction contract for the City Improvements (which shall be delivered to the construction contractor thereunder only upon receipt by Escrow Holder of the Additional Purchase Price Deposit as described in Section 4.3.1); and (v) following payment by Developer of the Additional Purchase Price Deposit and promptly satisfaction of the Horizontal Improvements Initial Satisfaction Date conditions (and provided that Close of Escrow has not then occurred), Developer and the City shall execute the Horizontal Improvements License Agreement pursuant to which Developer shall commence and perform construction of the Horizontal Improvements upon the Real Property within the time period set forth therein and in the Schedule of Performance. Except as set forth in Section 5.5 or authorized by a License Agreement executed by the Parties, Developer shall have no right to enter upon the Development Area or to commence the Horizontal Improvements, including the Grading Work, or any portion thereof.

(b) Vertical Improvements. Following the Close of Escrow, Developer shall construct or cause the construction of the Vertical Improvements, in accordance with the Schedule of Performance, the Scope of Development, the Approved Plans, the Design Guidelines or other plans and specifications prepared by Developer and approved by the City, the Entitlements, the Development Permits, the Design Guidelines, and all other Governmental Requirements (subject to Section 1.6).

## 8.2 Timing and Conditions of Project Development.

8.2.1 Schedule of Performance. The Schedule of Performance sets forth the schedule for submissions, approvals and actions, including the design and development of the Project and construction of the Improvements during the term of this Agreement. The Parties acknowledge and agree that, subject to Section 17.7.4, time is of the essence with respect to the dates set forth in this Agreement including the Schedule of Performance. Following the Effective Date, Developer shall promptly begin and thereafter diligently prosecute to completion within the time specified in the Schedule of Performance all steps required by the Schedule of Performance, including design, construction and development of the Improvements. Subject to Section 17.7, the City may, in its sole discretion and upon written request from Developer, extend the time specified for any of Developer's obligations in this Agreement, including in the Schedule of Performance. Any such agreed upon changes shall be within the limitations of the Specific Plan, the Entitlements, the Development Permits and all other Governmental Requirements. To be effective, any extensions shall be requested in writing by Developer and evidenced by written notice from the City Manager or designee.

8.2.2 Completion of Improvements. Immediately after Close of Escrow (or pursuant to the Grading License Agreement or Horizontal Improvements License Agreement if therein earlier required), Developer shall promptly begin and thereafter diligently prosecute to Completion the Improvements in accordance with the requirements of and within the time periods established by this Agreement, including the Schedule of Performance, the Approved Plans, the Entitlements, the Development Permits, the Specific Plan, and all other Governmental Requirements, as well as all requirements of private utility purveyors. Developer shall complete

the Improvements on or before the date set forth for performance of such work in the Schedule of Performance.

### 8.3 **Land Use Matters.**

8.3.1 **Subdivision.** Developer at its sole cost and expense shall (a) cause the Parcels within each Phase to be legally described and (b) as required by the Subdivision Map Act and the City Code, file and prosecute applications to create separate legal parcels for the Parcels in each Phase. Accordingly, Developer has submitted for the City's approval, as part of the Entitlements, a Developer Tentative Tract Map for the Development Parcels.

8.3.2 **Required Entitlements.** Developer shall, at its sole cost and expense, process, obtain, and maintain all Entitlements to assure that the design, construction, use, operation, maintenance, repair and replacement of the Improvements is carried out in accordance with the provisions of this Agreement, and is permitted by the Entitlements and all other Governmental Requirements. Development of the Project shall be subject to the following Entitlements review processes of the City: (a) Design Review approval (Design Review application 2019-00009); (b) Developer Tentative Tract Map approval (Developer Tentative Tract Map No. 19103); and (c) Development Agreement approval (2019-00001) and any other approvals to the extent required by the City Code to permit the uses contemplated in the Site Plan or Approved Plans. Without limiting the foregoing, in developing and constructing the Project, Developer shall ensure that the Project complies with all applicable development standards in the Specific Plan, the City Code and with all building codes, landscaping, signage and parking requirements, except as may be permitted through variances and modifications.

8.3.3 **Development Permits.** Developer, at its sole cost and expense shall process, obtain, and maintain all Development Permits required for the construction, use, operation, maintenance, repair and replacement of the Improvements.

8.3.4 **Agreement Does Not Grant Entitlements.** Nothing in this Agreement shall be construed or interpreted as committing the City to approve or undertake any action or review process or activities that require the independent exercise of discretion by the City in its Governmental Capacity, including any approval of any of the Entitlements or Development Permit applications for which Developer applies after the Effective Date. This Agreement does not (a) grant any land use entitlement or approval to Developer, (b) supersede, nullify or amend any condition which may be imposed by the City in its Governmental Capacity in connection with approval of the Project, (c) guarantee to Developer or any other party any profits from the development of the Property, or (d) amend any Governmental Requirements of the City. The issuance or approval of any of the Entitlements not issued or approved on or prior to the Effective Date or any Development Permit described in this Agreement shall be done by the City in its Governmental Capacity and the failure of the City to issue or approve any such matters shall not be a Default. Nothing contained in this Agreement shall be deemed to waive the right of the City to act in its Governmental Capacity with respect to the consideration and approval of the Entitlements, Development Permits and all other permits, licenses and approvals requested by Developer from time to time in connection with the Project nor shall it entitle Developer to any of the Entitlements, Development Permits or other City approvals necessary for the development of

the Project, or to the waiver of any applicable City requirements relating thereto, and the failure of the City to issue or approve any of the Entitlements described in this Agreement, including to certify or approve any CEQA document, to approve any tentative tract map, design review, conditional use permit or other entitlements or approvals, including the Entitlements or Development Permits, shall not be a Default of the City under this Agreement.

8.3.5 **Cooperation of City.** Consistent with this Agreement, the City agrees, without cost or other liability to the City or any commitment of the City to approve or conditionally approve any Entitlements required for the full implementation of this Agreement, to assist and cooperate with Developer in its efforts to process the Entitlements and Development Permits. The City will use good faith efforts to expedite review of applications for the Entitlements and the Development Permits that are to be issued by the City and other submissions made by Developer where reasonably appropriate in order to meet the deadlines set forth in the Schedule of Performance and will assist and cooperate with Developer in its efforts to process such Development Permits, Entitlements and other submissions.

8.3.6 **CEQA Requirements.** The Parties acknowledge and agree that CEQA is applicable to discretionary actions associated with the development of the Project. The Developer acknowledges that the City shall prepare any supplemental environmental information, if any, as may need to be completed in order to effect compliance with CEQA, as determined by the City in its sole discretion, and Developer shall be responsible to pay all costs incurred by the City to prepare or to cause to its consultants to prepare such environmental documents and shall enter into such agreements to pay such costs as the City shall require. Developer agrees to cooperate with the City in obtaining information to determine the environmental impact of the Project, if any.

8.3.7 **Entitlements Conditions.** Developer acknowledges and agrees that the City in its Governmental Capacity may require satisfaction of certain conditions and dedication of certain property in connection with approval of any Entitlements.

8.3.8 **Payment of Fees.** Without limiting any other provision of this Agreement, Developer shall pay (a) all fees, costs and deposits normally charged by the City or other Governmental Authority in connection with application for and review and approval of Development Permits and Entitlements, (b) any fees or costs incurred by the City or any other Governmental Authority in complying with CEQA or the State CEQA implementing regulations; (c) any costs to review or approve any of the Entitlements or Development Permits applications or submittals by Developer to the City or any other Governmental Authority in connection with the Project.

#### 8.4 **Design Approval.**

8.4.1 **Design Review.** It is understood and agreed to by Developer that the quality, character and uses proposed for the Project are of particular importance to the City. In furtherance of the development of the Project and the foregoing, the City, acting in its Governmental Capacity, shall require Design Review approval as part of the Entitlements. In addition, in its Proprietary Capacity as the current owner of the real property that is the subject of

this Agreement and of substantial portions of Tustin Legacy, the City will require review and approval of the Basic Concept Plan for the Project and the Landscape Improvements upon the Landscape Areas as further set forth in this Section 8.4. Review of design documents by the City in its Proprietary Capacity only shall be subject to time periods set forth below.

8.4.2 **Plan Development and Cost.** All plans and specifications for the Project shall be prepared by Developer at Developer's sole cost and expense and subject to the requirements set forth in this Article 8.

8.4.3 **Process for Governmental Review.** The Parties acknowledge that the City shall have the right to review all plans, specifications and submissions, including any changes therein, through its normal plan review and Entitlements process and that the City may exercise its governmental discretion in review of any of the plans, specifications and submissions. Developer has previously submitted to the City the Site Plan graphically depicting the overall plan for development of the Improvements on the Development Property, the layout of the Homes and buildings, proposed Common Area, parking, and access on and related to each Building Pad, conceptual renderings and setting forth the Phasing plan. Within the timeframe shown in the Schedule of Performance (or prior to Close of Escrow if the same are required to be submitted prior to Close of Escrow to satisfy a City Closing Condition), Developer shall submit for approval by the City in its Governmental Capacity, final design drawings and related documents conforming to the requirements of the City Code, the Specific Plan and all other Entitlements and conditions of approval. The Community Development Department is authorized pursuant to City Code to approve minor changes to building plans after approval by the City provided such changes do not significantly reduce the quality of the development concept or the design and materials to be used in enhancing the architecture and aesthetics of the Improvements.

8.4.4 **Coordination.** Developer and the Project Architect shall meet with representatives of the City to review and come to a clear understanding of the planning and design criteria required by the City. During the preparation of all plans and specifications for the Project, staff of the City and Developer shall hold regular progress meetings to coordinate the preparation, submission and review of such plans. The staff of the City and Developer shall communicate and consult as frequently as necessary to facilitate prompt and speedy consideration of Developer's submittals.

8.4.5 **Proprietary Review.** Prior to the Effective Date, Developer has caused the Basic Concept Plan to be prepared and submitted to the City for approval and the City has reviewed and approved the Basic Concept Plan in its Proprietary Capacity, including with respect to landscape plans, exterior elevations, exterior materials (including selections and colors) and the size, and floor plans for all Homes and Buildings, the phasing of the Project, the product mix and the Landscape Improvements upon the Landscape Areas. Developer acknowledges and agrees that the City's Community Development Department is responsible for reviewing the working drawings and issuing recommendations with respect to the appropriate Entitlements and has approved the Basic Concept Plan. In addition to its submittal of same to the Community Development Department, Developer shall submit any modifications to the Basic Concept Plan to the City Manager's office for its approval in accordance with this Section. The exercise by the City Manager's office of its right to inspect or review the concept plans, drawings and related

documents for development of the Project: (a) shall be an exercise of the City's Proprietary Capacity and not its Governmental Capacity; (b) shall not constitute an approval by the City of any Entitlements; (c) shall not constitute a determination by the City of the engineering or structural design, sufficiency or integrity of the improvements contemplated by such plans, drawings and related documents, and (d) shall not constitute a determination by the City of the compliance of such plans, drawings and related documents with any applicable building codes, safety features and standards. Any inspection or approval of plans and drawings made or granted pursuant to this Agreement shall not constitute an inspection or approval of the quality, adequacy or suitability of such plans, specifications or drawings, nor of the labor, materials, services or equipment to be furnished or supplied in connection therewith. Developer acknowledges and agrees that the City in its Proprietary Capacity may approve or disapprove the Basic Concept Plan and design review plans and any modifications thereto in order to satisfy the City's obligation to promote the sound development and redevelopment of land, to promote a high level of design that will impact development surrounding the Project, and to provide an environment for the social, economic and psychological growth and well-being of the citizens of the City and that the City is not constrained or limited to act solely within its governmental discretion, authority, or capacity. Developer shall not be entitled to damages or compensation as a result of the City's disapproval, conditional approval, or failure to approve or disapprove the Basic Concept Plan or any modification thereto in its Proprietary Capacity.

8.4.6 **Process for Proprietary Review.** If Developer desires to modify the Basic Concept Plan, Developer shall submit two sets of the modifications to the Basic Concept Plan for the Improvements to the City. Such sets of the Basic Concept Plan shall be submitted in writing over the signature of Developer or a representative duly authorized by Developer in writing. If the City approves such modifications, the City Manager or designee shall endorse its approval on one set of such Basic Concept Plan and return them to Developer. The City, in its Proprietary Capacity only, shall conclusively be deemed to have disapproved such modifications to the Basic Concept Plan unless, within fifteen (15) Business Days after the City's receipt of such modifications, the City gives written notice of approval to Developer. Developer shall make changes in response to the City's notice of disapproval or deemed disapproval and resubmit such Basic Concept Plan to the City for review and approval in accordance with the provisions of this Section 8.4.6 (and in such case the City's review period shall be ten (10) Business Days.) If the City disapproves or is deemed to have disapproved any proposed modification of the Basic Concept Plan and such delay adversely impacts Developer's compliance with the requirements of the Schedule of Performance, then the dates for Developer's performance under the Schedule of Performance which are impacted by the City delay shall be extended day for day until the City's approval has been given to such modification.

8.4.7 **Approved Plans.** Upon approval by the City of each of matters described in the definition of Approved Plans, the Approved Plans shall govern development of the Improvements. In addition to any other rights to approve or disapprove the construction level drawings in its Governmental Capacity, the City may disapprove such documents in its Proprietary Capacity if such documents are not consistent with the Entitlements and the Basic Concept Plan previously approved, do not represent a logical or commercially reasonable implementation thereof, and/or do not provide for construction of the same square footage as set forth therein. Developer shall not construct any Improvements on the Real Property and shall not conduct any

Grading Work on the Development Property unless the same are shown in the Approved Plans or unless the prior written consent of the City in its Proprietary Capacity and, if necessary, the approval of the City in its Governmental Capacity are obtained to any modification thereof. To the extent of any inconsistencies between the plans identified in the Scope of Development or the Site Plan and the Approved Plans, the Approved Plans shall govern and control as to the development of the Development Property.

## 8.5 **Financial Status.**

8.5.1 **Financial Capability.** After the Close of Escrow, and thereafter until issuance of the Certificate of Compliance, Developer shall continue to be responsible for demonstrating to the City the financial capacity of Developer and the capability of Developer to perform its obligations under this Agreement. In addition to the requirements set forth in Sections 4.6.1, 4.6.2, and 4.6.5, as applicable, during the period commencing on the Close of Escrow and ending on the issuance of the Certificate of Compliance for the Project, Developer shall submit annually, on the anniversary of the Closing Date, a date-down of the Updated Financing Plan presented at Close of Escrow meeting the requirements set forth in Section 4.6.1(b). If the City is not reasonably satisfied with the financial status of Developer following review of the Updated Financing Plan, the City shall be entitled to obtain the financial information of other members, owners and/or partners of the proposed development entity, if any, and their respective members, partners, shareholders and/or other owners at each tier until substantial assets acceptable to the City in its sole discretion are identified.

8.5.2 **No Mortgage.** In light of Developer's representations set forth in Section 3.1 (or, if applicable, any Assignment Agreement executed by Developer as Transferee), Developer hereby waives its rights: (a) to require or utilize third party financing with respect to the acquisition of the Property or development of the Improvements on the Development Property or any portion thereof prior to issuance of the Certificate of Compliance for the Project and (b) to Transfer the Property or any portion thereof or to Transfer Control of Developer to a Mortgagee or to record a Mortgage against the Property prior to the issuance of the Certificate of Compliance unless otherwise agreed by the City in its sole discretion. The covenants of Developer pursuant to this Section and the representations in Section 3.1 or any such Assignment Agreement represent material consideration to the City.

8.5.3 **Additional Information.** Developer understands and agrees that the City reserves the right at any time to reasonably request in writing from Developer additional information, including information, data and commitments, to ascertain the depth of the capability and desire of Developer or other equity participants, to develop the Project expeditiously.

8.5.4 **Guaranty.** Developer, on behalf of itself and each Successor Owner, hereby agrees that any Guaranty provided pursuant to the requirements of this Agreement (or, if applicable, any replacement Guaranty provided to and approved by the City pursuant to this Agreement) shall not be amended, modified or terminated prior to issuance of a Certificate of Compliance without the prior written consent of the City in its sole discretion.

## 8.6 **Project Budget Statement.**

Developer understands and agrees that the City reserves the right to reasonably request at any time prior to the issuance of the Certificate of Compliance for the Project (but not more frequently than quarterly) that Developer provide a Project Budget Statement in the format required by the Financing Plan. If requested by the City, Developer shall submit such Project Budget Statement within thirty (30) calendar days following the later of Developer's receipt of the City's written request therefor and the expiration of the applicable quarter. Notwithstanding the foregoing, the delivery of such Project Budget Statement shall be for informational purposes only and in no event shall the City be entitled to declare a Potential Default or Material Default, or exercise any of its remedies pursuant to this Agreement, based on the contents of such Project Budget Statement absent an actual Potential Default or Material Default under one of the other covenants or obligations of Developer set forth in this Agreement. All Project Budget Statements submitted by Developer in response to request by the City shall be subject to the confidentiality provisions set forth in Sections 4.6.1 and 17.24.

#### 8.7 District Fees and Other Fees and Exactions.

8.7.1 Developer Acknowledgements. Developer acknowledges and agrees that: (a) the development of the Project, together with the development of the remainder of Tustin Legacy, will contribute to the need for Tustin Legacy backbone infrastructure located off of the Development Parcels, including Tustin Legacy roadway improvements; traffic and circulation mitigation to support the Tustin Legacy project; domestic and reclaimed water; sewer; telemetry; storm drains and flood control channels; utilities backbone (electricity, gas, telephone, cable, telecommunications, etc.) as such program is in effect as of the Effective Date ("**Tustin Legacy Backbone Infrastructure Program**"); (b) the Base Purchase Price does not include Developer's fair share contribution to development by the City of the Tustin Legacy Backbone Infrastructure Program on behalf of the Project, as further described below; (c) Developer has had an opportunity to review the budgets, plans and projections developed by the City in connection with the Tustin Legacy Backbone Infrastructure Program and the studies prepared by the City in connection therewith; (d) there is an essential nexus between the imposition on the Project of the Project Fair Share Contribution and a legitimate governmental interest; and (e) the Project Fair Share Contribution is roughly proportional to and reasonably and rationally related to the impacts that will be caused by development of the Project.

8.7.2 Project Fair Share Contribution. Developer is responsible to pay its fair share of the costs of the Tustin Legacy Backbone Infrastructure Program. It is acknowledged that the Base Purchase Price does not include the Project Fair Share Contribution of Developer. Except as described above, no further obligation shall be imposed on Developer in connection with the Project Fair Share Contribution or the Tustin Legacy Backbone Infrastructure Program. Developer waives its right to fund all or any portion of such contribution pursuant to a community facilities district, including pursuant to any special tax for the development of facilities within the Tustin Legacy Backbone Infrastructure Program or pursuant to other community facilities district.

#### 8.7.3 Community Facilities District.

(a) The City has previously established Community Facilities District 18-01 with a Tax B component to pay for various essential services at Tustin Legacy

("District"). The City, by action of the City Council, intends to form a new improvement area of the District (to be denominated CFD 18-01 Improvement Area No. 2) with respect to the Real Property and Improvements (and to thereby annex the Real Property and Improvements into the District) and to adopt an RMA for Improvement Area No. 2. When the new improvement area is formed, the District shall impose a tax and lien upon the Property in accordance with the terms of the instruments governing the District, the RMA and the requirements of this Agreement. At the time of annexation into the District, the Real Property and Improvements will be de-annexed from any other City community facilities districts.

(b) Developer, on behalf of itself and its Successor Owners, agrees to the imposition of the District, as described in clause (a) of this Section 8.7.3, the RMA and the new Tax B, the proceeds of which shall be used by City to fund a portion of City essential services, including but not limited to police protection services, fire protection services, ambulance and paramedic services, recreation program services, maintenance of City-owned parks, parkways and open space, flood and storm protection and street and sidewalk maintenance at Tustin Legacy. Unless otherwise agreed by the City and Developer, each in its sole discretion, the following shall apply to any District formed by the City:

(i) The term of the Tax B component or any equivalent service assessment District imposed upon the Real Property and the Improvements shall be perpetual and shall not be time limited in any manner unless determined by the City in its sole discretion.

(ii) At the Closing Date, the RMA shall establish that the annual property tax burden on each Home including all general and special taxes and assessments from any existing assessment district and assessments resulting from the District shall not exceed the amount shown on the Maximum Tax Burden Schedule attached as Attachment 24. Thereafter, taxes and assessments imposed pursuant to any District may be adjusted upward at a rate of not less than two percent (2%) per year and not more than four percent (4%) per year, subject to and as further described in the RMA.

(iii) At the sole discretion of the City, the District and RMA may be structured such that assessments shall be due and payable with respect to the Real Property without consideration for whether or not Homes have been Completed thereon (i.e., such that all Homes shall be assessed as improved or developed property); provided however, the District assessment on unimproved land or undeveloped portions of the Property shall be at an undeveloped property assessment rate of Zero Dollars until a date established by the City, but in no event earlier than the commencement of the 2020/2021 tax year.

(iv) The City will provide Developer with the opportunity to review and provide input on all documents and budgets relating to the formation of the new improvement area, annexation of the Property into the District and adoption of the RMA (including any funding and acquisition agreement and the rate and method of allocating the District assessments) at least thirty (30) calendar days prior to the date on which the

formation, annexation and RMA documents are expected to be submitted for the agenda package related to the formation of the new improvement area and adoption of the RMA.

(c) The City and Developer agree that any District assessments are imposed by the City in its Proprietary Capacity as seller under this Agreement and not in its Governmental Capacity and that such assessments, shall additionally be a Public Benefit (as such term is defined in the DA) under the DA made applicable to the Property and the Improvements thereon and shall be a tax and lien upon the Property in accordance with the terms of the instruments governing the District and the requirements of the DA. The agreement of Developer to imposition of the District on the terms set forth above and the payment of such proceeds to the City constitutes additional and material consideration to the City under this Agreement. In addition to the requirements in this Agreement, the establishment of the District and assessments imposed thereby, and the proceeds of any bonds issued in connection therewith shall be payable to the City as Public Benefits under the DA. In addition to the remedies imposed pursuant to this Agreement in favor of the City, nothing herein shall restrict the right of the City to exercise its remedies under the DA and to withhold building permits with respect to the Project pursuant to the DA if Developer fails to timely comply with its obligations with respect to the District.

(d) Developer acknowledges and agrees that its development plan for the Project will not require use of community facilities district proceeds and that neither assessment district nor community facilities district proceeds will be used to reimburse Developer for its Development Costs, including Project Fair Share Contribution or Project specific infrastructure costs. Developer, on behalf of itself and its Successor Owners, waives its right to fund all or any portion of the development of the Project pursuant to a community facilities district.

(e) Developer will not oppose a determination by the City to form the District, including a determination to subject all or any portion of the Real Property and the Improvements thereon to such assessment, provided that the City, the District and such assessments comply with Section 8.7.3(b).

(f) The City shall not be prohibited by the terms of this Agreement from subjecting the Real Property and/or the Improvements thereon to any increase in ad valorem real property tax pursuant to a City of Tustin-wide election, provided that nothing herein shall be construed to constitute a waiver by Developer of its right or ability to dispute or oppose passage of a City of Tustin-wide bond, the proposed formation of any special district or taxing authority in connection therewith, or the imposition of any such tax, or its right to dispute any portion of the Real Property's assessed value. In addition, nothing in this Agreement shall preclude liens, charges or assessments by the Homeowners' Association pursuant to the CC&Rs or by the City pursuant to the Landscape and Water Treatment Installation and Maintenance Agreement, including liens, charges or assessments against Homeowners to cover the penalties, fines and other charges incurred by the City, if any, in connection with the maintenance, operation, repair and replacement of the Water Treatment Improvements or the failure to maintain, operate, repair or replace the Water Treatment Improvements.

8.7.4 **Master Marketing Program Fees.** Developer acknowledges that the City (in its Proprietary Capacity) requires that all builders within Tustin Legacy contribute a master

marketing fee towards the marketing of Tustin Legacy by the City. In complete satisfaction of such obligation by Developer, Developer shall pay to the City through Escrow Holder at the Close of Escrow a one-time master marketing fee of Fifty Thousand Dollars (\$50,000.00). The City acknowledges and agrees that this payment shall satisfy all obligations of Developer to contribute to the master marketing program or any future master marketing program for the Project and that Developer shall have no additional obligations on account thereof after the payment of such fee at the Close of Escrow.

8.7.5 **Other Fees and Assessments.** Developer acknowledges and agrees that in addition to City fees, fees may be imposed by other Governmental Authorities with jurisdiction over the Project and/or the Property and payment of any such fees and assessments shall be at Developer's sole cost, including (a) the Foothill/Eastern Corridor Fee, (b) state-mandated school impact fees and assessments by each School District, (c) Orange County School Facility Bonds (Measure G and Measure L), and (d) utility meter and connection fees.

8.7.6 **No Quimby Act Fees or Park Fees.** Except as set forth in this Agreement or the Other Agreements, all fees and/or dedications required in connection with the Project pursuant to the Quimby Act, California Government Code Section 66477, are included within the Project Fair Share Contribution and Developer shall not have any additional liability on account thereof.

8.8 **Recording of Developer Final Tract Map and Subdivision Improvement Agreement.**

Developer shall cause the Developer Final Tract Map to be Recorded within six (6) months following the Close of Escrow. Developer shall enter into the Subdivision Improvement Agreement with the City prior and as a condition to Recording of the Developer Final Tract Map and issuance by the City of building permits for any Homes, including Models.

