

## ORDINANCE NO. 652

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF CALISTOGA, COUNTY OF NAPA, STATE OF CALIFORNIA, ADOPTING A DEVELOPMENT AGREEMENT (DA 2007-02) FOR THE VINEYARD OAKS SUBDIVISION PROJECT [ZONING ORDINANCE TEXT AMENDMENT (ZO 2008-01), TENTATIVE SUBDIVISION MAP (TTM 2007-02) AND DESIGN REVIEW (DR 2008-01)], A 15-LOT RESIDENTIAL SUBDIVISION LOCATED AT 2400 GRANT STREET AND 1881 MORA AVENUE WITHIN THE "RR", RURAL RESIDENTIAL ZONING DISTRICT. (APNS: 011-010-013 & 014 AND 011-021-002)**

The City Council of the City of Calistoga does hereby ordain as follows:

**SECTION ONE:**

**WHEREAS**, BNK Investments, LLC, on behalf of the property owners (Ira and Lois Carter and 1881 More Avenue LLC.) requests an amendment to the Zoning Ordinance to provide an alternative means for residential projects to satisfy the affordable housing requirements and to subdivide approximately 18 acres of land into 15 single-family lots. The lots are approximately 1 acre in size. The subdivision includes a lot line adjustment with the property to the east along Mora Avenue strictly for utility and emergency vehicle access;

**WHEREAS**, BNK Investments filed an application with the City of Calistoga for the purpose of planning and developing the Project;

**WHEREAS**, the Developers and the City of Calistoga have negotiated and drafted a development agreement for the Project ("Development Agreement");

**WHEREAS**, an environmental assessment, including preparation of an Initial Study, determined that a Mitigated Negative Declaration was necessary to address the environmental impacts associated with the Project;

**WHEREAS**, adoption of this Development Agreement will not result in conflicts with any other appropriate ordinance and to the extent such conflict exists, this resolution is hereby repealed;

**WHEREAS**, the Planning Commission has reviewed and considered this application at its regular meeting on March 12, 2008, May 14, 2008 and May 28, 2008, and prior to taking action on the application, the Commission received written and oral reports by the Staff, and received public testimony. After considering the project, the Commission recommended approval of a Development Agreement based upon findings presented in the Staff Report and subject to conditions of approval;

**WHEREAS**, a public notice of the City Council public hearing of April 15, 2008 and June 3, 2008 for the Draft Initial Study/Mitigated Negative Declaration, Zoning Ordinance Text Amendment, Development Agreement, Tentative Tract Map and Design Review was published in the local newspaper and made available on the City's website;

**WHEREAS**, the City Council has reviewed and considered the application for the Project at its regular meetings on April 15, 2008, June 3, 2008 and June 17, 2008, considered as one of its items of business, this Ordinance to be adopted in accordance with Government Code Section 65090, this Ordinance to be adopted in accordance with Government Code Section 65850, to include the written and oral staff report, proposed findings and comments received from the general public and interested agencies and parties;

**WHEREAS**, the City Council adopted the following findings with the introduction of an Ordinance:

1. The City Council duly adopted Ordinance No. 547 enacting procedures for entering into development agreements.
2. That this Development Agreement is a contract negotiated and entered into voluntarily between the City of Calistoga, the owners of the subject properties (Ira and Lois Carter and 1881 Mora LLC.), and the project applicant (BNK Investments LLC) of the Vineyard Oaks Subdivision.
3. This Agreement furthers the public health, safety and general welfare and is consistent with the General Plan and that there is no applicable specific plan. City and Developer have further determined that the Project is a development for which this Agreement is appropriate. This Agreement will eliminate uncertainty regarding Existing Project Approvals and Subsequent Project Approvals, thereby encouraging planning for, investment in and commitment to development of the Property. Continued use and development of the Property in accordance with this Agreement is anticipated to provide substantial benefits and contribute to the vitality of the City, thereby achieving the goals and purposes for which the Development Agreement Statute was enacted.
4. That this agreement contains conditions and obligations relating to the performance stated in the resolution(s) approving the project.
5. That the project known as Vineyard Oaks Subdivision is a project of significance to the community and upon the community of Calistoga and for that reason a development agreement is a proper use of the City's authority to secure the project benefits for the community.

**SECTION TWO:**

The City Council hereby approves, adopts a Development Agreement for the Vineyard Oaks Subdivision Project as provided in Exhibit A, attached hereto and incorporated herein by reference, and authorizes the Mayor to execute the Development Agreement upon the effective date of this Ordinance. Upon execution of the Development Agreement by all parties, the City Clerk is hereby directed to record the Development Agreement with the Napa County Recorder's Office.

**SECTION THREE:**

If any section or portion of this ordinance is for any reason held to be invalid and/or unconstitutional by a court or competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance.

**SECTION FOUR:**

**THIS ORDINANCE** shall take effect thirty (30) days after its passage and before expiration of fifteen (15) days after its passage, shall be published in accordance with law in a newspaper of general circulation published and circulated in the City of Calistoga.

**THIS ORDINANCE** was introduced with the first reading waived at the City of Calistoga City Council meeting of the 3<sup>rd</sup> day of June 2008, and was passed and adopted at a regular meeting of the Calistoga City Council on the 17<sup>th</sup> day of June 2008, by the following vote:

**AYES: Councilmember Kraus, Councilmember Garcia and Vice Mayor Dunsford**

**NOES: None**

**ABSTAIN: None**


**ABSENT: Councilmember Slusser and Mayor Gingles**

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**MICHAEL DUNSFORD, Vice-Mayor**

**ATTEST:**

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**SUSAN SNEDDON, City Clerk**

Ord 652

RECORDING REQUESTED BY  
AND WHEN RECORDED RETURN TO:

City of Calistoga  
1232 Washington Street  
Calistoga, CA 94515  
Attention: City Clerk

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Space Above This Line Reserved for Recorder's Use  
Exempt from Recording Fee Per Government Code Section 27383

**DEVELOPMENT AGREEMENT**

**BY AND AMONG**

**THE CITY OF CALISTOGA**

**AND**

**BNK LLC, IRA AND LOIS CARTER, AND 1881 MORA LLC.**

**(VINEYARD OAKS SUBDIVISION)**

**JULY 18, 2008**  
**EFFECTIVE DATE**

**CITY OF CALISTOGA, CALIFORNIA**

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## DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT ("*Agreement*") is entered into as of the 17th day of June 2008, by and among BNK LLC, a California limited liability company, Ira Carter, an individual, Lois Carter, an individual, and 1881 Mora LLC, a California limited liability Company, (who are