8.9 **Construction of Improvements by Developer.**

8.9.1 **Grading Work.** Promptly following the execution and delivery of this Agreement and as a condition to the Grading Work Initial Satisfaction Date, Developer shall deliver all Performance Bonds required by the City Department of Public Works to be delivered in connection with the issuance of two encroachment permits for the Grading Work upon the City Streets Grading Area (the first, for the Flight Way Component and the second for the remainder of the License Area Grading Work upon the City Streets Grading Area). Upon satisfaction by Developer of the conditions to the Grading Work Initial Satisfaction Date, Developer and the City shall enter into the Grading License Agreement. Developer shall cause the Grading Work upon the City Streets Grading Area to be carried out and completed in accordance with the Approved Plans and the requirements of this Agreement and the Grading License Agreement within the time period set forth in the Schedule of Performance and promptly thereafter shall cause such Grading Work to be certified by the engineer of record as complete in accordance with the Approved Plans to the satisfaction of the Director of Public Works. The Performance Bonds so delivered shall be retained by the City until the Grading Work upon the City Streets Grading Area has been completed and certified by the engineer of record as complete in accordance with the Approved

Plans to the satisfaction of the Director of Public Works. Prior and as a condition to commencement of the rough and mass Grading Work upon the Real Property, Developer shall deliver to the City all Performance Bonds required for issuance of the grading permit for such Grading Work and prior and as a condition to commencement of the precise Grading Work upon the Real Property, Developer shall deliver to the City all Performance Bonds required for issuance of the grading permit for such Grading Work. Concurrently with or following completion of the Grading Work upon the City Streets Grading Area, Developer shall cause the remaining Grading Work to be carried out and completed in accordance with the Approved Plans within the time period set forth in the Schedule of Performance and promptly thereafter shall cause such Grading Work to be certified by the engineer of record as complete in accordance with the Approved Plans to the satisfaction of the City Building Division (for Grading Work on the Real Property). All mass and rough Grading Work on the City Streets and the Real Property shall be performed pursuant to the terms of the Grading License Agreement. Precise grading of the Real Property shall be performed pursuant to the terms of the Horizontal Improvements License Agreement and shall be commenced only following the Horizontal Improvements Initial Satisfaction Date, the execution and delivery of the Horizontal Improvements License Agreement (and any additional terms, including the requirement to deliver Performance Bonds for such work) and the delivery of the Additional Purchase Price Deposit. The Performance Bonds so delivered shall be retained by the City until the Grading Work upon the Real Property has been completed and certified by the engineer of record as complete in accordance with the Approved Plans to the satisfaction of the City Building Division. The Performance Bonds required as a condition to issuance by the Department of Public Works of the encroachment permits for the performance of the License Area Grading Work upon the City Streets Grading Area and the Performance Bonds required as a condition to issuance of the grading permit for the mass and rough Real Property Grading Work are referred to herein collectively as the “**Grading Bonds**”.

8.9.2 **Horizontal Improvements.** Developer acknowledges and agrees that it shall be responsible for design and construction of all local infrastructure to support the development of the Project as further described in the Schedule of Performance and the Scope of Development, including the Landscape Improvements within the Boundary Landscape Area, the Horizontal Improvements and the Phase Improvements. Developer shall promptly obtain permits for the Horizontal Improvements and when authorized by this Agreement or the Other Agreements, and following the satisfaction of all conditions to the Horizontal Improvements Satisfaction Date, begin construction thereof and thereafter shall diligently prosecute such work to Completion in accordance with and subject to this Agreement, including the Schedule of Performance, the Scope of Development, the Approved Plans, the Specific Plan, the Developer Tentative Tract Map and Entitlements conditions, Development Permits and any other Governmental Requirements and, if applicable, the License Agreements. The Landscape Improvements shall include vegetation of a type and amount as may reasonably be required to maintain landscaping consistent with High Quality Residential Standards. To secure Developer’s performance of the Grading Work and additional Horizontal Improvements, prior to the date set forth in the License Agreements or, for Performance Bonds not required to be delivered pursuant to the License, prior and as a condition to the Close of Escrow, Developer shall provide one or more Performance Bonds securing its obligations to perform the Grading Work and construct the Horizontal Improvements. Developer shall perform the License Area Grading Work on the City Streets Grading Area prior to the Close of Escrow and in accordance with the time period set forth

in the Grading License Agreement and the Schedule of Performance. City and Developer shall, and shall cause their civil and infrastructure teams to, cooperate with respect to design and performance of grading (and related soil import and/or export if required) by Developer and design and construction of the City Improvements in order to achieve an efficient design and to avoid delays in construction of the License Area Grading Work and the City Improvements.

8.9.3 **Phase Improvements.** The Project is currently anticipated to be implemented in forty-eight (48) Phases as depicted on Attachment 6. Developer shall construct the Phase Improvements in accordance with this Agreement, including the Schedule of Performance, the Scope of Development, Approved Plans, the Specific Plan, the Developer Tentative Tract Map, Entitlements conditions, Development Permits and any other Governmental Requirements. The Phase Improvements, generally comprising those infrastructure improvements and Common Area Improvements to be constructed within the Phase areas as depicted on the Phasing Map attached hereto as Attachment 6, shall be constructed sequentially by Phase; provided, however, the swimming pool and restrooms and pedestrian access and landscaping related to such facilities shall be completed on or before August 31, 2022 as further described in the Schedule of Performance. For each Phase, Developer shall commence with the components of the Phase Improvements comprising infrastructure improvements. Each Phase shall be commenced and Completed in accordance with the Inventory Commitment and the Schedule of Performance and upon Completion thereof, each Phase shall comply with all Governmental Requirements, including all Specific Plan requirements and Entitlements conditions of approval for development on the Development Property, without reliance upon Improvements to be constructed in future Phases; provided that construction of Building utilities hookups and alleys and motor courts for the motor court flats will be installed with vertical construction of each such Building and completed in accordance with the requirements of the DA.

8.9.4 **Vertical Improvements.** Developer shall construct the Vertical Improvements for residential purposes in accordance with this Agreement, including the Schedule of Performance, the Scope of Development, the Approved Plans, the Specific Plan, the Developer Tentative Tract Map, Entitlements conditions, Development Permits and any other Governmental Requirements. It is acknowledged that the Vertical Improvements shall be constructed sequentially by Phase. Developer shall also comply with the following requirements with respect to its development of the Vertical Improvements on the Real Property (collectively, “**Inventory Commitment**”):

8.9.5 **Construction of Models.** Commence construction of Models on the Real Property within six (6) months following the Close of Escrow and Complete construction of and open all Models to the public not later than eighteen (18) months following the Close of Escrow, provided that Force Majeure Delays with respect to the foregoing shall not exceed three (3) months in the aggregate. Model Home construction on the Real Property to consist of three (3) Model complexes (thirteen (13) Models) consisting of the following: three (3) detached single family residences, seven (7) motor court flats and three (3) townhomes), representative of Homes in each of the three product types proposed to be constructed as part of the Project. The Model complexes shall be constructed and completed prior to completion of Homes within the first area of the Property to be developed. Each Model complex shall open to the public promptly

upon completion thereof and shall remain open to the public until such time that Developer has sold ninety-five percent (95%) of the Homes of such product type within the Property.

(a) Initial Product Inventory. Subject to extension for Force Majeure Delay, Complete construction of initial production home inventory within nine (9) months following opening of the first of the Models to the public. Initial product inventory requirement shall consist of completion of framing and exteriors for not less than six (6) townhomes, fifteen (15) motor court flats and three (3) detached single family homes (for a total of twenty-four (24) Homes) available for sale in addition to the Models;

(b) Ongoing Inventory and Production Phase Requirements. Construct, obtain valid certificates of occupancy and offer for sale the Homes in production phases which are based upon a reasonable analysis of market conditions and anticipated absorption and which otherwise are in conformance with the Schedule of Performance. Taking into consideration the market conditions and anticipated absorption, use commercially reasonable efforts to commence construction of each subsequent production phase of Homes not later than the close of escrow on the last Home for sale to the public in the prior production phase.

(c) Marketing. Conduct reasonable marketing efforts in conformance with Developer's master marketing program, to sell all of the Homes;

(d) Maximum Release. Except as may from time to time be specifically agreed in writing by the City, Developer shall not release for sale to the public (i) in any one sales release more than the following number of units by product type: (A) twenty-two (22) Homes comprising stacked flats units; (B) twelve (12) Homes comprising townhome units and (C) twelve (12) detached single family unit Homes, provided that each of the Homes described in clauses (A), (B) and (C) of this Section 8.9.5(d) may be released concurrently, and (ii) a second or later sales release of Homes within thirty (30) calendar days of the immediately prior sales release.

#### 8.10 City Improvements.

(a) The City Improvements are generally depicted on Attachment 27 and are anticipated, upon completion, to provide multiple access points for the Project. Following certification of the Flight Way Component of the License Area Grading Work by the engineer of record as complete in accordance with the Approved Plans and approval of such Flight Way Component by the Director of Public Works, the City shall use good faith efforts, subject to availability of funds, to construct the City Improvements. Developer acknowledges that both its completion of the Flight Way Component on the City Streets Grading Area and approval of the Flight Way Component by the Director of Public Works as described in the preceding sentence are conditions precedent to City's commencement of the City Improvements. In carrying out construction of the City Improvements, the City will seek to construct the City Improvements in priority phases so as to first allow construction access to the Model Lots, by installing utilities in Flight Way and paving Flight Way to a standard meeting the construction access requirements of the Orange County Fire Authority and thereafter by constructing roadways providing additional construction access to the Property at subsequent times pursuant to the milestones outlined in the Schedule of Performance. The City has approved the plans for the City Improvements and intends

to seek permits and to use good faith efforts to construct the City Improvements consistent with the Schedule of Performance. Notwithstanding anything to the contrary set forth in this Agreement, Developer acknowledges that (i) the City will not execute a contract for performance of the City Improvements or commence construction of the City Improvements until it has received certification by the civil engineer of record that the Flight Way Component is complete in accordance with the Approved Plans, such portion of the License Area Grading Work has been approved by the Director of Public Works, and the Additional Purchase Price Deposit has been paid; (ii) the schedule established in the Schedule of Performance for construction of the City Improvements is an estimate only and failure of the City to commence or carry out the tasks described in this Section, or to complete construction of the City Improvements within the time set forth above or at all or for any reason shall not be a Default by City under this Agreement and (iii) for avoidance of doubt, due to the vagaries of the public bidding process, the City cannot control, and shall not be deemed to be in breach of its good faith obligation under this Section if completion of City Improvements is delayed or cannot be completed due to any challenge, protest or other third party claim, act or failure to act, that delays or restricts the City's issuance of requests for bids or awarding of contract(s) for the City Improvements, the City's processing of requested change orders or the City's ability to prosecute work under an awarded contract to completion as a result of contractor challenges, issues or change order requests or other similar matters. Developer further acknowledges that (x) portions of the City Improvements such as capping of roadways, construction of sidewalks and landscape may remain uncompleted until following Completion of the Project to allow for future construction access and (y) satisfaction of the Developer Closing Condition in Section 7.2.1(f) is subject to actions by IRWD and SCE that are outside of the control of the City.

(b) The dates for performance by Developer of the Grading Work within the City Streets Grading Area and the City's good faith efforts to cause construction of the City Improvements have been divided into two components in order to provide what is anticipated to be sufficient time for IRWD and SCE to complete the work required to satisfy the Developer Closing Condition in Section 7.2.1(f). Accordingly, time is of the essence with respect to the commitments by Developer to achieve the June 16, 2020 date with respect to the Flight Way Component and the August 16, 2020 date with respect to the remaining components of the Grading Work within the City Streets Grading Area. Developer acknowledges that the City's entry into a contract for construction of the City Improvements on or after June 16, 2020 will be made in reliance upon Developer's ability to deliver all of the Grading Work within the City Streets Grading Area and to obtain the approval of the Department of Public Works thereto, prior to August 16, 2020.

(c) Notwithstanding anything to the contrary set forth in this Agreement, if the Flight Way Component has not been completed, certified by the engineer of record as complete in accordance with the Approved Plans and accepted by the Director of Public Works by June 16, 2020, or if the remainder of the License Area Grading Work within the City Streets has not been completed, certified by the engineer of record as complete in accordance with the Approved Plans and accepted by the Director of Public Works by August 16, 2020, then regardless of whether the City has then provided written notice to Developer of Default or such delay is a Force Majeure Delay, any and all of the City's good faith commitments with respect to the performance of the City Improvements shall be extended on a day for day basis for each day

following the above dates that the applicable condition set forth above has not been satisfied and in addition, as further set forth in Section 7.1.2, the City shall have a right to extend the Closing Date and the Outside Closing Date on a day for day basis for each such day of delay.

(d) From and after the Close of Escrow, Developer shall grant to the City a non-exclusive license on commercially reasonable terms providing to the City and its officers, directors, employees, agents, representatives, consultants, and contractors the right to enter upon the Real Property at reasonable times for purposes of constructing the City Improvements including stubbing of Utilities from the City Streets to the Real Property. The Parties shall use good faith efforts to agree upon the form of license agreement prior to the Grading License Agreement Start Date, provided that if they are unable to do so prior to such date, such license shall be in the form of the Grading License Agreement except that the environmental indemnity provisions and other provisions applicable to the City Streets (and not the Real Property) shall be utilized. If Developer shall fail to promptly upon request by the City grant such license on reasonable terms and for a reasonable time period, the City shall have the right to exclude from the City Improvements the construction of utility extensions and other components of the City Improvements for which access to the Real Property is reasonably required and such components of the City Improvements shall instead be constructed by Developer as part of the Horizontal Improvements. During the time period in which the City is accessing the Real Property pursuant to the license agreement to perform components of the City Improvements, the City and Developer shall cause their respective contractors to coordinate in order to permit the orderly performance of work by each upon the Real Property.

#### 8.11 Outside Date of Completion of Construction.

Notwithstanding any other provision of this Agreement, Developer shall be obligated to Complete the Project (including the Horizontal Improvements, Phase Improvements, Vertical Improvements and all of the Homes) within the earlier of (a) sixty-one (61) months following opening of the first of the Models to the public, subject to extension for a maximum total of twelve (12) months for Force Majeure Delay or (b) sixty-six (66) months after Close of Escrow, subject to extension for a maximum total of twelve (12) months for Force Majeure Delay.

#### 8.12 Development Covenants.

With respect to construction of the Improvements and the Project, Developer, on behalf of itself and Successor Owners, hereby covenants and agrees as follows:

(a) Developer shall maintain throughout the term of this Agreement, sufficient equity, capital and firm binding commitments for financing necessary to (i) pay through Completion, all costs of development, construction, marketing, sale and/or leasing, operation and management of all the Improvements as defined in the Scope of Development without a Mortgage; and (ii) enable Developer to perform and satisfy all the covenants of Developer contained in this Agreement, the Quitclaim Deed, the CC&Rs, the Special Restrictions and the Landscape and Water Treatment Installation and Maintenance Agreement. Neither Initial Developer nor any Successor Owner or successor and assign (but excluding any End Users) to Initial Developer shall undertake any additional project if it could reasonably be expected to jeopardize the sufficiency of

any equity, capital and firm and binding commitments for the purposes expressed in the preceding sentence.

(b) The development of the Project shall be done in a professional and competent manner. Developer shall, and shall cause all others carrying out work on the Development Property to, perform all work required to construct and Complete the Improvements and the Project and related work in accordance with the Approved Plans, the Entitlements, the Development Permits, the Design Guidelines and all Governmental Requirements and at the level of quality set forth in the Scope of Development.

(c) Developer shall be responsible for the timeliness and quality of all work performed and materials and equipment furnished in connection with the Project, whether the work, materials and equipment are performed and furnished by Developer or through contractors, subcontractors (of all tiers) and suppliers.

(d) Developer shall not place, or allow to be placed, on its interests in the Development Property, Improvements, or any portion thereof, any Mortgage or encumbrance of lien, including any Construction Lien, not authorized by this Agreement.

(e) Developer shall, within thirty (30) calendar days following receipt of notice thereof, cause to be removed or bonded against (such bonding to be by the provision of bonds satisfying California statutory requirements) any and all mechanic's liens, stop notices and/or bonded stop notices that are recorded and/or served by contractors, subcontractors (of all tiers) and suppliers in connection with the Project including construction of Improvements on the Development Areas and on adjoining City-owned property or performance of other work by Developer or any of the Developer Representatives in connection therewith, including conducting investigations or causing the foregoing to be carried out ("**Construction Liens**"). Notwithstanding the foregoing, Developer may contest the amount, validity or application, in whole or in part, of any Construction Liens; subject, however, to the further requirement that neither the Development Property nor any Improvements nor any part or interest in either thereof would be in any danger of being sold, forfeited, attached or lost pending the outcome of such proceedings. If any such contest is finally resolved against Developer, then Developer shall promptly pay the amount required to be paid, together with all interest and penalties accrued thereon. Developer hereby agrees to indemnify, defend and hold the City Indemnified Parties free and harmless from and against any and all Claims arising from or related to failure to pay for construction of Improvements or other work related to the Project including costs to remove or bond any Construction Liens. Subject to Section 9.7, the indemnity set forth in this Section shall survive the termination of this Agreement.

(f) Subject to Sections 8.2.1 and 17.7, Developer shall, following the Close of Escrow, commence the development of the Project promptly and shall diligently pursue to Completion and shall Complete development of the Project and the Improvements in accordance with the time periods in the Schedule of Performance and, in all events, on or before the dates set forth for Completion of the Project set forth in the Schedule of Performance.

#### 8.13 City Rights of Access.

In addition to any rights it may have in its Governmental Capacity or as owner of the License Areas, representatives of the City shall have the reasonable right of access to all portions of the Property and the Improvements (other than Improvements owned by Homeowners), without charges or fees, at normal construction hours during the period of construction for the purposes of this Agreement, including the inspection of the work being performed in constructing the Improvements. The City agrees to indemnify, defend and hold Developer harmless for any and all Claims, arising out of any such non-governmental inspection or other activity on the Development Areas, the Improvements or the Project by the City, or its agents, employees or contractors permitted pursuant to this Section 8.13, except to the extent caused by the gross negligence or willful misconduct of Developer. The indemnity set forth in this Section 8.13 shall survive the termination of this Agreement as to inspections or activities arising on the Development Areas prior to termination of this Agreement as to such portion of the Development Areas.

#### 8.14 **Disclaimer of Responsibility by City and Exculpation.**

8.14.1 **Disclaimer of Responsibility.** The City neither undertakes nor assumes nor will have any responsibility or duty to Developer, any Successor Owner, any End User or to any other third party to review, inspect, supervise, pass judgment upon or inform Developer, any Successor Owner, any End User or any third party of any matter in connection with the development or construction of Improvements or the approval of any maps, including Condominium Plan, whether regarding the quality, adequacy or suitability of the plans, any labor, service, equipment or material furnished for development of the Project, any Person furnishing same, or otherwise. Developer, any Successor Owner, End User and all third parties shall rely upon its or their own judgment regarding such matters, and any review, inspection, supervision, exercise of judgment or information supplied to Developer, any Successor Owner, End User or to any third party by the City in connection with such matter is for the public purpose of developing the Project, and neither Developer nor any Successor Owner, End User nor any third party is entitled to rely thereon.

8.14.2 **Exculpation.** The City shall not be liable in damages to Developer or to any owner, lessee, any licensee or other Person, on account of (a) any approval or disapproval by the City, including by the City Manager or designee, whether made in the Governmental Capacity or Proprietary Capacity of the City of any design documents or maps, in connection with the Project, the Horizontal Improvements, the Vertical Improvements, the Phase Improvements or any Condominium Plan, including the Approved Plans, any Basic Concept Plan and grading plans with respect to the foregoing, whether or not defective or whether or not in compliance with applicable laws or ordinances; (b) any construction, performance or nonperformance by Developer or any owner, lessee, licensee or other Person of any work on the Development Areas or the Improvements, whether or not pursuant to Approved Plans or whether or not in compliance with applicable laws or ordinances; (c) any mistake in judgment, negligence, action or omission in exercising its rights, powers and responsibilities under this Agreement or any other agreement between City and Developer in connection with Section 8.14.1 and clauses (a) and (b) of this Section 8.14.2; and/or (d) the enforcement or failure to enforce any of the provisions of this Agreement. Every Person who makes design submittals for approval agrees by reason of such submittal, and Developer and every Successor Owner agrees by acquiring title to the Property or

the Improvements or any portion thereof or interest therein, not to bring any suit or action against the City seeking to recover any such damages and expressly waives any such claim or cause of action for such damages which it would otherwise be entitled to assert. The review of any design submittals shall not constitute the assumption of any responsibility by, or impose any liability upon, the City as to the accuracy, efficacy, sufficiency or legality thereof nor decrease or diminish any liability, duties, responsibilities, or obligations of Developer under this Agreement or otherwise.

8.14.3 **City Responsibility.** Nothing in this Section 8.14 shall limit the City's express representations, warranties, covenants and obligations set forth in this Agreement and the Other Agreements.

8.14.4 **No Supervision or Control.** The City (whether acting in its Governmental Capacity or its Proprietary Capacity) does not have any right, and hereby expressly disclaims any right, of supervision or control over the architects, designers, engineers or persons responsible for drafting or formulating of the plans, drawings and related documents of Developer.

8.14.5 **Graded Condition of the Development Parcels.** The City has previously caused its contractor to rough grade the Development Parcels and such Development Parcels have been certified by Fabio Escobar, Jr. on April 10, 2014 (Permit No. 2013-0010). Developer acknowledges that the City is delivering Development Property as-is, and does not certify in any manner the grading or condition of the Development Property. Developer shall look solely to the engineers, consultants and contractors and their respective certifications and not to the City for all purposes related to the Grading Work (including the License Area Grading Work) performed, including the adequacy of the work and the certification(s).

8.14.6 **Survival.** The provisions of this Section 8.14 shall survive the Close of Escrow and the termination of this Agreement and shall not be merged with the Quitclaim Deed and shall be binding upon Developer, its successors and assigns under the DDA and each and every Person claiming by, through or under Developer or any Successor Owner including, without limitation, each Homeowner and all other End Users, for the benefit of the City and its Governmental Successors, and from and after the Close of Escrow, shall run with the land and shall be binding upon and burden the Real Property.

8.15 **Local, State and Federal Laws.**

Developer shall carry out the construction of the Project, including all Improvements, subject to Sections 8.1.4 and 8.1.5 and in conformity with all Governmental Requirements including all applicable federal and State labor laws and regulations and shall investigate the applicability of and, if and to the extent applicable, pay prevailing wages meeting the requirements of such laws and regulations; provided that Developer reserves the right to reasonably contest such laws and regulations. Developer hereby agrees that, with respect to the Project, Developer shall be fully responsible for determining whether the foregoing wage requirements are applicable and hereby agrees on behalf of itself, and its successors and assigns under this Agreement, each Successor Owner and each and every Person claiming by, through or under Developer or any Successor Owner but excluding End Users to indemnify, defend and hold the City and its elected

and appointed officials, employees, agents, attorneys, affiliates, representatives, contractors, successors and assigns free and harmless from and against any and all Claims arising from or related to compliance by Developer or Developer's officers, directors, employees, agents, representatives, consultants and/or contractors (at every tier) in construction of the Project with the prevailing wage requirements imposed by any applicable federal and State labor laws. The indemnity set forth in this Section shall survive the termination of this Agreement.

#### 8.16 **Liens, Taxes and Assessments.**

Developer shall pay prior to delinquency all real estate taxes and assessments assessed and levied on or against all portions of the Property or the Improvements during the period of ownership thereof by Developer. Developer shall not place, or allow to be placed, on its interests in the Property, or any Lot or Home, or any portion thereof, any Mortgage or encumbrance or lien not authorized by this Agreement. Developer shall remove, or shall have removed, any levy or attachment made on its interests in the Property or the Improvements (or any portion thereof) or shall assure the satisfaction thereof within thirty (30) calendar days following receipt of notice thereof. Except as set forth in Section 8.7.2 and Sections 8.7.3(e) and (f), nothing contained in this Agreement shall be deemed to prohibit Developer from contesting the validity or amount of any tax or assessment or to limit the remedies available to Developer in respect thereto. Developer hereby agrees, on behalf of itself, and its successors and assigns under this Agreement, each Successor Owner and each and every Person claiming by, through or under Developer or any Successor Owner but excluding End Users to indemnify, defend and hold the City and its elected and appointed officials, employees, agents, attorneys, affiliates, representatives, contractors, successors and assigns free and harmless from and against any and all Claims arising with respect to payment of liens, taxes and assessments assessed or levied against the Property and/or the Improvements during the period of ownership thereof by Developer. The indemnity set forth in this Section shall survive the termination of this Agreement.

#### 8.17 **License Agreements for Construction.**

8.17.1 **Grading License Agreement.** From and after the Grading Work Initial Satisfaction Date, and provided that all of the representations and warranties of Developer set forth in Sections 3.1 and 17.12.1 (or in the case where a Transfer occurs prior to the Close of Escrow, the representations and warranties made by the Transferee in the applicable Assignment Agreement) are true and correct as of such Grading Work Initial Satisfaction Date, the Parties shall enter into the Grading License Agreement, which shall remain in effect until terminated in accordance with its terms. Thereafter, Developer shall, at its sole cost and expense, perform the License Area Grading Work within the City Streets Grading Area and upon the Real Property in accordance with the Schedule of Performance and the terms and conditions of this Agreement and the Grading License Agreement. The Grading License Agreement shall terminate upon the earlier of the Close of Escrow, the termination of this Agreement, or the termination of such License Agreement in accordance with its terms.

8.17.2 **Water Treatment Improvements License Agreement Conditions.** From and after the Water Treatment Improvements Initial Satisfaction Date and further provided that (a) all of the representations and warranties of Developer set forth in Sections 3.1 and 17.12.1

(or in the case where a Transfer occurs prior to the Close of Escrow, the representations and warranties made by the Transferee in the applicable Assignment Agreement) are true and correct as of the Water Treatment Improvements Initial Satisfaction Date; (b) all of the conditions to the Water Treatment Improvements Initial Satisfaction Date have been satisfied; and (c) the Close of Escrow has not then occurred, the Parties shall enter into the Water Treatment Improvements License Agreement providing a license in favor of Developer upon Lot A. Thereafter, Developer shall, at its sole cost and expense, construct the Water Treatment Improvements on said Lot A in accordance with the Schedule of Performance and the terms and conditions of this Agreement and the Water Treatment Improvements License Agreement. The Water Treatment Improvements License Agreement shall terminate upon the earlier of the Close of Escrow, the termination of this Agreement, or the termination of such agreement in accordance with its terms.

8.17.3 **Horizontal Improvements License Agreement Conditions.** From and after the Horizontal Improvements Initial Satisfaction Date and further provided that (a) Developer has then delivered the Additional Purchase Price Deposit to Escrow Holder; (b) all of the representations and warranties of Developer set forth in Sections 3.1 and 17.12.1 (or in the case where a Transfer occurs prior to the Close of Escrow, the representations and warranties made by the Transferee in the applicable Assignment Agreement) are true and correct as of the Horizontal Improvements Initial Satisfaction Date; (c) all of the conditions to the Horizontal Improvements Initial Satisfaction Date have been satisfied; and (d) the Close of Escrow has not then occurred, the Parties shall enter into the Horizontal Improvements License Agreement. Thereafter, Developer shall, at its sole cost and expense, construct the Horizontal Improvements on the Real Property in accordance with the Schedule of Performance and the terms and conditions of this Agreement and the Horizontal Improvements License Agreement. The Horizontal Improvements License Agreement shall exclude from its scope the License Area Grading Work and the construction of the Water Treatment Improvements. The Horizontal Improvements License Agreement shall terminate upon the earlier of the Close of Escrow, the termination of this Agreement, or the termination of such agreement in accordance with its terms.

8.17.4 **Insurance Requirements Under License Agreements.** Prior to the effective date of the Grading License Agreement (“**Grading License Agreement Start Date**”) and throughout the term of the License Agreements, Developer shall, at its own expense, cause to be procured and maintained the policies of insurance required pursuant to Section 11.1 and any additional insurance required to be provided pursuant to the terms of the Grading License Agreements. Specifically, Developer shall obtain insurance meeting the requirements in Sections 11.1.3 and 11.1.4. Developer shall not rely upon or have rights to claim for reimbursement, payment, or coverage under any pollution legal liability insurance presently maintained by City. In addition, to the extent the contractor performing the Grading Work and/or construction of the other Horizontal Improvements on behalf of Developer has or obtains a Contractor Pollution Liability policy with respect to the Grading Work and the other Horizontal Improvements, Developer shall use commercially reasonable efforts to have the contractor cause its policy to be primary and the PLL policy to be noncontributory with respect to matters covered by the Contractor Pollution Liability policy. Developer shall be responsible for all self-insured retention or deductible amounts due under the PLL policy.

8.17.5 **License Area Grading Work.** Commencing upon the Grading License Agreement Start Date, Developer shall, at its sole cost and expense, (a) construct, complete the License Area Grading Work upon the Development Areas and as further depicted on Attachment 29 and (b) upon completion thereof, shall obtain (i) certification from the engineer of record that the License Area Grading Work upon the Development Areas is complete in accordance with the Approved Plans, (ii) approval of the Director of Public Works of the License Area Grading Work on the City Streets Grading Area and (iii) approval of the City Building Division of the License Area Grading Work on the Real Property. The License Area Grading Work shall be commenced, performed and completed in accordance with the Schedule of Performance and the terms and conditions of this Agreement, the Grading License Agreement, and the applicable grading and encroachment permits. Developer acknowledges that its performance of the License Area Grading Work in the City Streets Grading Areas is a condition precedent to performance by the City of the City Improvements and a Closing Condition for the benefit of the City. Accordingly, notwithstanding any other provision of this Agreement, and regardless of whether or not the conditions to the Grading Work Initial Satisfaction Date or other conditions to commencement of such work set forth in Section 8.17.1 have then occurred, if on or before the date set forth for each in the Schedule of Performance, Developer shall fail to perform the License Area Grading Work in accordance with the time periods established in this Agreement or the Schedule of Performance, the City shall have the right to terminate this Agreement pursuant to Section 15.2.

8.18 **City Additional Covenants.**

8.18.1 **Dedication and Completion of Streets.** Promptly following completion of construction of the City Improvements, the City shall properly dedicate all streets comprising City Improvements as public roadways.

8.18.2 **Third Party Licenses.** At no cost to the City, the City shall assist and cooperate with Developer to obtain from other Persons (including IRWD and the City of Irvine) any licenses or entry permits necessary or reasonably desirable in connection with Developer's development of the Horizontal Improvements.

8.18.3 **TUSD Lien Release Documentation.** TUSD has informed the City that TUSD will accept an advance payment from the proceeds of the sale of the Property to allow early payoff of the sums due for the Property pursuant to the existing TUSD CFD 15-02 ("TUSD CFD"). City shall use good faith efforts to obtain from TUSD documentation establishing the lien release amount for the Development Parcels ("**TUSD Lien Release Documentation**") with TUSD and if such TUSD Lien Release Documentation is received, the City shall use good faith efforts to cause TUSD to either remove the lien of the TUSD CFD at the Close of Escrow or to otherwise demonstrate that the TUSD CFD is paid in full as to the Property, as further discussed in Sections 7.1.2 and 7.2.2(l).

9. **Certificate of Compliance.**

9.1 **Completion; Schedule of Performance.**

Subject to Section 17.7, following the Close of Escrow, Developer shall construct the Project and shall satisfy all Conditions Precedent relating to issuance of the Certificate of Compliance for the Project when and as required by this Agreement in accordance with the Schedule of Performance.

9.2 **Certificate of Compliance Defined.**

After Completion of all construction and development required to be undertaken by Developer in conformity with this Agreement and in accordance with the Schedule of Performance and the satisfaction by Developer of the Conditions Precedent set forth in Section 9.3, the City shall deliver to Developer or Successor Owner owning fee title to the Real Property a “**Certificate of Compliance**” for the entirety of the Project. The Certificate of Compliance shall be substantially in the form and substance of the Certificate of Compliance set forth on Attachment 16 and in such form as to permit the Certificate of Compliance to be Recorded against the entirety of the Property. Developer, on behalf of itself, each Successor Owner, and each and every Person claiming by, through or under Developer or any Successor Owner, including each End User, hereby consents to Recording of the Certificate of Compliance against the entirety of the Real Property, notwithstanding that portions or all of the Real Property may have been transferred prior thereto to Successor Owners or End Users and confirms that no further acknowledgement or consent by the then-owners of the Property shall be required in connection with such Recording. The Certificate of Compliance shall state the actual number of units constructed on the Real Property as of the date of issuance thereof, and such unit count shall establish the actual number of units allocated to Developer by the City pursuant to Section 4.1.2.

9.3 **Conditions Precedent for Certificate of Compliance.**

The City shall not be obligated to issue the Certificate of Compliance for the Project, unless and until each of the following has occurred:

(a) Completion of the Improvements and satisfaction of the obligations of Developer under any executed License Agreements.

(b) Final inspection of the Development Property and the Improvements by or on behalf of the City and determination by the City that the Project and all Improvements have been Completed in conformance with this Agreement, including the Approved Plans and all Governmental Requirements;

(c) Issuance of the final certificate of occupancy by the City for all four hundred (400) Homes within the Project or such lesser number of Homes as are shown on Condominium Plan for the Project;

(d) Written release or bonding in accordance with California law of all Construction Liens or rights to record liens from the general contractor and all subcontractors (at

all tiers) having served valid preliminary 20-day notices, and the statutory period for filing liens having expired without any such Construction Liens being filed;

(e) Recording of the CC&Rs against the Real Property and with respect to those Lots or portions thereof owned by Developer or the Homeowners' Association at the time of Developer's request for the issuance of a Certificate of Compliance, confirmation that all liens of record as of the date of the request for the Certificate of Compliance are junior and subordinate to the Recorded CC&Rs;

(f) Payment of the Interim Payment (as defined in the Profit Participation Agreement) required by the Profit Participation Agreement in an amount equal to 75% of the Estimated Total Profit Participation (as defined in the Profit Participation Agreement) and provision by Developer to City of a payment bond in an amount equal to twenty five percent (25%) of the Estimated Total Profit Participation from a surety reasonable acceptable to City, and in form and substance reasonably acceptable to City, to secure Developer's obligations to pay the remaining Profit Participation, if any;

(g) Payment by Developer to the City of all funds then owing to the City under this Agreement and, if applicable, the Other Agreements; and

(h) No Potential Default or Material Default by Developer under this Agreement or the Other Agreements shall have occurred and be continuing.

#### 9.4 **Conclusive Presumption.**

The Certificate of Compliance shall be, and shall so state, conclusive determination of satisfactory completion of the obligations of Developer pursuant to this Agreement and shall be evidence of termination of the DDA, subject only to the continuing effectiveness of this Agreement, the provisions referenced in Sections 9.7(a) through (f) and the Other Agreements, each of which shall survive in accordance with its respective terms.

#### 9.5 **Not Evidence.**

Issuance by the City of a Certificate of Compliance is not notice of completion as referred to in Section 8182 of the California Civil Code.

#### 9.6 **City Obligations.**

The City shall not unreasonably withhold, condition, or delay issuance of the Certificate of Compliance when all the Conditions Precedent thereto are satisfied. If the City refuses or fails to issue such Certificate of Compliance after written certification from Developer (which shall provide evidence of satisfaction of each of the conditions precedent to such issuance set forth in Section 9.3), provided each of the conditions established in Section 9.3 have been satisfied, the City shall, within fifteen (15) Business Days of the written request, provide a written statement which details the reasons the City refused or failed to issue the Certificate of Compliance. The statement shall also contain a statement of the actions that Developer must take to obtain the

Certificate of Compliance. The City shall cause the Certificate of Compliance to be Recorded within five (5) Business Days after issuance.

9.7 **Effect of Certificate of Compliance; Termination of Agreement.**

After Recording of the Certificate of Compliance, except as set forth below, this Agreement shall terminate and any Person then owning or thereafter purchasing, leasing, or otherwise acquiring any interest in the Real Property subject to the Certificate of Compliance shall not (because of such ownership, purchase, lease or acquisition) incur any obligation or liability under this Agreement with respect to such Improvements, except that the Quitclaim Deed, the Profit Participation Agreement, the Special Restrictions, the CC&Rs, and the Landscape and Water Treatment Installation and Maintenance Agreement, and if applicable in accordance with their terms, the terms of the License Agreements surviving termination thereof and the DA shall each remain in effect for the term specified therein. Issuance of the Certificate of Compliance shall not waive any rights or claims that the City may have against any Person for latent or patent defects in design, construction or similar matters under any applicable law, nor shall it be evidence of satisfaction of any of Developer's obligations to others not a party to this Agreement. The Certificate of Compliance shall be in such form as to permit it to be Recorded. Upon execution and Recording by the City of the Certificate of Compliance, this Agreement shall terminate, except that:

(a) the provisions of Sections 4.5.2, 4.5.3 and 8.14, including the releases and waivers set forth therein, as and to the extent set forth in the Quitclaim Deed shall survive in perpetuity, shall run with the land and shall be binding upon and burden the Real Property and Developer, its successors and assigns under the DDA and each and every Successor Owner claiming by, through or under Developer or any Successor Owner of the Real Property or portion thereof including each Homeowner and all other End Users, for the benefit of the City and its Governmental Successors;

(b) the provisions of Section 11.1.4 shall survive until the expiration of the time period for provision of the environmental insurance policy described thereby; and the obligation to provide such insurance policy shall remain in effect for a period of ten (10) years from Close of Escrow and shall for the benefit of the City and its Governmental Successors (i) continue to run with the land owned by Developer, its successors and assigns (excluding any End Users) and Successor Owners, and not then conveyed to any Homeowner or other End User, and (ii) be binding upon and burden the Real Property, Developer, its successors and assigns (excluding any End Users) and Successor Owners and each and every prior Developer not released by the City pursuant to Section 2.2.3(b), provided that upon sale or transfer to any Homeowner or any other End User, such obligation shall not run with the land or survive with respect to or bind any such Homeowner or End User or any of their respective successors and assigns;

(c) the indemnities set forth in Sections 5.5, 8.12(e), 8.15, 8.16, 10.1, 10.2 and 17.12.1 shall remain in effect and shall run with the land and shall be binding upon and burden the Real Property and the indemnifying party and its successors and assigns under the DDA and each and every Person claiming by, through or under such indemnifying party including Developer and each Successor Owner (excluding any End Users) to the extent set forth in the

Special Restrictions and Section 10.3 for the benefit of the City and its Governmental Successors; provided however that upon sale or transfer of the fee interest in the Real Property or any portion thereof to an End User, such indemnities shall terminate as to such End User and shall cease to run with the land acquired by such End User or any of their respective successors and assigns;

(d) any and all obligations contained in the Federal Deed shall survive in perpetuity to the extent set forth therein, unless such obligations are released by the Federal Government;

(e) neither Developer, its successors and assigns (but excluding any End Users) or any Successor Owner shall modify or terminate any prepaid environmental insurance policy in effect as of the issuance of the Certificate of Compliance; and

(f) the provisions of Section 11.1.1 requiring liability insurance to be maintained in full force and effect until issuance of the Certificate of Compliance and so long thereafter as necessary to cover any claims of damages suffered by persons or property prior to issuance of the Certificate of Compliance, resulting from any acts or omissions of Developer, Developer's employees, agents, contractors, suppliers, consultants or other related parties, shall (i) continue to run with the land owned by Developer, its successors and assigns (excluding any End Users) and Successor Owners and not then conveyed to any Homeowner or other End User and (ii) bind Developer and its successors and assigns (excluding any End Users) and Successor Owners and each and every prior Developer not released by the City pursuant to Section 2.2.3(b), provided that upon sale or transfer to any Homeowner or any other End User, such obligation shall not run with the land or survive with respect to or bind any such Homeowner or any other End User or any of their respective successors and assigns.

Notwithstanding anything to the contrary set forth in this Agreement, the provisions of this Section 9.7 shall survive the termination of this Agreement and the execution and Recording by the City of the Certificate of Compliance and shall be binding upon Developer, its successors and assigns and Successor Owners and each and every prior Developer (unless released by the City pursuant to Section 2.2.3(b) or Section 16.6) and Successor Owner thereof, the Real Property and the Improvements for the term set forth above, and each such party shall be jointly and severally liable under such provisions with respect to the entirety of the Project, the Real Property and the Improvements for the term set forth above, but except as set forth in clause (a) of this Section 9.7 or as may otherwise be set forth in the Quitclaim Deed, Special Restrictions, Memorandum of DDA, the Landscape and Water Treatment Installation and Maintenance Agreement or the CC&Rs, shall not be binding on any Homeowner or other End User.

## 10. Indemnification and Environmental Provisions.

### 10.1 Developer's Indemnification for Non-Environmental Matters.

As a material part of the consideration for this Agreement and to the maximum extent permitted by law, Developer on behalf of itself and its successors and assigns under this Agreement, its Successor Owners and each and every Person claiming by, through or under Developer or any Successor Owner but excluding End Users, hereby agrees to indemnify, protect,

defend, assume all responsibility for and hold harmless the City Indemnified Parties from and against any and all Non-Environmental Claims to the extent (a) caused by the following, or (b) resulting or arising from the following during the period of Developer's ownership of the Property or any portion thereof and any Additional Liability Period applicable thereto and with respect to those obligations of a Transferor described in clause (d) of the definition of Ongoing Matters:

(i) Developer's marketing, sale or use of the Property or construction on the Development Property;

(ii) All acts and omissions of Developer in connection with the Project, the Development Property, the Improvements or any portion of any of the foregoing;

(iii) Any plans or designs for Improvements prepared by or on behalf of Developer, including any errors or omissions with respect to such plans or designs;

(iv) Any loss or damage to the City resulting from any inaccuracy in or breach of any representation or warranty of Developer, or resulting from any Potential Default or Material Default by Developer, under this Agreement;

(v) the non-performance or breach by Developer or the Developer Representatives, of any term or condition of this Agreement or the Other Agreements; or

(vi) Any development or construction of Improvements or other structures or facilities by Developer, any Developer Affiliate or Developer Representatives, whether regarding the quality, adequacy or suitability of any labor, service, equipment or material furnished to the Development Property, any Person furnishing the same, or otherwise.

Developer's obligations under clauses (i), (iii), (iv) and (v) of this Section 10.1 shall apply from and after the Effective Date, and Developer's obligations under clauses (ii) and (vi) of this Section 10.1, shall apply from and after the Close of Escrow.

Notwithstanding the foregoing, the foregoing shall not apply to and Developer shall not be obligated to indemnify any of the City Indemnified Parties to the extent caused by (A) the gross negligence or willful misconduct of the City Indemnified Parties, (B) any uncured Material Default by the City with respect to any of the representations or warranties of the City set forth in Sections 3.3 or 17.12.2 or any of the covenants or obligations set forth in this Agreement, in either case provided that the Material Default is directly related to the Claim, or (C) any uncured material default by the City with respect to any of the covenants or obligations set forth in any Other Agreement then in effect that is directly related to the Claim. The indemnification provisions in this Section 10.1 shall not apply to Environmental Claims. Developer's indemnification obligations to the City regarding any Environmental Claims are exclusively addressed in Section

10.2. The foregoing indemnity shall be included in the Special Restrictions and shall run with the land in accordance with Section 10.3.

### 10.2 **Environmental Indemnity**

As a material part of the consideration for this Agreement, and effective as of the Close of Escrow, Developer on behalf of itself and its successors and assigns, its Successor Owners under this Agreement and each and every Person claiming by, through or under Developer or any Successor Owner but excluding End Users, hereby agrees that Developer and each Successor Owner shall, to the maximum extent permitted by law, indemnify, protect, defend, assume all responsibility for and hold harmless the City Indemnified Parties from and against any and all Claims resulting or arising from or in any way connected with the existence, Release, threatened Release, presence, storage, treatment, transportation and/or disposal of any Hazardous Materials on, in or under the Development Parcels, or migrating from the Development Areas to adjacent properties regardless whether any such condition is known or unknown now or upon acquisition and regardless of whether any such condition pre-exists acquisition or is subsequently caused, created or occurring (“**Environmental Claims**”); provided that neither Developer nor any Successor Owner shall be responsible (and such indemnity shall not apply) to the extent caused by (a) any uncured Material Default by the City with respect to any of the representations or warranties of the City set forth in Sections 3.3 or 17.12.2 or any of the covenants or obligations set forth in this Agreement, in either case provided that the Material Default is directly related to the Claim, or (b) the Active Negligence, willful misconduct or fraud of the City or any City Indemnified Party with respect to Hazardous Materials Releases occurring prior to the Close of Escrow with respect to work performed by such Persons on the Development Parcels. This indemnity shall remain in effect for the period specified in Section 10.3 and shall be subject to the other terms set forth therein. This indemnity shall not be deemed to limit in any manner the rights and/or remedies that City, Developer or Successor Owners may have against the Federal Government as described in Section 4.1. The foregoing indemnity shall be included in the Special Restrictions and shall run with the land in accordance with Section 10.3.

### 10.3 **Duration of Indemnities.**

The indemnities set forth in Sections 5.5, 8.12(e), 8.15, 8.16, 10.1, 10.2 and 17.12.1 shall run with the land and shall bind Developer, its successors and assigns and each and every Successor Owner, shall survive the Close of Escrow and the execution and Recording by the City of the Certificate of Compliance and shall not merge into the Quitclaim Deed; provided however that upon sale or transfer of the fee interest in the Real Property or any portion thereof to an End User, such indemnities shall terminate as to such End User and shall cease to run with the land acquired by such End User or any of their respective successors and assigns. Notwithstanding the foregoing, the obligations of Developer with respect to each of the indemnities set forth Sections 5.5, 8.12(e), 8.15, 8.16, 10.1, 10.2 and 17.12.1 shall (a) survive the Close of Escrow and shall not merge into the Quitclaim Deed; (b) survive the sale of land to each End User and the issuance of the Certificate of Compliance; and (c) continue to be binding upon Developer and Developer’s successors and assigns and each and every prior Developer not released by the City pursuant to Section 2.2.3(b) and each such party shall be jointly and severally liable under such provisions with respect to the entirety of the Project and the Development Property, provided that

upon sale or transfer to any Homeowner or any other End User, such obligation shall not run with the land or survive with respect to or bind any such Homeowner or End User or any of their respective successors and assigns. Notwithstanding the foregoing, if any portion of the Property is subject to revesting or repurchase by the City, as to such portion of the Property the foregoing indemnity shall apply only to the extent set forth in Section 16.6. The provisions of Sections 10.1 through 10.5 shall not merge with the Quitclaim Deed, shall survive the termination of this Agreement and shall be set forth in their entirety in the Special Restrictions.

#### 10.4 Claim Response.

In the event that following the Close of Escrow, any Environmental Agency or other third party brings, makes, alleges, or asserts a Claim, arising from or related to any actual, threatened, or suspected presence or Release of Hazardous Materials on or about the Development Areas, including any Claim for Investigation or Remediation on the Development Areas, or such Environmental Agency or other third party orders, demands, or otherwise requires that any Investigation or Remediation be conducted on the Development Areas, Developer shall promptly upon its receipt of notice thereof, notify the City in writing and thereafter shall promptly and responsibly evaluate and respond to such Claim as provided in Section 10.5 below. Further, upon receipt of such Claim, order, demand or requirement, Developer shall take such reasonable measures, as necessary or appropriate, to reasonably attempt to dissuade such Environmental Agency or other third party from bringing, making, alleging, or asserting any Claim against the City arising from or related to the presence or any actual, threatened, or suspected Release of Hazardous Material on or about the Development Areas, including any Claim for Investigation or Remediation on the Development Areas, any of the Lots or Improvements; provided, however, that Developer shall have no obligation pursuant to this sentence with respect to any Claim, order, demand or requirement arising from or related to any actual, threatened or suspected Release of Hazardous Material to the extent caused by the gross negligence or willful misconduct of the City Indemnified Parties. The provisions of this Section 10.4 and of Sections 10.5 and 10.6 shall not merge with the Quitclaim Deed, shall survive the termination of this Agreement and shall be set forth in their entirety in the Special Restrictions.

#### 10.5 Release Notification and Remedial Actions.

If, after Close of Escrow, any Release of a Hazardous Material is discovered on the Development Parcels, Developer shall promptly provide written notice (or in the event of emergency, telephonic notice, followed by written notice) of any such Release to the City. To the extent that any Environmental Agency (other than the City) is requiring that the City Remediate such Release and Developer acknowledges that it is obligated to assume responsibility or indemnify the City with respect to such Release pursuant to Section 10.2 or there is a good faith dispute between the City and Developer as to whether Developer is obligated to assume responsibility or indemnify the City with respect to such Release pursuant to Section 10.2, then Developer shall (a) Remediate the Release in compliance with and to the extent required by Environmental Laws and such Environmental Agency, or if such removal is prohibited by any Environmental Laws, take whatever action is required by any Environmental Law and such Environmental Agency; (b) take such other reasonable action as is necessary to have the full use and benefit of the Development Parcels as contemplated by this Agreement; and (c) provide the

City with satisfactory evidence of the actions taken as required in this Section 10.5. To the extent that any Environmental Agency (other than the City) is requiring that the City Remediate such Release and the City acknowledges that Developer is not obligated to assume responsibility or indemnify the City with respect to such Release pursuant to Section 10.2 or no Environmental Agency (other than the City) is requiring that the City Remediate such Release, then (as between Developer and the City under this Agreement) Developer may elect in its sole and absolute discretion whether to Remediate such Release and/or pursue any rights that Developer has against any Person with respect to such Release. The foregoing shall be without prejudice to Developer's or the City's rights against any responsible party or against the Federal Government pursuant to the Navy Responsibilities and without compromising the applicability of any insurance coverage in regard to such Release. The City and Developer will coordinate any action required under this Section 10.5 with appropriate environmental insurance carriers so as not to compromise coverage for the costs of such actions. Nothing set forth herein requires Developer to perform any obligation of the Federal Government and nothing set forth herein shall be deemed to limit or impair (or take any action that might limit or impair) in any manner the rights and/or remedies that Developer or the City may have against the Federal Government or any other third party. The foregoing shall not apply to the Returned Property after acquisition thereof by the City.

**10.6 Conflict with Section 330 and Other Federal Government Obligations.**

Notwithstanding anything to the contrary contained in this Article 10, in the event that any actions required to be taken by Developer pursuant to this Article 10 could potentially result in Developer losing rights, or are contrary to any rights, which it otherwise would have pursuant to the Navy Responsibilities or otherwise against the Federal Government, then the City and Developer shall meet in order to determine the proper course of action to be taken by Developer. The course of action to be agreed upon shall protect the City's interest in the Project and Tustin Legacy, while retaining for Developer its rights pursuant to the Navy Responsibilities or otherwise against the Federal Government to the extent reasonable under the circumstances. Notwithstanding the foregoing, nothing set forth in this Section 10.6 relieves Developer or its Transferees or Successor Owners with respect to the environmental responsibilities and obligations to, and/or environmental indemnification of the City in this Agreement.

**10.7 Insurance and Indemnification.**

Notwithstanding anything contained herein and without limiting or relieving Developer or any Successor Owner of its obligations under this Agreement, the City agrees that with respect to any Claims tendered by any one or more of the City Indemnified Parties under this Agreement for which Developer has the obligation to indemnify the City pursuant to the terms of this Agreement, the City Indemnified Parties shall seek recourse for such Claims under Developer's insurance coverage required by Article 11 of this Agreement, in each case only to the extent such insurance could reasonably be determined to be applicable to the type, extent, value and location of the Claim being made. The City shall thereafter use reasonable commercial efforts to prosecute its Claim for coverage with such insurer(s). Developer shall reimburse the City for its reasonable costs incurred in complying with this Section 10.7, including staff costs and attorney fees. To the extent that insurance is determined by the City not to be reasonably applicable the Claim or, if after six (6) months from tender of the Claim to the insurer, despite such efforts, insurance proceeds are not

available to cover all or a portion of the Claim or if such Claim is earlier denied by the insurance carrier, then Developer shall defend and indemnify the City Indemnified Parties for the full amount of the Claim not covered by the insurance, including but not limited to sums theretofore expended by City Indemnified Parties defending such Claim, but only to the extent Developer has such obligations in this Agreement. If an insurer(s) to which a Claim is tendered declines to defend, or fails to timely defend, the Claim within the six (6) month time period described above, then Developer shall defend and indemnify the City Indemnified Parties for the full amount of the Claim not covered by the insurance, including but not limited to sums theretofore expended by City Indemnified Parties defending such Claim, but only to the extent Developer has such obligations in this Agreement. At any time after six (6) months have passed since the original tender of a Claim to an insurer by the City as described herein if the insurer has not paid out on all or part of the claim, Developer in its sole discretion may decide to pay for the legal fees and expenses associated with filing and prosecuting litigation against such insurance carrier. If Developer decides to pay such legal fees and expenses, the City shall proceed with such litigation at Developer's expense as further set forth below. Developer shall have the right to select counsel to represent the City in connection with the prosecution of such Claim in litigation. Any fees and expenses of such litigation will be borne by Developer.

#### 10.8 **Selection of Counsel and Defense Obligations.**

A Party being defended pursuant to this Article 10 (“**Defended Party**”) shall select legal counsel of its choice and reasonably acceptable to the Party with the obligation to defend (“**Defending Party**”) and shall cooperate in the defense of any such action. Failure of the Defended Party to notify the Defending Party promptly of the filing of any Claim or Action shall offset the indemnification obligations of the Defending Party only to the extent of any prejudice to the Defended Party caused by such failure to notify.

#### 10.9 **Settlement Procedures.**

Neither Party shall settle any Claim or Action that is the subject of an indemnity or obligation to defend under this Agreement without the prior written consent of the other Party, which consent shall not be unreasonably withheld, conditioned or delayed.

#### 10.10 **Assignment of Rights.**

From and after the Close of Escrow, City hereby assigns to Developer, to the extent such rights are assignable, on a non-exclusive basis and as the Parties' interests may appear, any rights that City has against any Person with respect to any Remediation, indemnification or liability with respect to Hazardous Materials located on or about the Grading License Area that Developer is responsible for under this Agreement, excluding any rights with respect to City's existing insurance policies, including but not limited to the City's pollution legal liability insurance policies.

### 11. **Insurance.**

#### 11.1 **Required Insurance.**

Without limiting the City's rights to indemnification, Developer shall procure and maintain, at its own cost and expense, and furnish or cause to be furnished to the City, evidence of the following policies of insurance (complying with the requirements set forth below) naming Developer as insured and, with respect to the general liability and environmental liability insurance required pursuant to Sections 11.1.1 and 11.1.4 only, the City and the City's additional insureds specified below and such additional insurance as may be required by the terms of the Other Agreements. Unless otherwise specified below, all insurance required below shall be obtained by Developer upon the date specified below and shall be kept in force with respect to each such component of the Development Areas, the Project and/or the Improvements until issuance of the Certificate of Compliance with respect thereto or for such longer period as is described below. The insurance obligations under this Agreement shall be: (a) all the insurance coverage and/or limits carried by or available to Developer; or (b) the minimum insurance coverage requirements and/or limits shown in this Agreement; whichever is greater. Any insurance proceeds in excess of or broader than the minimum required coverage and/or minimum required limits, which are applicable to a given loss, shall be available to the City. No representation is made that the minimum insurance requirements of this Agreement are sufficient to cover the obligations of Developer under this Agreement.

11.1.1 **Liability Insurance.** Commencing upon the Effective Date, Developer shall maintain or cause to be maintained commercial general liability insurance and automobile liability insurance, to protect against loss from liability imposed by law for damages on account of personal injury, including death therefrom, suffered or alleged to be suffered by any Person or Persons whomsoever on or about the Property, or during the term of each of the License Agreements or encroachment permits, the applicable License Areas and area subject to such encroachment permits, as applicable, the Project and/or the Improvements and the business of Developer on the Property, or in connection with the operation thereof, resulting directly or indirectly from any acts or activities of Developer or anyone directly or indirectly employed or contracted with or acting for Developer, or under its respective control or direction, and also to protect against loss from liability imposed by law for damages to any property of any Person occurring on or about the Property, or during the term of each of the License Agreements, the applicable License Areas and during the term of any encroachment permit, the areas subject to such encroachment permit, the Project and/or the Improvements or related to the Project and the business of Developer on the Property, or in connection with the operation thereof, caused directly or indirectly by or from acts or activities of Developer or any Person acting for Developer, or under its control or direction. Such insurance shall also provide for and protect the City against incurring any legal cost in defending Claims for alleged loss. Such insurance shall be maintained in full force and effect until issuance of the Certificate of Compliance and so long thereafter as necessary to cover any claims of damages suffered by persons or property prior to issuance of the Certificate of Compliance, resulting from any acts or omissions of Developer, Developer's employees, agents, contractors, suppliers, consultants or other related parties, as further set forth in Sections 9.7 and 10.3. The amount of insurance required shall include comprehensive general liability and personal injury with limits of at least Ten Million Dollars (\$10,000,000.00) and automobile liability with limits of at least Five Million Dollars (\$5,000,000.00) combined single limit per occurrence. The insurance shall be issued by a company authorized by the Insurance Department of the State to do business in the State and rated A-/VII or better (if an admitted carrier) or A-/X (if offered by a surplus line broker), by the latest edition of Best's Key Rating Guide

("Best's"). Subject to the prior approval of the City Attorney and the City Risk Manager, such insurance may be provided in part by an umbrella or excess insurance policy otherwise meeting the requirements of this Article 11.

Policies and endorsements signed by authorized representative(s) of the underwriter and approved by the City shall be delivered within seven (7) Business Days following the Effective Date and annually thereafter evidencing renewals of each policy until issuance of the Certificate of Compliance for the Project. The endorsements shall provide as follows: (a) designate "the City of Tustin and the Successor Agency to the Tustin Community Redevelopment Agency, and their respective elected and appointed officials, agents, representatives and employees" as additional insureds on the commercial general liability policies and automobile liability policies; (b) the commercial general liability and automobile liability insurance coverages shall be primary, and not contribute with any insurance or self-insurance maintained by the City; and (c) a waiver of subrogation for the benefit of the City of Tustin and the Successor Agency to the Tustin Community Redevelopment Agency, and their respective elected and appointed officials, agents, representatives and employees. The procuring of such insurance and the delivery of policies, certificates or endorsements evidencing the same shall not be construed as a limitation of Developer's obligation to indemnify the City Indemnified Parties as set forth in this Agreement.

11.1.2 **Workers' Compensation Insurance.** Commencing upon the Effective Date, Developer shall obtain, and thereafter maintain or cause to be maintained, workers' compensation insurance issued by a responsible carrier authorized under the laws of the State to insure employers against liability for compensation under the workers' compensation laws now in force in California, or any laws hereafter enacted as an amendment or supplement thereto or in lieu thereof. Such workers' compensation insurance shall cover all Persons employed by Developer in connection with the Project and shall cover liability within statutory limits for compensation under any such act aforesaid, based upon death or bodily injury claims made by, for or on behalf of any Person incurring or suffering injury or death in connection with the Project or the operation thereof by Developer. Notwithstanding the foregoing, Developer may, in compliance with the laws of the State and in lieu of maintaining such insurance, self-insure for workers' compensation in which event Developer shall deliver to the City evidence that such self-insurance has been approved by the appropriate State authorities. Developer shall also furnish (or cause to be furnished) to the City evidence satisfactory to the City that any contractor with whom it has contracted for performance of work on the Development Property or otherwise pursuant to this Agreement carries workers' compensation insurance required by law. The insurance policy(ies), by endorsement signed by an authorized representative of the underwriter(s), shall contain a waiver of subrogation for the benefit of the following additional insureds: "the City of Tustin and the Successor Agency to the Tustin Community Redevelopment Agency, and their respective elected and appointed officials, agents, representatives and employees". The insurance provided for under this Section 11.1.2 shall be issued by a company rated B-/VIII or better by Best's or from the State Compensation Fund.

11.1.3 **Builder's Risk Insurance.** Commencing upon the commencement of construction by Developer of any Improvements and continuing until such time as the City delivers a Certificate of Compliance, Developer shall obtain, or shall cause its contractor to obtain, and thereafter maintain a builder's risk policy with respect to Improvements constructed on the

Development Areas or in connection with development of the Project or maintain comparable coverage through a property policy. Such insurance shall be maintained in an amount not less than one hundred percent (100%) of the full insurable value of the Improvements to be constructed on the Development Property or in connection with development the Project. The insurance provided for under this Section 11.1.3 shall be provided by insurer(s) licensed, qualified, or approved to do business in the State and with a Best's rating of B/NR or better.

11.1.4 **Environmental Insurance.** Commencing upon the Effective Date, Developer shall obtain and shall thereafter maintain environmental and pollution legal liability insurance coverage for the Development Parcels, including coverage for loss, remediation expense and legal defense expenses, and naming "the City of Tustin and the Successor Agency to the Tustin Community Redevelopment Agency, and their respective elected and appointed officials, agents, representatives and employees" as additional insureds to address pollution risks at the Development Parcels ("PLL"). Such policy shall comply with the following minimum requirements unless otherwise agreed by the City in its sole discretion:

(a) The policy shall be written by the insurance company selected by Developer and approved by the City, which approval shall not be unreasonably withheld, and which insurer(s) shall have a Best's rating of A-/VII or better;

(b) The policy shall provide at least Five Million Dollars (\$5,000,000.00) in coverage and with at least Five Million Dollars (\$5,000,000.00) per claim, subject to a maximum Two Hundred and Fifty Thousand Dollars (\$250,000.00) deductible per claim, to protect against Claims and loss from liability relating to known and unknown conditions on the Development Areas for at least a ten (10) year term.

(c) The policy shall be paid for in full at the time of issuance and shall be endorsed as non-cancelable by Developer without the written consent of the City in its sole discretion to such cancellation, and shall contain a waiver of subrogation for the benefit of the City of Tustin and the Successor Agency to the Tustin Community Redevelopment Agency, and their respective elected and appointed officials, agents, representatives and employees. The unwillingness of an insurance company to provide a waiver of subrogation for the benefit of the City Indemnified Parties shall be a reasonable basis for the City to withhold approval of the insurance company under Section 11.1.4(a).

(d) Developer's obligation to maintain environmental insurance pursuant to this Section 11.1.4 shall survive the termination of this Agreement following the Close of Escrow for the term required for such insurance policy pursuant to Section 11.1.4(a).

(e) Developer shall name the City and the Successor Agency to the Tustin Community Redevelopment Agency, and their respective elected and appointed officials, agents, representatives and employees as additional insureds with respect to any additional environmental and pollution legal liability insurance coverage Developer acquires for the Development Parcels or any portion thereof and to the extent such policy is prepaid, shall not modify or terminate such policy following the termination of this Agreement.

(f) The policy shall permit (by the terms of the policy or by endorsement) transfer of the policy to Successor Owners and successors and assigns of Developer (but excluding any End Users) and, if this Agreement terminates and the Close of Escrow does not occur, to the City.

Except as approved by the City in writing, Developer shall not carry out any environmental testing, sampling, invasive testing, or boring on the Development Areas prior to the effective date of the environmental insurance policy. The provisions of this Section 11.1.4 shall survive the termination of this Agreement.

## 11.2 General Insurance Requirements.

11.2.1 For all policies or certificates, the insurer endorsements (or a copy of the policy binder, if applicable) shall specifically identify this Agreement and shall provide evidence that Developer has paid for its premium in full for any policy that is currently in place.

11.2.2 The term “**full insurable value**” as used in this Article 11 shall mean the cost determined by mutual agreement of the Parties (excluding the cost of excavation, foundation and footings below the lowest floor and without deduction for depreciation) of providing similar Improvements of equal size and providing the same habitability as the Improvements immediately before such casualty or other loss, but using readily-available contemporary components, including the cost of construction, architectural and engineering fees, and inspection and supervision.

11.2.3 All insurance provided under this Article 11 shall be for the benefit of the Parties. Developer shall, and shall cause each Insured Party, (a) to timely pay all premiums for such insurance and, at its sole cost and expense, to comply and secure compliance with all insurance requirements necessary for the maintenance of such insurance, and (b) with respect to coverage required by Sections 11.1.1 and 11.1.2, to submit certificates evidencing such insurance to the City on an ACORD form within five (5) Business Days following the Effective Date, or, with respect to coverage required by Section 11.1.4, upon the earlier of the Grading License Agreement Start Date or the Close of Escrow and with respect to coverage required by Section 11.1.3, upon commencement of construction. Within seven (7) calendar days, if practicable, after expiration of any such policy, certificates evidencing renewal policies (and all required endorsements) shall be submitted to the City, together with evidence of payment of premiums.

11.2.4 If Developer fails to procure or to cause any Insured Party to procure and maintain insurance as required by this Agreement, the City shall have the right, at the City’s election, and upon ten (10) calendar days’ prior written notice to Developer, to procure and maintain such insurance. The premiums paid by the City shall be treated as a loan, due from Developer, to be paid on the first calendar day of the month following the date on which the premiums were paid and such cost, until paid, shall constitute a City Lien on the Property. The City shall give prompt notice of the payment of such premiums, stating the amounts paid and the name of the insured(s).

12. **Covenants and Restrictions.**

The following covenants and restrictions shall be set forth in the Special Restrictions and shall run with the land for the duration set forth below and in the Special Restrictions for the benefit of the City in its Proprietary Capacity. The Special Restrictions may contain additional covenants and restrictions as further set forth therein. Developer covenants and agrees on behalf of itself, and each Successor Owner and each and every Person claiming by, through or under Developer or any Successor Owner, including, only where specified below, each End User, and where not otherwise specified, excluding any End Users:

12.1 **Use Covenant.**

Developer shall cause the Real Property to be developed (a) only for lawful residential uses and such uses as are ancillary or incidental thereto and (b) as a High Quality Residential Project.

12.2 **Maintenance Covenant.**

12.2.1 **Maintenance Standards.** In addition to any requirements established in the License Agreements during the term thereof, Developer, on behalf of itself and each Successor Owner, hereby covenants and agrees, from and after the Close of Escrow to maintain the Property and, during the term of each of the License Agreements (whether before or following the Close of Escrow) and each encroachment permit, the applicable License Areas and area subject to such encroachment permit and the Improvements, including the Landscape Improvements (other than the public sidewalks, which shall be maintained by the City) and the Water Treatment Improvements, thereon consistent with the following requirements:

(a) Prior to commencement of construction, Developer shall be responsible, at its sole cost and expense, (i) to secure and maintain the Development Property in a clean, safe and secure condition, in compliance with all Governmental Requirements, (ii) to abate weeds and other hazards and nuisances on the Development Property, (iii) to erect and maintain barricades and fencing, and provide security, in each case with respect to the Development Property and as reasonably necessary to protect the public and any Improvements already constructed, and (iv) to maintain (in compliance with all Environmental Laws) erosion control on the Development Property.

(b) From the date of commencement and during the continuance of construction of any Improvements, Developer shall maintain the Development Property and the Improvements then under construction consistent with normal and customary construction industry practice. From and after the initial installation of any of the Landscape Improvements or Water Treatment Improvements, Developer shall maintain all Landscape Improvements then installed (other than the public sidewalks, which shall be maintained by the City) and all Water Treatment Improvements in good condition and consistent with the requirements of this Agreement, the Special Restrictions, the CC&Rs and the Landscape and Water Treatment Installation and Maintenance Agreement, as applicable; provided that with respect to Landscape Improvements and Water Treatment Improvements located on Common Areas, and provided that the CC&Rs delegate such responsibility to the Homeowners' Association, the obligation of

Developer under this Section shall terminate with respect thereto upon transfer of the Common Area associated therewith to the Homeowners' Association. The obligation to maintain the Water Treatment Improvements shall include the obligation to comply with all Governmental Requirements, including by accepting and treating stormwater runoff from the public City Streets and other areas identified within the BMP Drainage Management Area Boundary set forth in the approved Water Quality Management Plan for the Real Property and adjoining City Streets, complying with maintenance requirements identified within the such approved Water Quality Management Plan, and maintaining the Water Treatment Improvements and Water Treatment Area in a manner compliant with the Water Quality Management Plan and other applicable Governmental Requirements.

(c) From and after the issuance of a certificate of occupancy for any Home, Building or other Improvements on the Real Property, and prior to the transfer thereof to an End User (or for such longer period thereafter as may be required by the CC&Rs), Developer shall maintain all Improvements on such Real Property and all Landscape Improvements not then under construction in a clean, sanitary, orderly and attractive condition, and in accordance with High Quality Residential Standards, subject to reasonable wear and tear and to Section 12.2.2 and in accordance with the requirements of the Special Restrictions, the Landscape and Water Treatment Installation and Maintenance Agreement and the CC&Rs. Developer shall be required to meet the standard for the quality of maintenance of the Improvements on the Real Property required by this Section regardless of whether or not a specific item of maintenance is listed below, except that, in each case, and notwithstanding anything in this Section 12.2 to the contrary, Developer shall not have any maintenance obligation with respect to (i) any Completed Improvements owned or controlled by (or on property owned or maintained by) any Homeowner or the Homeowners' Association, or (ii) with respect to any Completed Improvements owned by any utility, Governmental Authority, lighting or landscape district or, except as set forth in the Landscape and Water Treatment Installation and Maintenance Agreement, by the City. Representative items of maintenance shall include: (A) maintenance, repair and replacement on a regular schedule, consistent with High Quality Residential Standards, of all Common Area, Common Area Improvements, Landscape Improvements (other than the public sidewalks, which shall be maintained by the City), Buildings, structures, improvements, Private Drives and Sidewalks and all other roads, drives, bike paths, alleyways, sidewalks, utilities, courtyards, landscaping, hardscaping and fountains but excluding City-owned streets and sidewalks; (B) regular inspection for graffiti or damage or deterioration or failure, and reasonably prompt (or, in the case of graffiti, within 48 hours) repainting or repair or replacement of all surfaces, fencing, walls, equipment, etc., as necessary; (C) emptying of trash receptacles and removal of litter; (D) regular sweeping of Private Drives and Sidewalks throughout the Real Property; (E) fertilizing, irrigating, trimming and replacing vegetation and other Landscape Improvements, as necessary; (F) cleaning exterior windows on a regular basis; (G) painting the Buildings and other structures on the Real Property on a regular program and prior to the deterioration of the painted surfaces; (H) conducting roof inspections on a regular basis and maintaining roofs in a leak-free and weather-tight condition and (I) complying with all Governmental Requirements, including, with respect to maintenance of the Water Treatment Improvements on the Water Treatment Area, by accepting and treating stormwater runoff from the public City Streets and other areas identified within the BMP Drainage Management Area Boundary set forth in the approved Water Quality Management Plan for the Real Property and adjoining City Streets, complying with

maintenance requirements identified within the such approved Water Quality Management Plan, and maintaining the Water Treatment Improvements and Water Treatment Area in a manner compliant with the Water Quality Management Plan and other applicable Governmental Requirements.

12.2.2 **Casualty.** In the event of casualty occurring with respect to portions of the Property still owned by Developer, Developer shall, in its sole discretion, either (i) promptly repair the Improvements and prior to commencement of such repair maintain the portions of the Real Property subject to casualty in accordance with Section 12.2.1(b), or (ii) if Developer determines in its sole discretion not to repair such Improvements, maintain the portions of the Real Property subject to casualty in accordance with Section 12.2.1(a). In each case, upon commencement of any construction with respect to the affected portions of the Real Property and until completion thereof, Developer shall comply with the requirements set forth in Section 12.2.1(b) and upon completion of the repair work, shall comply with the requirements set forth in Section 12.2.1(c). Notwithstanding the foregoing, the portions of the Real Property unaffected by any such casualty shall be maintained as otherwise required by this Agreement, including pursuant to Section 12.2.1(c), and unless not economically feasible due to cost or physical proximity as demonstrated to the reasonable satisfaction of the City, Developer shall provide landscaping or other barriers to shield the portions of the Real Property remaining in use and adjacent public roadways from those subject to casualty and from adjoining streets in order to maintain the portions of the Real Property and the Improvements thereon unaffected by such casualty as required pursuant to Section 12.2.1(c). The provisions of this Section shall survive the termination of this Agreement.

12.2.3 **City Rights to Maintain.** If Developer fails to maintain the Real Property, Improvements, Landscaping Improvements or Water Treatment Improvements on the Development Property or within the Landscape Area or any portion thereof in accordance with the standard for the quality of maintenance set forth in this Article 12, the Special Restrictions or the Landscape and Water Treatment Installation and Maintenance Agreement and such failure continues for thirty (30) calendar days after City's delivery of written notice to Developer regarding such failure or for such shorter period as is allotted to Developer for cure under the terms of the Landscape and Water Treatment Installation and Maintenance Agreement, the City or its designee shall have the right but not the obligation to enter the Development Property and/or the Landscape Area, as applicable, upon reasonable notice to Developer, correct any such failure, and hold Developer and each Successor Owner responsible for the cost thereof, and such cost, until paid, shall constitute a City Lien on the Property as and to the extent described in Section 16.2. Nothing in this Agreement shall restrict the City's rights to enter and utilize its reserved rights pursuant to Section 12.2.2.

12.2.4 **Maintenance Responsibilities.** Except as otherwise provided in this Section 12.2, Developer's maintenance responsibilities shall be vested in one entity for the entirety of the Project and all of the Development Property; provided however that Developer's obligations under this Section 12.2 shall terminate with respect to (a) each License Area upon termination of the applicable License Agreement and (b) any portion of the Real Property transferred to an End User and such termination shall be effective automatically upon such termination or transfer. With respect to those portions of the Real Property not yet transferred to an End User, Developer shall

have the right (x) following creation of such Homeowners' Association and execution and Recording of the CC&Rs by declarant, to assign its maintenance responsibilities under this Agreement pursuant to Transfer to such Homeowners' Association, following which assignment Developer shall have no further liability under this Section 12.2, and (y) to subcontract its maintenance responsibilities under this Agreement to such Homeowners' Association or a first class property management company provided that such subcontracting shall not relieve Developer of any liability for its obligations under this Section 12.2; provided, however that such assignment shall not relieve Developer of its maintenance obligations under this Section 12.2.

### 12.3 Duration of Covenants.

The covenants in Sections 12.1 and 12.2 shall be included in the Special Restrictions, shall run with the land and shall remain in force and effect with respect to the Real Property until the date which is the twenty-fifth (25th) anniversary of Recording of the Special Restrictions, provided that the provisions of Section 12.2.1(c) shall terminate upon Recording of the CC&Rs against the Property, unless released at an earlier date by the City in writing. In addition, the covenants set forth in Section 12.2.2 shall apply with respect to all portions of the Real Property owned by Developer during the term of this Agreement.

### 12.4 Profit Participation Price.

Developer covenants and agrees on behalf of itself and each Successor Owner to pay to the City the Profit Participation Price pursuant to the terms and conditions of the Profit Participation Agreement, which shall be in substantially the form and substance of the Profit Participation Agreement attached to this Agreement as Attachment 25.

### 12.5 Obligation to Refrain from Discrimination.

Developer, on behalf of itself, each Successor Owner and each and every Person claiming by, through or under Developer or any Successor Owner, including each End User, that there shall be no discrimination against or segregation of any person, or group of persons, on account of sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation in the sale, lease, transfer, use, occupancy, tenure or enjoyment of the Property or in development of the Project, nor shall 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 of the Property or in development of the Project or any part thereof.

### 12.6 Deed Restrictions/Covenants Running with the Land.

This Agreement and all other obligations, agreements, covenants, representations, warranties, and indemnities set forth herein are hereby agreed by Developer and by the City to be covenants running with the land and enforceable as equitable servitudes against the Real Property and are hereby declared to be and shall burden and be binding upon the Real Property and Developer and its successors and assigns, each Successor Owner and each and every Person claiming by, through or under Developer or any Successor Owner but excluding End Users for the

benefit of the City and its successors and assigns, subject to the effects of Recording of a Certificate of Compliance as provided for in Article 9. To the extent set forth therein, the Special Restrictions, the Landscape and Water Treatment Installation and Maintenance Agreement and the Quitclaim Deed shall be covenants running with the land, shall be binding upon Developer, each Successor Owner and End User, and each and every Person claiming by, through or under Developer or any Successor Owner for the benefit of the City and its Governmental Successors, including where specifically set forth therein, End Users.

**12.7 Priority of DDA and Special Restrictions.**

This Agreement, including the City Lien, the Right of Purchase and the Right of Reversion contained herein, the Memorandum of DDA, the CC&Rs, the Landscape and Water Treatment Installation and Maintenance Agreement, the DA and the Special Restrictions shall be superior in priority to all Mortgages, provided, however, this Section 12.7 shall not apply to any Mortgages obtained by Homeowners.

**12.8 Landscape and Water Treatment Installation and Maintenance Agreement.**

As a condition to the Close of Escrow, Developer and the City shall enter into a landscape and water treatment system installation and maintenance agreement in the form and substance of the Landscape and Water Treatment Installation and Maintenance Agreement attached as Attachment 21 to this Agreement (“**Landscape and Water Treatment Installation and Maintenance Agreement**”). Pursuant to the Landscape and Water Treatment Installation and Maintenance Agreement, Developer on behalf of itself and each Successor Owner shall, as further set forth therein, agree to install and maintain, or following formation thereof to cause the Homeowners’ Association to maintain, at the sole cost of the Developer or Homeowners’ Association: (a) the landscape installation obligations with respect to the Landscape Area and maintenance obligations with respect to the Landscape Improvements other than the sidewalks and (b) the Water Treatment Improvements as further set forth in the Landscape and Water Treatment Installation and Maintenance Agreement for the benefit of the City and its Successor Owners at no cost to the City, including installation of landscape, irrigation systems, sidewalks, and Water Treatment Improvements as specified therein. Landscaping Improvements shall include vegetation of a type and amount as may reasonably be required to maintain landscaping of the Landscape Area consistent with High Quality Residential Standards and maintenance of such installed landscaping and irrigation systems within the public right of way but excluding a requirement to maintain public sidewalks, which maintenance work will be performed by the City. The Landscape and Water Treatment Installation and Maintenance Agreement or other instrument agreed upon by the City and Developer each in its sole discretion shall grant to the City the right to utilize self-help in the event of non-performance by Developer or its successors and assigns with respect to the obligations of such Persons under the Landscape and Water Treatment Installation and Maintenance Agreement. The Water Treatment Improvements and the Landscape Improvements shall be constructed within the time periods established in the Schedule of Performance.

## 12.9 Public Access Easement.

At the Close of Escrow or pursuant to Recording of the Developer Final Tract Map, whichever is earlier, there shall be Recorded against the Property a non-exclusive perpetual easement in gross for public access in, over, along, through, upon and across the Publicly Accessible Common Area depicted on Attachment 13A and the Publicly Accessible Common Area Improvements, and to and from the adjoining public streets and sidewalks in form and substance approved by the City in its sole discretion, binding upon Developer and its successors and assigns owning all or any portion of the Property, including End Users, for the benefit of the City and its successors and assigns and its permittees, including the general public, subject to reasonable rules and regulations established in the CC&Rs, in order that the Publicly Accessible Common Area and the Publicly Accessible Common Area Improvements are made available to the public.

## 12.10 Required Dedications and Irrevocable Offer to Dedicate Water Treatment Areas.

At the Close of Escrow or pursuant to Recording of the Developer Final Tract Map, whichever is earlier, there shall be Recorded against the Property an irrevocable offer to dedicate (a) a fee interest in and to the Water Treatment Area and all Water Treatment Improvements therein and (b) dedications and releases with respect to all other matters described in Exhibit I of the DA, all as more fully set forth in the DA and in the Covenant attached thereto.

## 13. CC&Rs and Homeowners' Association.

### 13.1 City Approval of CC&Rs.

No later ninety (90) calendar days following the Effective Date, Developer shall submit to the City for City Manager's approval, a first draft of a set of covenants, conditions and restrictions, as well as design guidelines for development of the Improvements to be constructed as part of the Project, together with other requirements included in the conditions of approval for the Developer Tentative Tract Map for the Project as approved by the City and pursuant to which the Homeowners' Association shall be formed ("CC&Rs"). As a condition precedent to the Close of Escrow for the benefit of the City, the City shall have reviewed and approved the CC&Rs. In order to accommodate the City's right of review and approval, Developer shall respond to any changes requested by the City within ten (10) Business Days following each iteration of comments by the City. In addition, not less than thirty (30) calendar days prior to submission of the CC&Rs to DRE, Developer shall submit to the City, for the City Manager's Approval, the draft of CC&Rs it proposes to submit to DRE, together with a "redline" comparison of that version to the draft originally reviewed by the City. Thereafter, prior to Recording of the CC&Rs, Developer shall submit to the City, for the City Manager's approval, the version of the CC&Rs approved by DRE together with a "redline" comparison of that version to the draft submitted to DRE and the City shall review and approve such final version, within two (2) Business Days from the City's receipt of such final version. The City's review and approval of the CC&Rs with respect to compliance with the conditions of approval for the Entitlements and the DA shall be made in the City's Governmental Capacity. The City's right of review with respect to all other aspects of the CC&Rs

shall be made in the City's reasonable discretion; provided, that it shall be reasonable for the City to disapprove the terms and conditions of the CC&Rs if, among other things, such terms and conditions conflict with any requirement of this Agreement, the DA or the Special Restrictions, relieve the Developer, Homeowners or the Homeowners' Association of any obligations imposed pursuant to this Agreement, the DA, the Landscape and Water Treatment Installation and Maintenance Agreement, or the Special Restrictions or impose any obligations upon the City; provided, however that except with respect to the requirement that the CC&Rs impose lien rights in favor of the City, the City may not disapprove any of the terms and conditions of the CC&Rs required by the DRE. Among other things, the CC&Rs shall establish (a) creation of only one Homeowners' Association for the Project (except as provided in Section 13.2) which entity shall (following relinquishment by Developer thereunder of such obligations) be responsible for maintenance of the Real Property, the Landscape Area, the Common Area and Common Area Improvements, including the Publicly Accessible Common Area and Publicly Accessible Common Area Improvements and the Water Treatment Improvements; (b) a mechanism for payment by Developer and thereafter for payment by and sharing of costs among the Homeowners through the Homeowners' Association for maintenance of the Landscape Area, the Water Treatment Area and the Common Area (including the Publicly Accessible Common Area) and the Landscape Improvements, Water Treatment Improvements and the Common Area Improvements (including the Publicly Accessible Common Area Improvements) including as further set forth in the Landscape and Water Treatment Installation and Maintenance Agreement, (c) in the event that the City performs any operation, maintenance, repair or replacement of Landscape Improvements or Water Treatment Improvements, the right of the City to invoice the Homeowners' Association for such work and in the event of nonpayment by the Homeowners' Association, to lien the Homeowners and to foreclose such liens, as further set forth in the Landscape and Water Treatment Installation and Maintenance Agreement; (d) a maintenance covenant for the benefit of the City as set forth in Section 12.2 or as otherwise agreed by the City in its sole discretion; (e) regulations governing the use, maintenance and operation of Homes by the Homeowners thereof and of the Common Area and Common Area Improvements by the Homeowners' Association; and (f) all other requirements included in the conditions of approval for the Developer Tentative Tract Map for the Project. The CC&Rs shall be Recorded prior to the issuance of the first certificate of occupancy for a completed Home within the Property. The responsibility of Developer, and its Successor Owners, including without limitation, the Homeowners' Association with respect to operation, maintenance, repair and replacement of the Water Treatment Area and Water Treatment Improvements shall include (i) all costs and expenses incurred by the Homeowners' Association with respect to operation, maintenance, repair and replacement of the Water Treatment Area and Water Treatment Improvements whether incurred for the benefit of the Real Property or the City streets identified within the BMP Drainage Management Area Boundary depicted in the approved Water Quality Management Plan drainage area, (ii) all penalties, fines and other charges or expenses incurred by the City as a result of the failure of Developer or the Homeowners' Association, as applicable, to carry out their respective responsibilities with respect to the Water Treatment Area and Water Treatment Improvements, and (iii) in the event of performance by the City of the maintenance, operation, repair and replacement of the Water Treatment Improvements following a default by Developer or the Homeowners' Association in the performance of their respective obligations under the Landscape and Water Treatment Installation and Maintenance Agreement or CC&Rs (regardless of whether or not the City has accepted the irrevocable offer to

dedicate with respect to the Water Treatment Area and the Water Treatment Improvements pursuant to the Developer Final Tract Map), all costs incurred by the City with respect to maintenance, operation, repair and replacement of the Water Treatment Area and Water Treatment Improvements, without offset or deduction due to the use of the facility for treatment of water discharged from City Streets, as further set forth in the Landscape and Water Treatment Installation and Maintenance Agreement.

### 13.2 **Homeowners' Association and Sub-Association.**

Developer shall form a Homeowners' Association as provided in Section 13.1, provided, however, Developer may, at its option, form one or more sub-associations in accordance with the requirements of the CC&Rs and the applicable provisions of California law composed of Homeowners and their successors and assigns within the Real Property. The Homeowners' Association and sub-associations shall be formed for the purpose of administering and enforcing covenants, conditions, restrictions, reservations, easements, equitable servitudes, liens and charges, collecting and disbursing assessments and charges, and performing such other acts as shall generally benefit the Real Property. Notwithstanding the right of Developer to form sub-associations, all Common Area Improvements shall be owned and maintained by the Homeowners Association, as opposed to a sub-association, none of the Homeowners within the Project shall be excluded from any Common Area or from use of any Common Area Improvements and the public shall be provided access in, on over and to the Publicly Accessible Common Area and the Publicly Accessible Common Area Improvements as required by Section 12.9.

## 14. **Potential Defaults and Material Defaults.**

### 14.1 **Potential Defaults.**

Except as otherwise provided in this Agreement, in the event either Party ("**Defaulting Party**") fails to perform, or delays in the performance of, any obligation, in whole or in part, required to be performed by the Defaulting Party as provided in this Agreement (a "**Potential Default**"), the other Party ("**Injured Party**") may give written notice of such Potential Default to the Defaulting Party ("**Default Notice**"), which Default Notice shall state the particulars of the Potential Default.

### 14.2 **Material Defaults.**

14.2.1 **Monetary Defaults.** Notwithstanding any other provision of this Agreement, if a Party fails to pay the other Party any sum as and when required to be paid or to make any deposit as and when required pursuant to this Agreement and the Injured Party gives the Defaulting Party a Default Notice of such nonpayment or failure to make a deposit, such nonpayment shall be a Potential Default. The Defaulting Party shall have a period of fifteen (15) calendar days after the date the Default Notice is received, or deemed to have been received, within which to cure the Potential Default by making the required payment; the period to cure such Potential Default shall not be extended by Force Majeure Delay. In the event a Potential Default for nonpayment or failure to make a deposit is not cured within said fifteen (15) calendar day

period, the Potential Default shall become a “**Material Default**” that shall be deemed to have occurred upon the expiration of the cure period.

14.2.2 **Non-Monetary Defaults.** With respect to non-monetary defaults under this Agreement, a Potential Default shall become a “**Material Default**” in the event the Potential Default is not cured, at the Defaulting Party’s expense, (a) within thirty (30) calendar days after the date the Default Notice is received, or deemed to have been received by the Defaulting Party; (b) if such cure cannot be reasonably accomplished within such thirty (30) calendar day period, within ninety (90) calendar days after the date the Default Notice is received, or deemed to have been received by the Defaulting Party, but only if the Defaulting Party has commenced such cure within such thirty (30) calendar day period and diligently pursues such cure to completion; or (c) within such longer period of time as may be expressly provided in this Agreement or as mutually agreed to in writing between the Parties with respect to the Potential Default, provided, that clauses (b) and (c) above shall not apply to a Potential Default with respect to Developer’s obligations under Section 8.7.3(e) or (f). Following written notice and failure to cure within the time periods set forth above, each Potential Default shall become a Material Default that shall be deemed to have occurred upon the expiration of the applicable cure period. Notwithstanding anything in the foregoing to the contrary, the Defaulting Party may cure a Material Default at any time prior to the date the Injured Party exercises its remedy for the Material Default. Except as set forth in Sections 4.7 and 14.2.3 and the proviso at the end of Section 16.4.1(e), the time periods set forth in this Section 14.2.2 to cure a Potential Default shall be extended by Force Majeure Delay.

14.2.3 **Transfer Defaults.** Notwithstanding the foregoing, any Transfer or any Transfer of Control in violation of the provisions of Article 2 shall be null and void and shall in all events be a Material Default under this Agreement as of the date of the Transfer or Transfer of Control by the violating party, without notice or cure period and shall not be subject to extension for Force Majeure Delay, except that with respect to involuntary Construction Liens for which the notice and cure periods set forth in Section 14.2.2 shall apply, in order to enable Developer to comply with the provisions of Section 8.12(e).

14.2.4 **Interest.** If a monetary Material Default occurs under this Agreement, then in addition to any other remedies conferred upon the Injured Party pursuant to this Agreement, the Defaulting Party shall pay to the Injured Party, in addition to all principal amounts due, interest on such principal amounts at the Default Rate, for the period from the date such payment or part thereof was due until the date the same is paid.

14.2.5 **No Waiver.** Failure or delay by an Injured Party to deliver a Default Notice shall not constitute a waiver of any Default, nor shall it change the time of Default. Except as otherwise expressly provided in this Agreement, any failure or delay by either Party in asserting any of its rights and remedies as to any Default shall not operate as a waiver of any Default or of any such rights or remedies. Delays by either Party in asserting any of its rights and remedies shall not deprive either Party of its right to institute and maintain any actions or proceedings which it may deem necessary to protect, assert or enforce any such rights or remedies.

14.3 **Due Diligence Information; Products.**

14.3.1 **Return of Due Diligence Information.** Within five (5) Business Days following a termination of this Agreement occurring prior to the Close of Escrow, Developer shall use commercially reasonable efforts to return to the City all written Due Diligence Information in Developer's possession. Developer's obligation to return Due Diligence Information to the City is without representation or warranty of any kind by Developer.

14.3.2 **Surrender of Transferable Products.** In connection with the proposed Project, Developer shall be preparing or causing to be prepared architectural and other products, surveys, plans, reports, tests, studies and investigations with respect to the Development Areas and the proposed Project (collectively, "**Products**"). All Products shall be prepared at Developer's sole cost and expense. If this Agreement is terminated for any reason other than a Material Default by the City prior to or following the Close of Escrow or if the Right of Purchase or Right of Reversion is exercised, then, with respect to all Products other than financial or economic estimates, projections and evaluations; studies and information related to potential tenants, lenders and investors; any confidential or proprietary information of Developer or its equity partner(s), or attorney-client or other privilege (the Products not subject to such exclusions are collectively "**Transferable Products**"), the City may request that Developer, for consideration to be mutually agreed, transfer Developer's rights to any or all of the Transferable Products identified by the City, but in no event shall the cost to the City exceed Five Thousand Dollars (\$5,000.00). Upon such request, Developer shall deliver to the City copies of all Transferable Products requested by the City together with a bill of sale therefor, provided that such transfer is made AS-IS and Developer makes no representation, warranty or guaranty regarding the completeness or accuracy of the Transferable Products, and Developer does not covenant to convey the copyright or other ownership rights of third parties thereto. Such Transferable Products shall thereupon be free of all claims or interests of Developer or any liens or encumbrances. Upon the City's acquiring Developer's rights to any or all of the Transferable Products, the City shall be permitted to use, grant, license or otherwise dispose of such Transferable Products to any Person for development of the Project or any other purpose; provided, however, that Developer shall have no liability whatsoever to the City or any transferee of title to the Transferable Products in connection with the use of the Transferable Products. Notwithstanding anything to the contrary herein, Developer shall only be obligated to transfer any Transferable Products to the extent that Developer owns the rights to the same pursuant to its contract with the preparer thereof, provided that Developer shall use commercially reasonable efforts to secure ownership of Transferable Products pursuant to such contracts.

14.3.3 **Survival.** The provisions of this Section 14.3 shall survive the termination of this Agreement in its entirety or as to any portion of the Property except that it shall terminate upon the issuance of the Certificate of Compliance.

15. **Remedies Prior to Close of Escrow; Nonoccurrence of a Condition at Close of Escrow.**

15.1 **Failure of a Condition Absent a Default.**

15.1.1 In the event the Close of Escrow is extended for any of the reasons set forth in this Section 15.1 not caused by a Default by either Party, either Party shall have the right to terminate this Agreement as hereinafter provided:

(a) In the event a final non-appealable decision in any litigation brought by a third party or approval of a referendum or initiative results in the inability of the City to convey all or any portion of the Property to Developer, or results in the inability of Developer to perform its material obligations under this Agreement despite Developer's commercially reasonable efforts to do so, either Party shall have the right, upon thirty (30) calendar days' prior written notice to the other Party and the Escrow Holder, to terminate this Agreement.

(b) In the event litigation, referendum, or initiative brought by a third party remains pending on the Outside Closing Date and (i) such ongoing challenge prevents the City from conveying all or any portion of the Property to Developer, or (ii) such ongoing challenge is the cause of Developer's inability to perform its material obligations under this Agreement despite Developer's commercially reasonable efforts to do so, either Party shall have the right, upon thirty (30) calendar days' written notice to the other Party and the Escrow Holder, to terminate this Agreement.

(c) In the event (i) the obligations of Developer described in Section 8.17.4 are not timely satisfied or (ii) in connection with construction of the City Improvements, the City identifies the presence or Release of Hazardous Materials that require the City to make more than one claim against its policy of environmental insurance.

15.1.2 In the event the circumstances creating the right of termination in Sections 15.1.1(a) or (b) have been cured during the thirty (30) calendar day period described in each such Section, the right to terminate with respect to such circumstances shall likewise be extinguished.

15.1.3 If the Close of Escrow does not occur on or before 5:00 p.m., Pacific Time, on the Outside Closing Date, because of the failure to occur of a Closing Condition for reasons other than a Default by either Party, then the Party for whose benefit the applicable Closing Condition was intended may, by delivery of written notice to the other Party and to the Escrow Holder, terminate this Agreement. In the event either Developer or the City is in Default as of the Closing Date, the Party in Default shall not have the right to terminate this Agreement pursuant to this Section 15.1 until and unless the Default is cured. Unless otherwise set forth in Sections 15.2, 15.3 or 15.4, upon termination of this Agreement each Party shall pay one-half (1/2) of Escrow Holder's normal cancellation charges and the amount of the Purchase Price Deposit then held by Escrow Holder shall be paid to and retained in full by the City. The termination of this Agreement pursuant to this Section 15.1 shall constitute a waiver of any rights or Claims either Party may have against the other or against the Property or the Improvements, or any portion thereof, but shall not terminate or release any liability or obligations of either Party to comply with

any obligations under this Agreement which are expressly stated to survive a termination of this Agreement prior to the Close of Escrow. In the event of a termination as provided in this Section 15.1, under no circumstances shall Developer have any right or claim to, or against, the Project or Property or any portion thereof.

15.1.4 For purposes of clarity, the failure of a Closing Condition for the benefit of either Party to be satisfied at or prior to the Close of Escrow shall not, on its own, constitute a Default by either Party hereunto absent a Default under a separate covenant, obligation, representation or warranty set forth in this Agreement or any Other Agreement.

15.2 **Failure of Close of Escrow For Reasons Other than Deposit Return Event.**

IF DEVELOPER IS IN DEFAULT UNDER THIS AGREEMENT PRIOR TO CLOSE OF ESCROW AND FAILS TO CURE SUCH DEFAULT WITHIN THE TIME PERIOD SPECIFIED IN SECTION 7.2.1(p) OR ARTICLE 14, AS APPLICABLE AND THE CITY ELECTS TO TERMINATE THIS AGREEMENT, OR IF FOR ANY REASON OTHER THAN SOLELY AS A RESULT OF A DEPOSIT RETURN EVENT, THE CLOSE OF ESCROW DOES NOT TAKE PLACE ON OR BEFORE 5:00 P.M., PACIFIC TIME, ON THE CLOSING DATE THEN IN EACH SUCH CASE, THE PARTIES ACKNOWLEDGE AND AGREE BY INITIALING THIS AGREEMENT IN THE SPACE PROVIDED BELOW THAT:

(a) THE CITY SHALL HAVE THE RIGHT TO TERMINATE THIS AGREEMENT AND THE ESCROW BY DELIVERING WRITTEN NOTICE TO DEVELOPER AND TO ESCROW HOLDER, WHEREUPON THIS AGREEMENT SHALL TERMINATE AND THE CITY SHALL BE RELEASED FROM ITS OBLIGATIONS UNDER THIS AGREEMENT, INCLUDING THE OBLIGATION TO SELL THE PROPERTY TO DEVELOPER. IN SUCH EVENT, ESCROW HOLDER SHALL DISBURSE THE PORTION OF THE PURCHASE PRICE DEPOSIT PREVIOUSLY PAID BY DEVELOPER TO ESCROW HOLDER AND ALL ACCRUED INTEREST THEREON TO THE CITY, AS LIQUIDATED DAMAGES, WHICH DAMAGES SHALL BE THE CITY'S SOLE AND EXCLUSIVE REMEDY UNDER THIS AGREEMENT FOR DEVELOPER'S FAILURE TO CLOSE ESCROW, EXCEPT FOR THE CITY'S RIGHTS AND REMEDIES FOR A SEPARATE BREACH, IF ANY, OF THE CONFIDENTIALITY PROVISIONS SET FORTH IN SECTION 17.24 AND/OR INDEMNIFICATION PROVISIONS SET FORTH IN SECTION 5.5 OF THIS AGREEMENT AND/OR THE PROVISIONS OF SECTION 14.3.

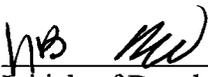
(b) THE PURCHASE PRICE DEPOSIT PROVIDED FOR IN SECTION 4.2.1, AS THE SAME MAY BE INCREASED WITH THE ADDITIONAL PURCHASE PRICE DEPOSIT, BEARS A REASONABLE RELATIONSHIP TO THE DAMAGES WHICH THE PARTIES ESTIMATE MAY BE SUFFERED BY THE CITY AS THE RESULT OF DEVELOPER'S FAILURE TO CLOSE ESCROW UNDER THIS AGREEMENT, WHICH DAMAGES WOULD BE IMPRACTICAL OR EXTREMELY DIFFICULT TO QUANTIFY, THAT SUCH PURCHASE PRICE DEPOSIT CONSTITUTES A REASONABLE ESTIMATE OF THE CITY'S DAMAGES IN SUCH EVENT, AND THAT THE REMEDY PROVIDED FOR IN THIS SECTION 15.2 IS NOT A PENALTY OR FORFEITURE AND IS A REASONABLE LIMITATION ON DEVELOPER'S POTENTIAL

LIABILITY AS A RESULT OF SUCH FAILURE TO CLOSE ESCROW; PROVIDED THAT NOTHING IN THIS AGREEMENT SHALL PRECLUDE THE CITY FROM RETAINING ALL REIMBURSEMENTS IT HAS PREVIOUSLY RECEIVED FROM DEVELOPER FOR THE DDA TRANSACTION EXPENSES AND RETAINING AND COLLECTING FROM DEVELOPER ANY ADDITIONAL AMOUNTS THEN DUE TO THE CITY ON ACCOUNT OF DDA TRANSACTION EXPENSES INCURRED BY THE CITY TO THE DATE OF TERMINATION OF THIS AGREEMENT;

(c) DEVELOPER SHALL PAY THE FULL AMOUNT OF ESCROW HOLDER'S CHARGES AS A RESULT OF SUCH DEFAULT AND TERMINATION, AND

(d) DEVELOPER SHALL COMPLY WITH THE REQUIREMENTS OF SECTION 14.3 AND SHALL INDEMNIFY THE CITY AS PROVIDED IN SECTION 5.5.

  
\_\_\_\_\_  
Initials of City

  
\_\_\_\_\_  
Initials of Developer

**15.3 Failure to Close; Default of City.**

**15.3.1 Developer Remedies.** If the Close of Escrow does not occur on or before 5:00 p.m., Pacific Time, on or before the Closing Date, solely as a result of a Default by the City in the performance of its obligations under this Agreement, then, so long as Developer is not in Default, and subject to the cure rights granted to City pursuant to Section 7.2.1(l) and Article 14 and the requirements of Section 15.3.2, Developer shall have the right, by providing notice to the City, within twenty (20) Business Days after the Closing Date, of its election to do so, either: (a) to purchase the Property pursuant to this Agreement notwithstanding such Default by the City subject to its agreement to waive all of Developer's rights with respect to any such City Default, whereupon such Default (other than Defaults with respect to City's failure to deliver the documents and instruments required under Section 7.2.1(a) above) shall be deemed waived as against the City; (b) to elect to extend the Closing Date for an additional period (over and above the time period set forth in Section 7.2.1(l)) of fifty (50) calendar days in order to provide the City with time to cure such Default (and in such event the City shall use commercially reasonable efforts to cure the same during such extension period); or (c) to terminate this Agreement and cancel the Escrow, in which case the provisions of Section 15.3.3 shall apply. In the event Developer fails to deliver such notice within such twenty (20) Business Day period, Developer shall be deemed to have elected to terminate this Agreement and cancel the Escrow. Notwithstanding the foregoing, in the event that all applicable City Closing Conditions have been waived by the City in writing or satisfied (except with respect to any applicable City Closing Condition which is not satisfied as a result of a Default by the City), and the City fails to deliver any of the materials described in Section 7.2.1(a) or otherwise fails to proceed with the Close of Escrow in breach of this Agreement within ten (10) Business Days after Developer has delivered into Escrow all of its required deliveries pursuant to Section 7.2.2 (other than the Developer Closing Payment), Developer shall have the right to bring an action in equity or otherwise against the City or subsequent owners, lessors or sublessors of the Property for specific performance of the City's obligation to Close Escrow in accordance with Article 7, provided, that Developer specifically waives any right to receive any monetary award as a result of the City's Default.

15.3.2 **Closing.** In the event the City receives timely notice of Developer's election to purchase the Property pursuant to Section 15.3.1(a), notwithstanding the Default by the City, Developer shall deliver the Developer Closing Payment and all other deliverables required by this Agreement into Escrow no later than ten (10) Business Days after the City's receipt of said notice and, provided that the City Closing Conditions have been satisfied, the Close of Escrow shall occur on that date which is eleven (11) Business Days after the City's receipt of such notice. Developer shall be deemed to have waived the Default as of the Close of Escrow.

15.3.3 **Developer Termination of DDA.** In the event the City is in Default of this Agreement and the City receives timely notice from Developer of Developer's election to terminate this Agreement pursuant to Section 15.3.1(b) or Developer is deemed to have elected to terminate this Agreement pursuant to Section 15.3.1, the City shall pay the full amount of Escrow Holder's charges and Developer (a) shall be entitled to a full refund of the Purchase Price Deposit then held by Escrow Holder and to payment, if applicable, of the Grading Costs for City Streets as further described in Section 15.3.6, which refund and payment shall be Developer's sole and exclusive remedy under this Agreement for the failure of the Close of Escrow, and (b) shall not be entitled to pursue an action against the City for damages or other remedies as a result of the Default by the City. In addition, if the Final City Map or Developer Final Tract Map has then been Recorded, the City shall release the monument and survey bonds, if any, posted by Developer as a requirement of the Final City Map, Developer Final Tract Map or Subdivision Improvement Agreement.

15.3.4 **City Right to Terminate Agreement.** In the event Developer has elected to purchase the Property but fails to deliver the Developer Closing Payment into Escrow and to satisfy the other Closing Conditions for the benefit of the City no later than ten (10) Business Days after the City's receipt of said notice, then the City shall have the right to terminate this Agreement by providing written notice of its election to terminate to Developer, such termination to be in accordance with the provisions of Section 15.3.3.

15.3.5 **Effect of Termination.** The termination of this Agreement pursuant to Section 15.3 shall not terminate or release any liability or obligations of Developer to indemnify the City as provided in Section 5.5 or to comply with Section 14.3. In the event of a termination as provided in Section 15.3.3, under no circumstances shall Developer have any right or claim to, or against, the Property or any portion thereof. The termination of this Agreement pursuant to this Section 15.3 shall constitute a waiver of any and all rights and Claims either Party may have against the other, except as expressly provided in this Section 15.3.

15.3.6 **Grading Costs for City Streets.** If both of the following have occurred: (a) Developer has completed the License Area Grading Work upon the City Streets Grading Area and such Grading Work has been certified by the engineer of record as complete in accordance with the Approved Plans and approved by the Director of Public Works, and (b) following a Default by the City which remains uncured following expiration of the periods allotted for cure of such Default in this Agreement, Developer elects to terminate this Agreement pursuant to Section 15.3.1, then the City shall pay to Developer an amount equal to the lesser of (i) the actual cost, without mark-up, incurred by Developer to perform the Grading Work upon the City Streets Grading Area (which shall be in an amount equal to the actual cost, without mark-up,

incurred by Developer in carrying out the Grading Work within the City Streets Grading Area which shall be determined for this purpose by multiplying the total costs incurred by Developer to perform the License Area Grading Work (without markup) by a fraction, the numerator of which shall be the acreage of the City Streets Grading Area and the denominator of which shall be the acreage of the Development Areas as a whole) or (ii) One Million Five Hundred Thousand Dollars (\$1,500,000.00) (“**Grading Costs for City Streets**”). Developer shall cause its contractor to maintain separate records detailing the cost of the License Area Grading Work for this purpose. Notwithstanding any allegation of Default made by Developer against the City, the City shall have the right to retain the Grading Bonds issued in connection with issuance by the Department of Public Works of the encroachment permits for the performance of the License Area Grading Work upon the City Streets Grading Area until such time as Developer has completed the License Area Grading Work upon the City Streets Grading Area and such Grading Work has been certified by the engineer of record as complete in accordance with the Approved Plans and approved by the Director of Public Works, or in the event of any dispute related to the Grading Work, for such longer period as may be required to resolve such dispute.

#### 15.4 **Failure to Close Escrow, Deposit Return Event.**

If the Close of Escrow does not occur on or before 5:00 p.m., Pacific Time, on the Outside Closing Date, as may be extended pursuant to Section 7.1.2 and/or Section 7.1.3, because of a failure of any Closing Condition and the failure of such Closing Condition is a Deposit Return Event and occurs for reasons other than a Default by either Party, then upon termination of this Agreement pursuant to Section 15.1, each Party shall pay one-half (1/2) of Escrow Holder’s normal cancellation charges and the Purchase Price Deposit then held by Escrow Holder shall be paid in full to Developer.

#### 15.5 **Termination of Agreement.**

The termination of this Agreement prior to the Close of Escrow shall constitute a waiver of any rights or Claims either Party may have against the other pursuant to this Agreement or against the Property or the Improvements, or portion thereof to which the termination applies, but shall not terminate or release any liability or obligations of either Party to comply with any obligations under this Agreement pursuant to this Article 15 which remain in effect or any other provisions of this Agreement which are expressly stated to survive a termination of this Agreement.

### 16. **Remedies for Defaults After the Close of Escrow.**

#### 16.1 **General Remedies.**

(a) In the event Developer is in Material Default following the Close of Escrow, in addition to whatever other rights the City may have in law or at equity, or as otherwise provided in this Agreement, the City may do any one or more of the following:

(b) The City may record a lien against the Property, or any portion thereof, in accordance with Section 16.2.

(c) Subject to Section 17.5.1, the City may sue for damages it may have incurred.

(d) The City may seek to specifically enforce the obligations of Developer.

(e) Subject to Section 16.6, the City may exercise its Right of Repurchase with respect to the Property pursuant to Section 16.3.

(f) Subject to Section 16.6, in the event of a Reversion Action Trigger only, the City may exercise its Right of Reversion with respect to the Property pursuant to Section 16.4.

(g) terminate this Agreement and/or the Other Agreements, or any of them, with respect to all or any portion of the Development Property.

## 16.2 Lien Rights.

Developer, on behalf of itself, its successors and assigns and each Successor Owner and each and every Person claiming by, through or under Developer or any Successor Owner (but specifically excluding any End Users) for the benefit of the City and its successors and assigns hereby agrees that the delinquent amount of any payments due under this Agreement, including any liquidated damages under this Agreement, together with any late charges or interest due on any such delinquent payment, reasonable attorneys' fees, experts' fees and consultants' fees and collection costs and the cost of in-house staff time (including City overhead and administrative costs) related to such delinquent payment shall, to the greatest extent permitted by applicable law, be a lien and charge upon the Property and shall be a continuing lien upon the Property in favor of the City effective upon Recording of the Memorandum of DDA ("**City Lien**"), which lien and charge shall be paramount to the lien and charge of each and every Mortgage, Construction Lien and other lien upon or affecting the Property and the City shall have the right to foreclose the City Lien with respect to any property so encumbered by such lien. Upon conveyance of any portion of the Real Property to an End User, unless otherwise provided in the Landscape and Water Treatment Agreement, the City Lien shall automatically terminate as to such conveyed portions, provided however, that the termination of such City Lien shall not terminate the obligations of Developer and its successors and assigns to City with respect to amounts due and secured by such lien, which shall remain an ongoing obligation of Developer.

## 16.3 Right of Purchase.

16.3.1 Following the Close of Escrow and prior to the issuance of a Certificate of Compliance with respect to the Property and the Project, in the event of a Repurchase Default (defined below), the City shall have the right ("**Right of Purchase**"), from time to time, at any time, to purchase all or a portion of the Real Property and all applicable Entitlements and other development rights, consents, authorizations, variances, waivers, licenses, permits, certificates and approvals from any governmental or quasi-governmental authority, Transferable Products, Intangible Property and all other appurtenant rights applicable thereto ("**Repurchased**

**Property**”). The Repurchased Property shall exclude (a) those Buildings and the Phases upon which such Buildings are located for which Developer has been issued a building permit prior to the date of the City’s delivery of notice of a Repurchase Default which permit has not expired as of the date of the City’s exercise of the Right of Purchase; and (b) as to the Buildings and Phases excluded pursuant to clause (a) above, (i) the Common Area and any Improvements located within such Building and/or Phase, as applicable, and (ii) all Entitlements and other development rights, consents, authorizations, variances, waivers, licenses, permits, certificates and approvals from any governmental or quasi-governmental authority, and all other appurtenant rights applicable thereto, including those units allocated to development of the Repurchased Property as shown in the Approved Plans or established pursuant to any Recorded Condominium Plan.

16.3.2 **Repurchase Default.** Subject to extension for Force Majeure Delay with respect to clauses (a) through (e) below only, the City shall have the right to acquire the Repurchased Property for the Repurchase Price in accordance with this Section 16.3 and upon the occurrence of any one of the following (each, a “**Repurchase Default**”):

(a) Developer fails to comply with the Inventory Commitment and such becomes a Material Default in accordance with the notice and cure provisions of Section 14.2;

(b) Developer fails to comply with the Schedule of Performance and such becomes a Material Default in accordance with the notice and cure provisions of Section 14.2;

(c) Developer constructs Improvements that are not in substantial conformity with the Approved Plans and the requirements of Sections 8.1.4, 8.1.5 and 8.9 and such becomes a Material Default in accordance with the notice and cure provisions of Section 14.2;

(d) For a period of one hundred eighty (180) consecutive calendar days, Developer is in Material Default of the maintenance obligations set forth in Section 12.2 (including as set forth in the Special Restrictions, the CC&Rs or Landscape and Water Treatment Installation and Maintenance Agreement), in accordance with the notice and cure provisions of Section 14.2;

(e) Developer commits waste on the Property and such failure becomes a Material Default in accordance with the notice and cure provisions of Section 14.2;

(f) The occurrence of a Developer Insolvency Event;

(g) With respect to any Guarantor which has provided a Guaranty to the City, the occurrence of a Guarantor Illiquidity Event or a City Guarantor Illiquidity Event, unless Developer shall, within the time period required thereby, provide substitute security meeting the requirements of Section 4.7; or

(h) Developer fails to pay prior to delinquency any property taxes or assessments, including District assessments or to pay to City any other sums due under this Agreement and such becomes a Material Default in accordance with the notice and cure provisions of Section 14.2;

(i) A Material Default arises because of a voluntary or involuntary Transfer or Transfer of Control.

16.3.3 **Exercise of Right of Purchase.** The City may exercise its Right of Purchase by delivering written notice to Developer stating that the City is exercising its Right of Purchase and specifying the Repurchased Property which it intends to purchase; provided that such notice is delivered at least ninety (90) calendar days prior to the date on which the City requires Developer to convey the Repurchased Property to the City pursuant to the Right of Purchase and otherwise in accordance with this Section 16.3. The Right of Purchase shall be a lien and encumbrance on the Property and Improvements thereon that shall be paramount to the lien and charge of any Mortgage, Construction Lien and/or other lien upon the Property. The Repurchased Property shall be delivered to the City at close of escrow for the Repurchased Property free and clear of all liens and Mortgages and subject only to (a) the Permitted Exceptions at the time of the Close of Escrow for such portion of the Property, and (b) all other matters created in connection with the Entitlements and the development of the Project pursuant to this Agreement.

16.3.4 **Access and Inspection.** The provisions of Section 16.5 shall apply with respect to the Repurchased Property.

16.3.5 **Process.** If the City is entitled to and elects to repurchase the Repurchased Property, the Parties shall: (a) within five (5) Business Days after the date of the City's notice of election to exercise the Right of Purchase, open an escrow with an escrow agent designated by the City for the purchase and sale, and shall execute an escrow agreement that shall provide that Developer shall pay all costs of the escrow and shall include such usual and ordinary terms as are reasonably required by the escrow agent and by the transaction; (b) no later than five (5) Business Days after the opening of escrow, Developer shall place into the escrow appropriate quitclaim deeds and bill of sale conveying fee title to the Repurchased Property; and (c) no later than eighty-five (85) calendar days after the opening of the escrow, the City shall deposit into the escrow an amount equal to (i) the Repurchase Price *minus* (ii) the Lien Release Amounts, if any, *minus* (iii) any amounts then owed to the City by Developer and/or any Successor Owner, including any City Liens arising pursuant to this Agreement with respect to the Repurchased Property and *minus* (iv) the actual costs incurred by the City to acquire environmental and pollution legal liability insurance coverage for the Repurchased Property, including coverage for loss, remediation expense and legal defense expenses. The escrow shall close, and title to the Repurchased Property shall be conveyed to the City, and the Repurchase Price paid to Developer no later than five (5) Business Days after the City has deposited into escrow the Repurchase Price, but in no event prior to the City's delivery of the City Repair Acknowledgement with respect to any repairs to the Improvements made pursuant to Section 16.5. Concurrently with the close of escrow, Developer shall comply with its obligations under Section 14.3 only with respect to the Repurchased Property. Nothing herein shall restrict the right of the City to terminate its exercise of the Right of Purchase at any time prior to the close of escrow and such termination shall not be a default by the City. At the close of escrow, real property taxes and assessments with respect to the Repurchased Property shall be prorated between Developer and the City as of the date of the close of escrow. All proration shall be based upon a 365-day year and actual days elapsed. All closing costs, including the cost of an ALTA policy of title insurance in favor of the City with respect to the Repurchased Property shall be borne by Developer and deducted from the

Repurchase Price. The Parties agree that the amount of reduction in the Repurchase Price as compared with the Purchase Price is justified in that it bears a reasonable relationship to the damages which the Parties estimate may be suffered by the City as the result of Developer's Material Default in the performance of its obligations under this Agreement, which damages would be impractical or extremely difficult to quantify, and that the remedy provided for herein is not a penalty or forfeiture, and is a reasonable limitation on Developer's potential liability as a result of Developer's default.

16.3.6 **Cooperation and Grant of Easements.** The Parties shall cooperate with respect to and concurrently with the close of escrow for the Repurchased Property, shall each reserve and/or grant to the other such roadway, utility, access and other easement rights as may be required by the other Party and its successors in interest to develop the Property as a unified development and as contemplated by the Entitlements, the CC&Rs, this Agreement and the Other Agreements.

16.3.7 **Termination of Right of Purchase.** The Right of Repurchase shall remain in effect from the Close of Escrow until Recording by the City of a Certificate of Compliance. In the event that prior to delivery by the City of written notice to Developer of its exercise of the Right of Purchase pursuant to Section 16.3.2, Developer or any Person on behalf of Developer either (a) cures the Repurchase Default which is the basis for the City's exercise of its Right of Purchase, but excluding any Transfer or Transfer of Control in violation of this Agreement, or (b) Completes the Improvements upon the Property that is subject to the Right of Purchase, such Right of Purchase shall cease and terminate with respect to such portions of the Repurchased Property for which the Material Default is cured or for which Improvements are so Completed only. In the event the City has declared a Repurchase Default, Developer shall not have the right to apply for building permits for Vertical Improvements in a manner that affects or thwarts the ability of the City to exercise its Right of Purchase. The Right of Purchase shall not apply to the Property after Recording by the City of the Certificate of Compliance.

16.3.8 **Effect of Repurchase.** The provisions of Section 16.6 shall apply with respect to the Repurchased Property following close of escrow. Following close of escrow, under no circumstances shall Developer or any lienholder have any right or claim to, or against, the Repurchased Property. Notwithstanding the purchase of the Repurchased Property by the City as provided in this Section 16.3, this Agreement shall remain in full force and effect with respect to the portions of the Property and Improvements not purchased by the City.

16.3.9 **Rights of Third Parties.** The Right of Purchase shall be a lien and encumbrance on the Property that shall be paramount to the lien and charge of (a) any Mortgage upon the Parcels or Improvements and (b) all other liens including Construction Liens that may attach to the Real Property or the Improvements thereon. The Right of Purchase shall not defeat or render invalid or limit any rights or interests provided in easements, covenants, conditions or restrictions in favor of third parties (i.e., Persons other than Developer or Developer Affiliates) granted pursuant to Transfers approved by the City (or constituting Permitted Transfers) and Recorded on the portion of the Property for which the City exercises its rights under this Section 16.3. The Repurchased Property acquired by the City shall be delivered to the City at close of escrow free and clear of all Mortgages including Permitted Mortgages and all other liens,

including Construction Liens (other than City Liens and Lien Release Amounts that are actually deducted from the Repurchase Price paid by the City), and subject only to (w) the Permitted Exceptions in effect at the time of the original Close of Escrow for such Property, (x) utility easements and/or roadway easements, (y) other matters affecting title consented to or requested by any Governmental Authority with respect to the Property in connection with development of the Property, or requested by the City and any covenants to comply with the Entitlements, and (z) the DA and Other Agreements recorded in accordance with the terms of this Agreement.

16.3.10 **Survival of Provisions.** The provisions of this Section 16.3 shall survive the termination of this Agreement.

16.4 **The Right of Reversion.**

Following the Close of Escrow and prior to Recording of the Certificate of Compliance, in the event of the occurrence of any Reversion Action Trigger (defined in Section 16.4.1), and in addition to its other rights or remedies as a result of the occurrence of any such Reversion Action Trigger, the City shall have the right on the terms and subject to the conditions set forth in this Section 16.4 to re-enter and take possession of the applicable Reacquired Property or any portion thereof and to revest title thereto in the City ("**Right of Reversion**") notwithstanding that the Reacquired Property may be encumbered by liens, including Construction Liens. The revesting of any Reacquired Property by the City is referred to herein as a "**Reversion Event**", whether based on voluntary action of Developer or otherwise after notice by the City of its intent to exercise the Right of Reversion. The City shall be entitled to exercise the Right of Reversion at any time on or after the occurrence of any of any one or more of the Reversion Action Triggers; provided that the City has complied with the conditions to exercise of the Right of Reversion set forth in Section 16.4.2. The Right of Reversion shall be a lien and encumbrance on the Property that shall be paramount to the lien and charge of any Mortgage, Construction Lien and/or other lien upon the Property.

16.4.1 **Certain Defaults Triggering the Right of Reversion.** Following the Close of Escrow and prior to Recording of the Certificate of Compliance, the City may exercise the Right of Reversion if it elects to do so with respect any portion of the Real Property and any Improvements thereon and all applicable Entitlements and other development rights, consents, authorizations, variances, waivers, licenses, permits, certificates and approvals from any Governmental Authority or quasi-Governmental Authority, the Transferable Products, the Intangible Property and all other appurtenant rights applicable thereto (collectively, "**Reacquired Property**") upon the occurrence of any one of the following (each, a "**Reversion Action Trigger**," and the date on which the Reversion Action Trigger occurs shall be referred to herein, as the "**Reversion Action Trigger Date**"). The Reacquired Property shall exclude (a) those Buildings and the Phases upon which such Buildings are located for which Developer has been issued a building permit prior to the Reversion Action Trigger Date which permit has not expired as of the date of the City's exercise of the Right of Reversion; and (b) as to the Buildings and Phases excluded pursuant to clause (a) above, (i) the Common Area and any Improvements located within such Building and/or Phase, as applicable, and (ii) all Entitlements and other development rights, consents, authorizations, variances, waivers, licenses, permits, certificates and approvals from any governmental or quasi-governmental authority, and all other appurtenant rights applicable thereto,

including those units allocated to development of the Reacquired Property as shown in the Approved Plans or established pursuant to any Recorded Condominium Plan.

(a) Developer fails to complete the Grading Work on the Real Property and the Horizontal Improvements within sixty-six (66) months after the Close of Escrow, as such date may be extended for Force Majeure Delay for a period not to exceed a total of twelve (12) months;

(b) Developer fails to Complete the Project within sixty-one (61) months following opening of the first of the Models to the public, as such date may be extended for Force Majeure Delay for a period not to exceed a total of twelve (12) months;

(c) Developer commits physical waste on the Property or any portion thereof and such becomes a Material Default in accordance with the notice and cure provisions of Section 14.2, subject to extension for Force Majeure Delay;

(d) Developer abandons or substantially suspends construction of the Project;

(e) For a period of one hundred eighty (180) cumulative calendar days, Developer is in Material Default with respect to the Inventory Commitment set forth in Section 8.9.3;

(f) For a period of one hundred eighty (180) cumulative calendar days, Developer is in Material Default of the maintenance obligations set forth in Section 12.2 (including as set forth in the Special Restrictions, CC&Rs or Landscape and Water Treatment Installation and Maintenance Agreement), in accordance with the notice and cure provisions of Section 14.2;

(g) The occurrence of a Developer Insolvency Event;

(h) With respect to any Guarantor which has provided a Guaranty to the City, the occurrence of a Guarantor Illiquidity Event, unless Developer shall, within the time period required thereby, provide substitute security meeting the requirements of Section 4.7.1; or

(i) A Material Default arises because of a voluntary or involuntary Transfer or Transfer of Control.

16.4.2 **Conditions to Exercise of the Right of Reversion.** The City shall be entitled to exercise the Right of Reversion at any time on or after the applicable Reversion Action Trigger Date, without regard to any notice and cure periods except as expressly provided in Section 16.4.1; provided that the City has provided written notice to Developer that the City elects to exercise its Right of Reversion and such notice states the date for the Reversion Event. The provisions of Section 16.5 shall be applicable to exercise of the Right of Reversion. The date for the Reversion Event shall not occur before the later of (a) the date that is ninety (90) calendar days after the date of such notice of exercise; (b) the date that is five (5) Business Days after Developer has had the opportunity to address the City Council at a public meeting regarding the Reversion Action Trigger; and (c) the date that is five (5) Business Days following the delivery of the City

Repair Acknowledgment with respect to any repairs to the Improvements made pursuant to Section 16.5.2 below. In the event that, following the first notice by City of its election to exercise the Right of Reversion and prior to the Reversion Event, Developer or any Person on behalf of Developer either (i) cures the Reversion Action Trigger which is the basis for the City's exercise of its Right of Reversion or (ii) Completes the Improvements prior to the date of the Reversion Event, such Right of Reversion shall cease and terminate with respect to such Reversion Action Trigger only; provided that the provisions of this sentence shall not be applicable to any subsequent notice by the City of its election to exercise the Right of Reversion.

16.4.3 **Exercise and Effect of Right of Reversion.**

(a) Cooperation. If the City exercises its Right of Reversion in accordance with the provisions of this Agreement, Developer shall, and shall cause each Mortgagee (if any) to use all reasonable efforts to take, or cause to be taken, all actions and to do, or cause to be done, all things necessary or desirable under applicable law to consummate the revesting of the Reacquired Property in the name of the City, including the execution and delivery of such other documents, certificates, agreements, deeds and other writings and the taking of such other actions as may be reasonably necessary to consummate such revesting and the other provisions of this Section 16.4.

(b) Effect on Mortgages. A Reversion Event shall foreclose, defeat and render invalid each and every Construction Lien and Mortgage and upon the occurrence of a Reversion Event all Construction Liens and Mortgages Recorded against or affecting all or any portion of the Reacquired Property shall be deemed to be automatically released and of no further force and effect with respect to the Reacquired Property.

16.4.4 **Sale of Reacquired Property.** Upon the revesting in the City of title to the Reacquired Property, the City shall use reasonable efforts to resell the Reacquired Property as soon and in such manner as the City shall find feasible, in accordance with applicable State law, if any, and consistent with the objectives of this Agreement, to a qualified and responsible Person or Persons as determined by the City in its sole discretion who will assume the obligation of making or completing the Improvements. Concurrently with such resale of the Reacquired Property, and each part thereof, the proceeds thereof shall be applied in the following order and amounts to the extent of funds available and the City shall have no liability to Developer or any Person to the extent the balance is insufficient to pay any or all of the following amounts nor shall the City have any obligation to make payments to any Person except in accordance with the priorities and obligations set forth below:

(a) Delinquencies. First, to repayment in full of all delinquent tax and delinquent assessment liens with respect to the portion of the Reacquired Property sold;

(b) Reimbursement to the City. Second, to repayment in full of City Liens and to reimburse the City on its own behalf for all costs and expenses incurred by the City, in connection with the recapture, management, maintenance, repair, and resale of the Reacquired Property, or any part thereof and the enforcement of City's rights under this Agreement and the Other Agreements including City's exercise of the Right of Reversion, taxes, assessments, and

other delinquent liens, if any, whether arising before or after the acquisition by the City of : a pro-rata share of the salaries of personnel engaged in such action (based on the amount of time spent by such personnel on such matters relating to the Reacquired Property as compared to the aggregate amount of time worked by such personnel; all taxes, assessments and utility charges with respect to the Reacquired Property; any payments made or necessary to be made to discharge or prevent from attaching or being made any subsequent encumbrances or liens due to obligations, Defaults or acts of Developer or any Successor Owner or each and every Person claiming by, through or under Developer or any Successor Owner (but specifically excluding any End Users); any expenditures made or obligations incurred with respect to the making or completion of the agreed improvements or any part thereof on the Reacquired Property; all costs of sale and marketing, including reasonable brokers' fees and costs incurred in the marketing and sale of the Reacquired Property; all legal fees and expenses; all escrow and title fees and costs; all survey and due diligence fees and costs; all the Lien Release Amounts, if any, paid by the City to third parties; and any amounts otherwise owing to the City by Developer and/or any Successor Owner under this Agreement or the Other Agreements, including any City Liens and the actual cost incurred by the City to acquire environmental and pollution legal liability insurance coverage for the Reacquired Property, including coverage for loss, remediation expense and legal defense expenses.

(c) Release of Liens. Third, to release all Claims affecting the Reacquired Property, including Claims asserted with respect to Construction Liens and/or Mortgages, in such amounts as may be determined by the City in its sole discretion to be required to satisfy such Claims or to reinstate service or work on the Reacquired Property, utility charges with respect to the Reacquired Property; any payments made or necessary to be made to discharge or prevent from attaching or being made any subsequent encumbrances or liens due to obligations, Defaults or acts of Developer or any Successor Owner or each and every Person claiming by, through or under Developer or any Successor Owner; any expenditures made or obligations incurred with respect to the making or completion of the agreed improvements or any part thereof on the Reacquired Property; all costs of sale and marketing, including reasonable brokers' fees and costs incurred in the marketing and sale of the Reacquired Property; all legal fees and expenses; all escrow and title fees and costs; all survey and due diligence fees and costs; and any amounts otherwise owing to the City or any third party by Developer and/or any Successor Owner) with respect to the foregoing, in each case (i) whether arising prior to or following the acquisition by the City of the Reacquired Property and (ii) only to the extent that the foregoing are not fully foreclosed or other terminated by or as a result of the exercise by the City of the Right of Reversion.

(d) Reimbursement to Developer. Fourth, to reimburse Developer up to the amount equal to the Repurchase Price attributable to the portion of the Reacquired Property sold; and

(e) Balance Retained by the City. Any balance remaining after such reimbursements shall be retained by the City as its property.

16.4.5 Effect of Exercise of Right of Reversion. The provisions of Section 16.6 shall apply with respect to the Reacquired Property following close of escrow. Following such close of escrow, under no circumstances shall Developer or any lienholder have any right or claim to, or against, the Reacquired Property. Notwithstanding the acquisition of the

Reacquired Property by the City as provided in this Section 16.4, this Agreement shall remain in full force and effect with respect to the portions of the Property and Improvements not purchased by the City. The City's Right of Reversion shall not defeat or render invalid or limit any rights or interests provided in easements, covenants, conditions or restrictions in favor of third parties who are not Developer Affiliates that are approved by the City (or constituting a Permitted Transfer) and recorded on the portion of the Property for which the City exercises its rights under this Section 16.4.

16.4.6 **Cooperation and Grant of Easements.** Concurrently with close of escrow for the Reacquired Property, the Parties shall each reserve and/or grant to the other such roadway, utility, access and other easement rights as may be required by the other Party and its successors in interest to develop the Property as a unified development and as contemplated by the Entitlements, the CC&Rs, this Agreement and the Other Agreements.

16.4.7 **Survival of Provisions.** The provisions of Sections 16.4 shall survive the termination of this Agreement.

16.5 **Access and Inspection.**

16.5.1 **Access.** From and after the occurrence of any Repurchase Default, City and its appointed and elected officials, agents, attorneys, employees, contractors, consultants and representatives shall have the non-exclusive right, exercising such right in the Proprietary Capacity of the City, to enter upon at any reasonable time, at its own cost and expense entirely and upon twenty four (24) hours prior telephonic or email notice to Developer, the Potential Returned Property for the purpose of making such feasibility and other studies, inspections, appraisals, audits, tests, evaluations, investigations, surveys and reports of the Potential Returned Property (including engineering and environmental audits, evaluations and tests relative to the presence of any Hazardous Material within, under or upon the Potential Returned Property) (collectively, "**City Inspections**") as City may elect to make or obtain in connection with its exercise of its Right of Purchase or Right of Reversion; provided that during such City Inspections on the Potential Returned Property, City shall use commercially reasonable efforts to minimize its interference with Developer's activities on the Property. City shall indemnify, protect and defend Developer against any and all Claims which Developer may incur or suffer by reason of any acts or omissions to act of the City or its appointed and elected officials, agents, attorneys, employees, contractors, consultants and representatives in conduct of City Inspections on the Potential Returned Property, provided that the foregoing indemnity shall not apply to the extent of (i) the gross negligence, willful misconduct or fraud of Developer or any of the Developer Representatives, (ii) Hazardous Materials conditions unless such condition is exacerbated by, or any Release caused by, negligent acts of City or its employees, consultants or contractors, or (iii) the negligence, gross negligence, or willful misconduct of Developer or any of the Developer Representatives in performance of work on the Development Areas Accruing prior to the close of escrow pursuant to this Article 16; provided that in no event shall the foregoing apply with respect to inspections conducted by the City in its Governmental Capacity.

16.5.2 **Inspection and Repair.** At any time following the occurrence of any Repurchase Default or Reversion Action Trigger, the City may inspect the Potential Returned

Property, and subsequent to the delivery of written notice by City to Developer of its exercise of the Right of Purchase or the Right of Reversion, as applicable, City shall deliver written notice to Developer identifying any defects in the Potential Returned Property (“**Defect Notice**”). Within thirty (30) calendar days following the delivery by the City of the Defect Notice, Developer shall cause all defects specified in the Defect Notice to be rectified or repaired, and such repair shall be in accordance with the original approved plans with respect thereto, if applicable. All costs and expenses of Developer in repairing, replacing or rectifying any defects identified in a Defect Notice shall be included within the definition of Horizontal Improvements Costs or Vertical and Phase Improvements Costs for purposes of determining the Repurchase Price. Upon completion of the repairs of the Improvements, or rectifying of any physical condition of the Potential Returned Property, including Environmental Matters, Developer and the City shall inspect to confirm that such work has been appropriately completed, and the City shall execute and deliver to Developer a certificate acknowledging the satisfactory completion of the work (“**City Repair Acknowledgment**”). City shall have the right at any time, and without consent of Developer, to waive the obligation of Developer to carry out or complete repairs and to proceed to close of escrow; provided that City’s acquisition of the Returned Property shall be subject to the provisions of Sections 16.6.3 and 16.6.4 notwithstanding the waiver.

16.6 **Obligations and Release Following Repurchase or Reversion.**

16.6.1 **Developer Obligations; Guaranty.** In the event the City exercises its Right of Purchase as to the Repurchased Property as provided in Section 16.3 or its Right of Reversion as the Reacquired Property as provided in Section 16.4 of this Agreement shall, unless otherwise determined by the City in its sole discretion, terminate with respect to the Repurchased Property or Reacquired Property, as applicable (each, “**Returned Property**”), as of the date of the quitclaim deed conveying to the City title to the Returned Property. Except as set forth in Sections 16.4.5 and 16.6, all other obligations of the Parties under this Agreement with respect to each other shall be released and terminated, as to the Returned Property only, at the close of escrow for the Returned Property; provided, however that in no event shall the Guaranty provided at the Close of Escrow (or any Guaranty approved by the City in its sole discretion as a replacement for such original Guaranty) to secure the obligations of Developer under this Agreement and the Other Agreements with respect to Returned Property be released or terminated as a result of the exercise by the City of the Right of Purchase or the Right of Reversion with respect to the obligations set forth in Sections 16.4.5 and 16.6 and with respect to the Enforcement Payment Obligation (as such term is defined in the Guaranty).

16.6.2 **Exceptions to Release.** Regardless of whether or not this Agreement is terminated with respect to the Returned Property by the City, and notwithstanding the provisions of Sections 16.6.3 and 16.6.4, the close of escrow with respect to the Returned Property shall not terminate or release any liability or obligations of Developer or any Responsible Developer with respect to such Returned Property for the following (and such liability and obligations shall survive the close of escrow and shall not be merged into the quitclaim deed) which in addition shall continue to be “Guaranteed Obligations” as such term is defined in each Guaranty provided in connection with the acquisition of the Returned Property by Developer (“**City Reserved Rights**”):

(i) to release the City Released Parties pursuant to Sections 4.5.2, 4.5.3 and 8.14;

(ii) to return any written Due Diligence Information with respect to the Returned Property pursuant to Section 14.3;

(iii) to indemnify, defend and hold harmless the City Indemnified Parties as provided in Sections 8.12(e), 8.15, 8.16 and 17.12.1 for matters Accruing during the period of Developer's ownership of the Returned Property and with respect to any Developer, Responsible Developer, during the Additional Liability Period;

(iv) to indemnify, defend and hold harmless the City Indemnified Parties as provided in Section 5.5 for matters occurring prior to the Close of Escrow;

(v) to indemnify, defend and hold harmless the City Indemnified Parties with respect to Environmental Claims as provided in Section 10.2 and provide environmental insurance as described in Section 11.1.4 for the period required by this Agreement and not to modify or terminate any prepaid environmental insurance policy then in existence for a longer term; and

(vi) to indemnify, defend and hold harmless the City Indemnified Parties as provided in Section 10.1 only with respect to the matters set forth in Section 16.6.3(c), (d) and (e) Accruing during the period of Developer's ownership of the Returned Property and, with respect to any Developer or Responsible Developer, during the Additional Liability Period.

16.6.3 **AS-IS Conveyance.** City and Developer acknowledge and agree that prior to the close of escrow City will have the full opportunity to inspect and investigate every aspect of the Returned Property, including all matters related to the legal status thereof or requirements with respect thereto, the zoning, the title condition, the economic conditions affecting the value, expense of operation, or income potential thereof, Environmental Matters and the physical condition and repair of the Returned Property and the Improvements thereon, including the work performed by Developer with respect to construction of the Improvements, and any construction defects, errors or omissions with respect to the Returned Property, but excluding the City Reserved Claims. The term "**City Reserved Claims**" shall mean all Claims relating to or arising out of the following: (a) the City Reserved Rights; (b) City Liens and amounts otherwise owed to the City by Developer and/or any Successor Owner (to the extent that Developer is liable therefor under the terms of any agreement between Developer and the City applicable to the Returned Property and not deducted from the Repurchase Price); (c) information with respect to any aspect of the Returned Property contained in written or electronic documents in the possession of Developer or any of the Developer Representatives that are not proprietary or confidential and not otherwise known or available to the City that the City has specifically requested in writing and that Developer has declined to provide; (d) Claims other than with respect to Environmental Matters brought against the City Indemnified Parties by third parties and Accrued during the period that (i) Developer owned the Returned Property; and (ii) with respect to any Developer or Responsible Developer, for the Additional Liability Period, as applicable; and (e) any Claim that

is the result of the willful misconduct or fraud of Developer or any of the Developer Released Parties. City specifically acknowledges and agrees that, except for the City Reserved Claims, the Returned Property, including any Improvements thereon, is conveyed pursuant to Section 16.3 or Section 16.4, as applicable, in an "AS IS" condition and "WITH ALL FAULTS" as of the date of the close of escrow for the transfer of the Returned Property. For purposes of this Section 16.6.3, except as otherwise set forth in Section 16.6, no statements, representations or warranties have been made or are made by Developer and no responsibility has been or is assumed by Developer, or by any partner, officer, employee, member, manager, person, firm, agent or representative acting or purporting to act on behalf of Developer as to the Returned Property or the Improvements thereon, or the value, expense of operation or income potential thereof, and the City is not relying upon any such statement, representation or warranty. Further, to the extent that Developer has provided to City information or reports regarding any inspection, engineering or other matters regarding the Returned Property, Developer makes no representations or warranties with respect to the accuracy, completeness, methodology of preparation or otherwise concerning the contents of such reports. City acknowledges that Developer has requested City to inspect fully the Returned Property prior to the close of escrow and investigate all matters relevant thereto and to rely solely upon the results of City's own inspections or other information obtained or otherwise available to City with respect thereto, rather than any information that may have been provided by Developer to City. City's acceptance of the quitclaim deed for the Returned Property shall constitute its irrevocable declaration that it has fully inspected the Returned Property, or has been given a reasonable opportunity to do so, and that it is fully satisfied with every aspect of the Returned Property. Nothing in this Section shall limit the obligations of Developer or Responsible Developer pursuant to Section 16.6.2.

16.6.4 **Waiver of Certain Matters.** Developer hereby (a) acknowledges that it has reviewed and understands the implications of each of the following sections of the California Code of Civil Procedure and (b) agrees that the City may exercise any and all of the rights contained in this Article 16 without such exercise constituting an "action" under any of Sections 580a, 580b, 580d, or 726 of the Code of Civil Procedure or any case interpreting any of said Sections or any doctrine or defense based in whole or in part on such sections of the Code of Civil Procedure and Developer hereby waives its right to assert and agrees not to assert any position or defense based in whole or in part upon such sections of the Code of Civil Procedure and hereby waives any benefit of such sections of the Code of Civil Procedure as might otherwise apply.

16.6.5 **Release.** Effective as of the close of escrow with respect to the Returned Property and except as provided in Section 16.6.2 and the City Reserved Claims, City shall, on behalf of itself and each Successor Owner and every Person claiming by, through or under City or any Successor Owner (each, including the City, a "**City Releasing Party**"), waive the right of each City Releasing Party to recover from, and fully and irrevocably release, Developer and its employees, agents, attorneys, affiliates, representatives, consultants, contractors, successors and assigns (individually, a "**Developer Released Party**" and collectively, the "**Developer Released Parties**") from any and all Claims that City or any City Releasing Party may now have or hereafter suffer arising from or related to the Returned Property, whether known or unknown by any City Releasing Party or any Developer Released Party, including: (i) any condition of the Returned Property or any existing Improvements or future improvements thereon, known or unknown by

any City Releasing Party or any Developer Released Party, including as to the extent or effect of any grading of the Returned Property; (ii) any construction defects, errors, omissions or other conditions, latent or otherwise; (iii) economic and legal conditions on or affecting the Returned Property, or any Improvements thereon; (iv) Environmental Matters, including the existence, Release, threatened Release, presence, storage, treatment, transportation or disposal of any Hazardous Materials at any time on, in, under, or from, the Returned Property or any current or future improvement thereon or any portion thereof; (v) Claims of or acts or omission to act of any Governmental Authority or any other third party arising from or related to any actual, threatened, or suspected Release of a Hazardous Material on, in, under, or from or about the Returned Property or any current or future improvement thereon, including any Investigation or Remediation at or about the Returned Property or any current or future improvements thereon; and/or (vi) arising from the Tustin Legacy Backbone Infrastructure Program, any District or the cost or extent thereof with respect to the Returned Property, or the amount of the Project Fair Share Contribution or any assessments with respect to District affecting the Returned Property described in this Agreement not owing as of the date of the transfer. The foregoing release shall not extend to any City Reserved Claims. Notwithstanding the foregoing, except as specifically set forth in this sentence, all City Reserved Claims shall automatically be included within the matters released under this Section effective upon the transfer or conveyance of the Returned Property (or a portion thereof), to a third party (as to the portion of the Returned Property conveyed); provided that Developer shall specifically not be released with respect to the City Reserved Claims specified in Section 16.6.2(i) and (iv), and Section 16.6.3(b) and (e). This release includes Claims with respect to the foregoing released matters of which City is presently unaware or which City does not presently suspect to exist (and which at the time of the close of escrow for the Returned Property the City may be unaware or which the City may not then suspect to exist) which, if known by City, would materially affect City's release of the Developer Released Parties. Effective as of the close of escrow for the Returned Property, with respect to the foregoing matters (and specifically excluding the City Reserved Claims), City specifically waives the provision of California Civil Code Section 1542, 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.”

In this connection, City, on behalf of itself, and the other City Releasing Parties hereby agrees, that (x) it realizes and acknowledges that factual matters now unknown to it may have given or may hereafter give rise to Claims or controversies which are presently unknown, unanticipated and unsuspected; (y) the waivers and releases in this Section 16.6.5 have been negotiated and agreed upon in light of that realization, and (z) City, on behalf of itself and the other City Releasing Parties, nevertheless hereby intends to release, discharge and acquit the Developer Released Parties from any such unknown Claims and controversies to the extent set forth above. To the extent permitted by law, the foregoing provisions of this Section 16.6.5 shall survive the close of

escrow for the Returned Property and the termination of this Agreement and shall not be merged with any quitclaim deed.

16.6.6 **City Responsibility in Sale to Third Party.** City agrees to cause Developer to be included as a benefited party under all release and indemnity provisions with respect to the Returned Property and any Improvements thereon which are contained in any agreement between the City and the third party transferee relating to the conveyance or transfer of the Returned Property or portion thereof, to the same extent as the City is released and/or indemnified by such third party transferee.

16.7 **Cooperation of Developer.**

If the City exercises its Right of Purchase or Right of Reversion in accordance with the provisions of this Agreement, Developer shall use all reasonable efforts to take, or cause to be taken, all actions and to do, or cause to be done, all things reasonably necessary or desirable under applicable law to consummate the repurchase of the Repurchased Property or reversion of the Reacquired Property, as the case may be, including the execution and delivery of such other documents, certificates, agreements, deeds and other writings and the taking of such other actions as may be reasonably necessary to consummate such transactions.

17. **General Provisions.**

17.1 **Applicable Law; Consent to Jurisdiction; Service of Process.**

This Agreement shall be governed by, interpreted under, construed and enforced in accordance with the laws of the State, irrespective of California's choice-of-law principles. Developer and the City agree that any disputes arising between them in connection with this Agreement or in connection with or under any instrument, agreement or document provided for or contemplated by this Agreement, including in connection with the execution of this Agreement, the Close of Escrow or any other matter arising under, related to or in connection with this Agreement (including a determination of any and all issues in such dispute, whether of fact or of law) shall be tried and litigated exclusively in the Superior Court of the County of Orange in the State, in any other appropriate court of that county, or in the United States District Court for the Central District of California. This choice of venue is intended by Developer and the City to be mandatory and not permissive in nature, thereby precluding the possibility of litigation between or among Developer and the City with respect to or arising out of or related to this Agreement in any jurisdiction other than that specified in this Section 17.1. Each Party hereby waives any right that it may have to assert forum non conveniens or similar doctrine or to object to venue with respect to any proceeding brought in accordance with this Section 17.1 and stipulates that the State and federal courts located in the County of Orange, in the State, shall have in personam jurisdiction and venue over each of them for the purpose of litigating any dispute, controversy or proceeding arising out of or related to this Agreement. Each Party hereby authorizes and accepts service of process sufficient for personal jurisdiction in any action against it as contemplated by this Section 17.1 by means of registered or certified mail, return receipt requested, postage prepaid, to its address for the giving of notices as set forth in this Agreement, or in the manner set forth in Section 17.6 (a) or (c) of this Agreement pertaining to notice. Any final judgment rendered against

a Party in any Action shall be conclusive as to the subject of such final judgment and may be enforced in other jurisdictions in any manner provided by law.

### 17.2 **Legal Fees and Costs.**

If any Party to this Agreement institutes any action, suit, proceeding, counterclaim or other proceeding for any relief against another Party, declaratory or otherwise (collectively an “**Action**”), to enforce the terms hereof or to declare rights under this Agreement or with respect to any inaccuracies or material omissions in connection with any of the covenants, representations, warranties or obligations on the part of the other Party to this Agreement, then the Prevailing Party in such Action shall be entitled to have and recover of and from the other Party all costs and expenses of the Action, including (a) the Prevailing Party's reasonable attorneys' fees (which shall be payable at the contractual hourly rate for City's litigation counsel at the time the fees were incurred, but in no event more than \$200.00 per hour with this rate being used to calculate the attorneys' fees to be recovered by the Prevailing Party (defined below) regardless of whether the City or another Person is the Prevailing Party), and (b) costs actually incurred in bringing and prosecuting such Action and/or enforcing any judgment, order, ruling or award (collectively, a “**Decision**”) granted therein, all of which shall be deemed to have accrued on the commencement of such Action and shall be paid whether or not such Action is prosecuted to a Decision. Any Decision entered in any final judgment shall contain a specific provision providing for the recovery of all costs and expenses of suit, including reasonable attorneys' fees and expert fees and costs (collectively “**Costs**”) incurred in enforcing, perfecting and executing such judgment. For the purposes of this paragraph, Costs shall include in addition to Costs incurred in prosecution or defense of the underlying action, reasonable attorneys' fees, costs, expenses and expert fees and costs incurred in the following: (i) post judgment motions and collection actions; (ii) contempt proceedings; (iii) garnishment, levy, debtor and third party examinations; (iv) discovery; (v) bankruptcy litigation; and (vi) appeals of any order or judgment. “**Prevailing Party**” within the meaning of this Section 17.2 includes a Party who agrees to dismiss an Action in consideration for the other Party's payment of the amounts allegedly due or performance of the covenants allegedly breached or obtains from a court of competent jurisdiction substantially the relief sought by such Party.

### 17.3 **Memorandum of DDA; Modifications or Amendments.**

The Parties shall cause the Memorandum of DDA to be Recorded concurrently with the Close of Escrow. No amendment, change, modification or supplement to this Agreement shall be valid and binding on any of the Parties unless it is represented in writing and signed by each of the Parties hereto. Except with respect to changes to Attachments 1, 2, 13A and 27, changes to Attachment 25 that reduce or delay the City's participation payments, and/or changes to Attachment 7 that extend the date of Completion of the Improvements by more than six (6) months, each of which shall require consent of the City Council, the Parties (with the City Manager or his or her designee having delegated authority to act on behalf of the City) may by mutual written agreement (in the Parties' sole and absolute discretion) update and substitute any updated Attachment for the Attachment attached hereto as of the Effective Date, and such substitution shall be deemed an administrative amendment of this Agreement and shall not require Recording of an

amendment of the Memorandum of DDA. The provisions of this Section do not modify or supersede the retention of authority set forth in Section 17.11.3.

17.4 **Further Assurances.**

Each of the Parties hereto shall execute and deliver at their own cost and expense, any and all additional papers, documents, or instruments, and shall do any and all acts and things reasonably necessary or appropriate in connection with the performance of its obligations under this Agreement in order to carry out the intent and purposes of this Agreement.

17.5 **Rights and Remedies Are Cumulative; Limitation on Damages.**

17.5.1 **Cumulative Remedies.** Except with respect to the rights and remedies expressly declared to be exclusive in this Agreement or the Other Agreements, the rights and remedies of the Parties are cumulative, and the exercise by either Party of one or more such rights or remedies shall not preclude the exercise by it, at the same or different times, of any other rights or remedies for the same Material Default or any other Material Default by the other Party. Except as otherwise specifically set forth in this Agreement, and subject to Section 17.5.2, wherever a Party has a right to damages for the Material Default of another Party (a) such damages shall be limited to direct (actual) damages for the Material Default of the other Party, and (b) each of the Parties, on behalf of itself and its successors and assigns, hereby expressly waives, releases and relinquishes any and all right to any lost profits, incidental, special, collateral, expectation, anticipation, indirect, consequential, exemplary or punitive damages or losses (it being understood that consequential or punitive damages owed by such Party to a third party shall constitute direct actual damages or losses of such Party).

17.5.2 **Limitation on Damages Payable by the City.** Developer acknowledges that the City would not have entered into this Agreement if the City could become liable for significant damages under or with respect to this Agreement and the Other Agreements. Consequently, and notwithstanding any other provision of this Agreement, except for (a) the monetary damages that may arise from the City's obligations referenced below in Section 17.5.3, and (b) the payment of attorneys' fees in accordance with Section 17.2 and court costs, the City shall not be liable in damages under this Agreement or any Other Agreement to Developer or to any Successor Owner and Developer, on behalf of itself and each Successor Owner and each and every Person claiming by, through or under Developer or any Successor Owner hereby waives any and all rights to claim damages of any kind or nature from the City except as set forth in Section 17.5.3.

17.5.3 **Special Circumstances Where Damages may be Payable by the City.** Subject to Section 17.5.1, the limitations on damages set forth in Section 17.5.2 shall not preclude Developer from seeking (a) payment of amounts, if any, which the City is obligated to pay to Developer or Escrow Holder pursuant to Sections 1.8.3, 7.4.1, 7.4.4, 14.2.4, 14.3.2, 15.1.3, 15.3.3, 15.3.6, 15.4 or 17.2 of this Agreement, provided that (i) the provisions of Section 17.5.1 shall apply to such claims and payments, and (ii) Developer shall not be entitled to any damages in addition to the actual amounts owed by City to Developer pursuant to this Agreement or the Other Agreements, or (b) damages which arise out of a breach of the City's representations and

warranties contained in Sections 3.3 or 17.12.2 of this Agreement, provided that the amount of any damages payable pursuant to this clause (b) shall be the lesser of (i) actual damages, or (ii) Five Hundred Thousand Dollars (\$500,000.00) or (c) the exercise of any of the rights reserved to the City pursuant to Section 1.2.2(a) or (b) and as the same shall be included in the Quitclaim Deed.

17.5.4 **Right to Specific Performance.** In the event the City is in Material Default following the Close of Escrow, Developer shall be entitled to seek specific performance or injunctive relief in order to enforce Developer's rights pursuant to this Agreement. For purposes of clarity, in the event that the City is obligated to pay any amounts to Developer pursuant to this Agreement, and the City fails to pay such amounts to Developer as and when required by this Agreement, Developer shall be entitled to seek specific performance of such obligation, notwithstanding the other provisions of this Section 17.5.

17.6 **Notices, Demands and Communications between the Parties.**

All notices, demands, consents, requests and other communications required or permitted to be given under this Agreement shall be in writing and shall be deemed conclusively to have been duly given (a) when hand delivered to the other Party; (b) three (3) Business Days after such notice has been sent by U.S. Postal Service via certified mail, return receipt requested, postage prepaid, and addressed to the other Party as set forth below; (c) the next Business Day after such notice has been deposited with an overnight delivery service reasonably approved by the Parties (Federal Express, Overnight Express, United Parcel Service and U.S. Postal Service are deemed approved by the Parties), postage prepaid, addressed to the Party to whom notice is being sent as set forth below with next-business-day delivery guaranteed, provided that the sending Party receives a confirmation of delivery from the delivery service provider; or (d) when transmitted if sent by facsimile transmission or email to the fax number or email address set forth below; provided that notices given by facsimile or email shall not be effective unless either (i) a duplicate copy of such notice is promptly sent by any method permitted under this Section 17.6 other than by facsimile or email (provided that the recipient Party need not receive such duplicate copy prior to any deadline set forth herein); or (ii) the receiving Party delivers a written confirmation of receipt for such notice either by facsimile, email or any other method permitted under this Section. Any notice given by facsimile or email shall be deemed received on the next Business Day if such notice is received after 5:00 p.m. (recipient's time) or on a non-Business Day. Unless otherwise provided in writing, all notices with respect to this Agreement shall be addressed as follows:

City:

City of Tustin  
Attn: Matthew S. West, City Manager  
300 Centennial Way  
Tustin, CA 92780  
Fax: 714-838-1602  
Email: [mwest@tustinca.org](mailto:mwest@tustinca.org)

With a copy to:

Director of Economic Development  
City of Tustin  
300 Centennial Way  
Tustin, CA 92780

Attn: John Buchanan  
Email: [jbuchanan@tustinca.org](mailto:jbuchanan@tustinca.org)

With a copy to:

Woodruff Spradlin & Smart, APC  
Attn: David Kendig, Esq., City Attorney  
555 Anton Boulevard, #1200  
Costa Mesa, CA 92626  
Fax: (714) 415-1183  
Email: [dkendig@wss-law.com](mailto:dkendig@wss-law.com)

And with a copy to:

Armbruster Goldsmith & Delvac LLP  
Attn: Amy E. Freilich, Esq., Special Counsel  
12100 Wilshire Boulevard, Suite 1600  
Los Angeles, CA 90025  
Fax: (310) 209-8801  
Email: [amy@agd-landuse.com](mailto:amy@agd-landuse.com)

Developer:

Brookfield Homes Southern California LLC  
3200 Park Center Drive, Suite 1000  
Costa Mesa, California 92626  
Attn: Nicole Burdette, Senior Vice President  
Email: [Nicole.Burdette@brookfieldrp.com](mailto:Nicole.Burdette@brookfieldrp.com)

With a copy to:

Songstad Randall Coffee & Humphrey LLP  
3200 Park Center Drive, Suite 950  
Costa Mesa, California 92626  
Attn: Timothy L. Randall  
Email: [trandall@sr-firm.com](mailto:trandall@sr-firm.com)

Any Party may by written notice to the other Party in the manner specified in this Agreement change the address to which notices to such Party shall be delivered.

#### 17.7 **Delay.**

17.7.1 **Definition of Force Majeure Delay.** “Force Majeure Delay” shall mean the occurrence of any of the following events when such event is beyond the control of the First Party and such Party’s officers, directors, employees, contractors, consultants, agents and representatives and is not due to an act or omission of such Party or its officers, directors, employees, contractors, consultants, agents or representatives or other Person for whom such Party may be contractually or legally responsible, which directly, materially and adversely affects the ability of the First Party to meet its non-monetary obligations under this Agreement, including the deadlines imposed by the Schedule of Performance, or the ability of Developer to Complete the Project, and which events (or the effect of which events) could not have been avoided by due diligence and use of commercially reasonable efforts by the Party claiming Force Majeure Delay:

(a) Civil Unrest. An epidemic, blockade, quarantine, rebellion, war, insurrection, act of terrorism, strike or lock-out, riot, act of sabotage, civil commotion, act of a public enemy, freight embargo, or lack of transportation;

(b) Unforeseeable Conditions. Reasonably unforeseeable physical condition of the Development Property including the presence of Hazardous Materials;

(c) Casualty. Fire, earthquake or other casualty, including liquefaction resulting from an earthquake, in each case only if causing material physical destruction or damage on the Development Property;

(d) Litigation. Any lawsuit seeking to restrain, enjoin, challenge or delay any issuance of any of the Entitlements or seeking to restrain, enjoin, challenge, or delay construction of the Project, which is defended by the First Party;

(e) Change of Law. The passage of a referendum or initiative that results in the inability of such Party to perform its material obligations under this Agreement; provided that the foregoing shall not apply to a Party's performance regarding the Close of Escrow, which are governed by Articles 7 and 15;

(f) Weather. Unusually severe weather conditions not reasonably anticipatable for the City of Tustin, based upon U.S. Weather Bureau climatological reports for the months included plus a report indicating average precipitation, temperature, etc. for the last ten (10) years from the nearest reporting station.

(g) City Improvements. With respect to construction and approval by third parties of the City Improvements or any portion thereof only, (i) challenge, protest or other third party claim that delays or restricts the City's issuance of requests for bids or awarding of contract for the City Improvements, the City's processing of requested change orders or the City's ability to prosecute work under an awarded contract to completion or other matters that affect the ability of the City to deliver the Initial City Improvements prior to the Outside Date for the Close of Escrow or to delivery any other portion of the City Improvements prior to the date established for City's good faith effort to deliver such improvements in the Schedule of Performance, or (ii) any action or failure to act by a third party, including IRWD, SCE or any Governmental Authority or Developer's Representative, that affects the ability of the City to deliver the Initial City Improvements prior to the Closing Date or Outside Date or to deliver any other portion of the City Improvements prior to the date established for City's good faith effort to deliver such improvements in the Schedule of Performance.

17.7.2 Limitation. The term "**Force Majeure Delay**" shall be limited to the matters listed Section 17.7.1 and specifically excludes from its definition the following matters which might otherwise be considered Force Majeure Delay:

(a) Entitlements. The suspension, termination, interruption, denial or failure to obtain or nonrenewal of any of the Entitlements, permits, including Development Permits, license, consent, authorization or approval which is necessary for the development of the

Project, except for any such matter resulting from a lawsuit or referendum as described in Section 17.7.1(d) or (e);

(b) Foreseeable Changes in Governmental Requirements. Any change in Governmental Requirements which was proposed or was otherwise reasonably foreseeable at the Effective Date;

(c) Failure to Perform Obligations. Failure of Developer or any Successor Owner or other Person to perform any obligation to be performed by Developer or any Successor Owner or such other Person under this Agreement as the result of adverse changes in the financial condition of Developer or such Successor Owner or other Person, as applicable;

(d) Failure to Provide Financial Security. Failure of Developer or any Successor Owner to provide financial security required by this Agreement when due or to submit evidence of financing of the Project or failure to perform any obligation to be performed by Developer or any Successor Owner or other Person under this Agreement as the result of adverse changes in market conditions;

(e) Failure to Submit Required Documentation. Failure of the First Party to submit documentation as and when required by this Agreement;

(f) Failure to Submit Basic Concept Plan or Other Plans and Entitlements. Failure to submit a Basic Concept Plan and Design Review submittals, and/or submittals for other Entitlements required for construction of the Improvements and/or development of the Project on the Development Property when required pursuant to this Agreement, including the Schedule of Performance;

(g) Failure to Maintain Required Insurance. Failure to acquire, maintain and submit evidence of insurance policies as required by Article 11;

(h) Failure to Execute Documents. Failure of the First Party to execute documents; and

(i) Other Matters. All other matters not caused by the Second Party and not listed in Section 17.7.1(a) through (f).

17.7.3 **Procedure**. If any Party (“**First Party**”) believes that it is entitled to an extension of time due to Force Majeure Delay, it shall notify the other Party (“**Second Party**”) in writing within ninety (90) calendar days from the date upon which the First Party becomes aware of such Force Majeure Delay, generally describing the Force Majeure Delay and its date of commencement. Upon written request from the Second Party, the First Party shall promptly provide the following information with respect to such Force Majeure Delay: a more detailed description of the Force Majeure Delay, when and how the First Party obtained knowledge thereof, the date the event commenced, the steps the First Party anticipates taking to respond to such Force Majeure Delay, and the estimated delay resulting from such Force Majeure Delay and response, and such other information as the Second Party may reasonably request. The extension for Force Majeure Delay shall be granted or denied in the Second Party’s sole discretion. If the First Party

fails to notify the Second Party in writing of its request for a given Force Majeure Delay within the ninety (90) calendar days specified above, there shall be no extension for such Force Majeure Delay.

17.7.4 **Extension of Time Periods.** Except as otherwise specifically set forth in this Agreement, all time periods under this Agreement, including the Schedule of Performance and the dates provided in Section 16.4 relating to non-monetary obligations under this Agreement shall be extended for Force Majeure Delay in accordance with this Section 17.7, such that no Party shall be in default for an excused Force Majeure Delay.

17.7.5 **Not Applicable to Reversion Action Trigger Dates.** Except as set forth in Section 16.4.1, the Reversion Action Trigger Dates shall not be extended for Force Majeure Delay.

17.8 **Conflict of Interest.**

No appointed or elected official or employee of the City shall have any personal interest, direct or indirect, in this Agreement nor shall any official or employee participate in any decision relating to this Agreement which affects his interests or the interests of any corporation, partnership, or association in which he or she is directly or indirectly interested.

17.9 **Non-liability of City Officials and City or Developer Employees.**

No elected or appointed official, representative, employee, agent, consultant, legal counsel or employee of the City shall be personally liable to Developer, any successor or assign of Developer or any Successor Owner of the foregoing in the event of any Default or breach by the City for any amount which may become due to Developer or such successors, assigns or Successor Owners on any obligation under the terms of this Agreement. No representative, agent, consultant, legal counsel or employee of Developer shall be personally liable to the City or any Successor Owner of the City in the event of any Default or breach by Developer for any amount which may become due to the City or any Successor Owner of the City or on any obligation under the terms of this Agreement.

17.10 **Inspection of Books and Records.**

The City shall have the right at all reasonable times, upon ten (10) calendar days written notice, to inspect the books and records of Developer pertaining to the Project, the Property, the Improvements, the License Areas and the areas subject to any encroachment permit as pertinent to the purposes of this Agreement.

17.11 **Consents and Approvals.**

17.11.1 **Consent.** In any instance in which a Party shall be requested to consent to or approve of any matter with respect to which such Party's consent or approval is required by any of the provisions of this Agreement, such consent or approval shall be given in writing. In addition, whenever not expressly otherwise stated: (a) the City when acting in its Governmental Capacity shall be permitted to utilize its sole discretion with respect to matters requiring its

approval except as otherwise specified in any applicable Governmental Requirements; (b) the City when acting in its Proprietary Capacity shall not unreasonably withhold, condition or delay its approvals with respect to matters requiring its approval under this Agreement; and (c) Developer shall not unreasonably withhold, delay or condition its consent with respect to matters requiring its approval under this Agreement.

17.11.2 **Deemed Submitted.** Any matter required by this Agreement to be submitted to the City shall be deemed submitted upon the submittal to the City Manager or designee.

17.11.3 **Action Taken.** Following its approval by the City, this Agreement shall be administered by any designee of the City Manager or the City Manager. Except where the terms of this Agreement expressly require the approval of a matter or the taking of any action by the City Council, any matter to be approved by the City shall be deemed approved, and any action to be taken by the City shall be deemed taken, upon the written approval by the City Manager (or designee). The City Manager or designee shall have the authority to issue interpretations with respect to this Agreement and to determine whether any action requires the approval of the City Council. All amendments or modifications of this Agreement shall require the approval of the City Council. All waivers and extensions of time for performance under this Agreement shall be approved by the City Manager (or designee) unless in the City Attorney's opinion such action requires a waiver to be approved by the City Council under applicable law.

17.12 **No Real Estate Commissions.**

17.12.1 **Developer Representation and Indemnity.** The City shall not be liable for any real estate commissions, brokerage fees or finder's fees which may arise from this Agreement. Developer represents that it has engaged no broker, agent or finder in connection with this Agreement or the transactions identified in this Agreement or the Other Agreements, other than disclosed to City in writing prior to the Effective Date. Developer, on behalf of itself, and its successors and assigns under this Agreement, each Successor Owner and each and every Person claiming by, through or under Developer or any Successor Owner but excluding End Users hereby agrees to indemnify and hold the City and its elected and appointed officials, employees and representatives harmless from any losses and liabilities arising from or in any way related to any claim by any broker, agent, or finder retained by Developer regarding this Agreement or the Other Agreements or for sale, leasing or development of the Project or the transactions identified in this Agreement or the Other Agreements.

17.12.2 **City Representation and Indemnity.** The City represents that it has engaged no broker, agent, or finder in connection with this Agreement or the transactions identified in this Agreement or the Other Agreements.

17.12.3 **Survival.** The indemnity set forth in Section 17.12.1 shall survive the termination of this Agreement.

**17.13 Date and Delivery of Agreement.**

Notwithstanding anything to the contrary contained in this Agreement, the Parties intend that this Agreement shall be deemed effective, executed and delivered for all purposes under this Agreement and for the calculation of any statutory time periods based on the date an agreement between the Parties is effective, executed and/or delivered, as of the Effective Date.

**17.14 Constructive Notice and Acceptance.**

Every Successor Owner and each and every Person claiming by, through or under Developer or any Successor Owner is and shall be conclusively deemed to have consented and agreed to every provision contained herein, whether or not any reference to this Agreement is contained in the instrument by which such Person acquired an interest in the Project or Property.

**17.15 Survival of Covenants, Representation and Warranties.**

**17.15.1 Runs with the Land.** The covenants, representations, warranties, and indemnities specified in this Agreement shall survive any investigation made by any Party hereto and the closing of the transactions contemplated hereby until the termination of this Agreement. This Agreement and the covenants, representations, warranties, releases and indemnities specified herein shall run with the Property, and except as provided herein, be binding upon all Successor Owners, unless and until terminated in accordance with the terms of this Agreement. Notwithstanding anything contained in this Agreement to the contrary, except for the express provisions contained in the Quitclaim Deed, the Memorandum of DDA, the Special Restrictions, the Landscape and Water Treatment Installation and Maintenance Agreement, or the CC&Rs, this Agreement and the obligations, covenants, conditions and restrictions set forth herein shall not run with that portion of the Property Transferred to an End User, and each End User shall take title to that portion of the Property conveyed to it free and clear of the lien or charge of this Agreement or any of the obligations, covenants, conditions and restrictions set forth herein.

**17.15.2 Rights of the City to Enforce.** The City is the beneficiary of the terms and provisions of this Agreement and of the covenants running with the land, for and in its own right and for the purposes of protecting the interests of the community and other parties, public or private, in whose favor and for whose benefit this Agreement and the covenants running with the land have been provided, without regard to whether the City has been, remains or is an owner of any land or interest in the Property, the Development Parcels or in the Project. The City shall have the right, if this Agreement or any covenants herein are breached, to exercise all rights and remedies, and to maintain any actions or suits at law or in equity or other proper proceedings to enforce the curing of such breaches to which it or any other beneficiaries of this Agreement and any covenants may be entitled. For avoidance of doubt, the provisions of this Section 17.15.2 shall be included in the Quitclaim Deed and the Special Restrictions and shall apply with respect to all covenants, representations, warranties, releases and indemnities included therein.

**17.16 Construction and Interpretation of Agreement.**

17.16.1 **Construction.** The language in all parts of this Agreement shall in all cases be construed simply, as a whole and in accordance with its fair meaning and not strictly for or against any Party. The Parties hereto acknowledge and agree that this Agreement has been prepared jointly by the Parties and has been the subject of arm's length and careful negotiation over a considerable period of time, that each Party has been given the opportunity to independently review this Agreement with legal counsel, and that each Party has the requisite experience and sophistication to understand, interpret, and agree to the particular language of the provisions hereof. Accordingly, in the event of an ambiguity in or dispute regarding the interpretation of this Agreement, this Agreement shall not be interpreted or construed against the Party preparing it. The provisions of California Civil Code Section 1654 are specifically waived by each Party hereto.

17.16.2 **Effect of Invalidity or Unenforceability.** If any term or provision of this Agreement, the deletion of which would not adversely affect the receipt of any material benefit by any Party under this Agreement, shall be held by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Agreement shall not be affected thereby and each other term and provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law. It is the intention of the Parties hereto that in lieu of each clause or provision of this Agreement that is illegal, invalid, or unenforceable, there be added as a part of this Agreement an enforceable clause or provision as similar in terms to such illegal, invalid, or unenforceable clause or provision as may be possible.

17.16.3 **Captions.** The captions of the articles, sections and clauses in this Agreement are inserted solely for convenience and under no circumstances are they or any of them to be treated or construed as part of this instrument.

17.16.4 **Gender, Singular and Plural.** As used in this Agreement and as the context may require, the singular includes the plural and vice versa and the masculine gender includes the feminine and vice versa.

**17.17 Time of Essence.**

Time is of the essence with respect to all provisions of this Agreement in which a definite time for performance is specified; provided that the foregoing shall not be construed to limit or deprive a Party of the benefits of any cure period or Force Majeure Delay expressly provided for in this Agreement.

**17.18 Fees and Other Expenses.**

Except as otherwise provided in this Agreement, each of the Parties hereto shall pay its own fees and expenses, including attorneys' fees, experts' fees and consultants' fees and costs, in connection with negotiation and preparation of this Agreement and compliance with its terms.

**17.19 No Partnership.**

Nothing contained in this Agreement shall be deemed or construed to create a partnership, joint venture or any other relationship between the Parties hereto other than purchaser and seller according to the provisions contained in this Agreement or cause the City to be responsible in any way for the debts or obligations of Developer.

**17.20 Binding Effect.**

This Agreement and terms, provisions, promises, covenants, conditions and restrictions contained herein shall be binding upon and shall inure to the benefit of the Parties hereto and their respective heirs, legal representatives, successors and assigns.

**17.21 No Third-Party Beneficiaries.**

This Agreement has been made and entered into solely for the benefit of the Parties to this Agreement and their respective successors and permitted assigns. Nothing in this Agreement confers any rights or remedies on any other Person. Nothing in this Agreement relieves or discharges the obligation or liability of any third Persons to any Parties to this Agreement.

**17.22 Counterparts.**

This Agreement may be executed in two or more separate counterparts, each of which, when so executed, shall be deemed to be an original. Such counterparts shall, together, constitute and shall be one and the same instrument. This Agreement shall not be effective until the execution and delivery by the Parties of at least one set of counterparts. The Parties agree to recognize execution of this Agreement by facsimile or other electronically transmitted signatures; provided that such execution by facsimile or electronic transmission shall not be effective unless a manually executed copy of the signature page is promptly sent by U.S. Postal Service, postage prepaid or overnight delivery service or is hand delivered to the Parties or Escrow Holder pursuant to Section 4.4. The Parties hereby authorize each other (and Escrow Holder) to detach and combine original signature pages and consolidate them into a single identical original. Any one of such completely executed counterparts shall be sufficient proof of this Agreement.

**17.23 Duplicate Originals, Entire Agreement and Waivers.**

**17.23.1 Duplicate Originals.** This Agreement is executed in three (3) duplicate originals, each of which is deemed to be an original.

**17.23.2 Entire Agreement.** This Agreement, including the Attachments hereto, together with the Other Agreements, constitute the entire agreement between the Parties with respect to the subject matter hereof. Except as set forth in the last sentence of this Section 17.23.2, this Agreement and the Other Agreements supersede and replace any and all prior agreements, proposed agreements, negotiations and communications, oral or written, relating to the subject matter hereof and contain the entire agreement between the Parties as to the subject matter hereof and any and all prior agreements, understandings or representations between the Parties and/or any Developer Affiliate are hereby terminated and canceled in their entirety. Each Party hereby acknowledges that no other Party hereto, nor its agents or attorneys, have made any promises, representations or warranties whatsoever, expressed or implied, not contained in this Agreement

or the Other Agreements, to induce such Party to execute this Agreement, and each Party acknowledges that it has not executed this Agreement in reliance on any such promise, representation or warranty not contained in this Agreement or any Other Agreements. For the avoidance of doubt, this Agreement shall terminate and supersede the ENA, except that this Agreement does not supersede Sections 3.5, 3.6, 4.3.3, 4.3.4, 4.3.5, 4.3.6, 4.5.2, 4.5.3, 4.5.4, 6.9.3, 10.2, 10.4, 10.6, 10.11 and 10.12 of the ENA which shall remain in effect with respect to claims arising during or related to the term of the ENA.

17.23.3 **No Waiver.** No waiver of any provision or consent to any action under this Agreement shall constitute a waiver of any other provision or consent to any other action, whether or not similar. No waiver or consent shall constitute a continuing waiver or consent or commit a Party to provide a waiver in the future except to the extent specifically set forth in writing. All waivers of the provisions of this Agreement must be in writing and signed by the appropriate authorities for the City and Developer and all amendments hereto must be in writing and signed by the appropriate authorities of the City and Developer.

#### 17.24 **Confidentiality.**

17.24.1 **Public Records Act.** Subject to the provisions of the California Public Records Act (Government Code Section 6250 *et seq.*) (“**Public Records Act**”), which governs the City’s use and disclosure of its agreements and records, the City and Developer hereby agree that each shall keep confidential information provided by the other and denominated as confidential and will not disclose any such information to any Person without obtaining the prior written consent of the other Party, except that (a) the City shall have the right to disclose any information contained in any third party reports produced or obtained by Developer and required to be disclosed by it pursuant to law, (b) Developer shall have the right to disclose any Developer Excluded Information, (c) the City shall have the right to disclose any City Excluded Information, (d) Developer shall have the right to disclose to its consultants, members, and their respective consultants and members, any information to the extent necessary or desirable in connection with Developer’s due diligence on the Development Areas and performance of its obligations under this Agreement and the Other Agreements, (e) City shall have the right to disclose to its officials, employees and the City retained consultants, attorneys and representatives all information received by it from Developer as required to perform its obligations under this Agreement and the Other Agreements, and (f) either Party shall have the right to disclose any information to the extent that it is legally required or compelled to do so provided that (to the extent permitted) it provides the other Party with prior notice of such disclosure obligation and cooperates with such other Party (at no cost or liability to the cooperating Party) in any attempts to obtain confidential treatment of such disclosed information. Developer’s obligations pursuant to this Section 17.24 shall terminate upon the earlier of (i) termination of this Agreement, (ii) the Close of Escrow or (iii) if the Close of Escrow has not then occurred, the Outside Closing Date. Except with respect to material described in Section 17.24.2, the City’s obligations pursuant to this Section 17.24 shall terminate upon the earlier of (x) the Close of Escrow or (y) if the Close of Escrow has not then occurred, the Outside Closing Date.

17.24.2 **Financial Information.** Developer shall identify with specificity any submitted financial documents (including equity financing documents and Guarantor information)

which Developer wants the City to maintain as confidential documents and a statement as to why the request is consistent and complies with the provisions of the Public Records Act. The City shall not disseminate such information and shall take all reasonable steps to maintain such confidentiality unless otherwise required by law. The City's staff, agents, negotiators and consultants may review the statements as necessary as long as such parties agree to maintain the confidentiality of such statements.

17.24.3 **Cooperation.** In the event that the City obtains a request pursuant to the provisions of the Public Records Act to disclose any of Developer's information which the City is required to keep confidential pursuant to the terms of this Agreement, the City shall provide Developer with prompt written notice thereof and the City and Developer shall cooperate at Developer's sole cost and expense to seek to avoid disclosure of such matters to the extent legally permissible pursuant to the provisions of the Public Records Act.

17.25 **Proprietary and Governmental Roles; Actions by Parties.**

Except where clearly and expressly provided otherwise in this Agreement, the capacity of the City in this Agreement shall be as owner, lessor, assembler, redeveloper and/or seller of property only ("**Proprietary Capacity**"), and any obligations or restrictions imposed by this Agreement on the City, shall be limited to that capacity and shall not relate to, constitute a waiver of, supersede or otherwise limit or affect the exercise by the City of its governmental authority with respect to any matter related to this Agreement which shall include the regulation and entitlement of the Development Areas pursuant to the Entitlements, Development Permits and/or Governmental Requirements, including enacting laws, inspecting structures, reviewing and issuing permits, and all of the other legislative and administrative or enforcement functions of each pursuant to federal, State or local law ("**Governmental Capacity**"). In addition, nothing in this Agreement shall supersede or waive any discretionary or regulatory approvals required to be obtained from the City under applicable Governmental Requirements.

17.26 **Performance of Acts on Business Days.**

In the event that the final date for payment of any amount or performance of any act under this Agreement falls on a day other than a Business Day, such payment may be made or act performed on the next succeeding Business Day.

*[Signature page follows]*

IN WITNESS WHEREOF, the City and Developer have signed this Agreement as of the date first set forth above.

CITY OF TUSTIN:

Dated: 1/13/2020

By: Matthew S. West  
Matthew S. West  
City Manager

ATTEST:

By: Erica N. Yasuda  
Erica N. Yasuda  
City Clerk

APPROVED AS TO FORM

By: David Kendig  
David Kendig  
City Attorney

Armbruster Goldsmith & Delvac LLP  
Special Real Estate Counsel to the City

By: Amy E. Freilich  
Amy E. Freilich

DEVELOPER:

BROOKFIELD HOMES SOUTHERN CALIFORNIA LLC, a Delaware limited liability company

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

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

IN WITNESS WHEREOF, the City and Developer have signed this Agreement as of the date first set forth above.

CITY OF TUSTIN:

Dated: \_\_\_\_\_

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

Matthew S. West  
City Manager

ATTEST:

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

Erica N. Yasuda  
City Clerk

APPROVED AS TO FORM

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

David Kendig  
City Attorney

Armbruster Goldsmith & Delvac LLP  
Special Real Estate Counsel to the City

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

Amy E. Freilich

DEVELOPER:

BROOKFIELD HOMES SOUTHERN CALIFORNIA LLC, a Delaware limited liability company

By: Nicole B

Name: Nicole Burdette

Title: Senior Vice President

By: Richard T. Whitney

Name: RICHARD T. WHITNEY

Title: Chief Financial Officer

**JOINDER OF ESCROW HOLDER**

The undersigned is joining this Agreement to evidence its agreement to receive, hold and disburse the Purchase Price Deposit in accordance with the terms of this Agreement and otherwise to comply with the escrow instructions set forth in this Agreement.

FIRST AMERICAN TITLE INSURANCE  
COMPANY

By: Alida Rice

Name: Alida Rice for Jeanne Gould

Title: ESCROW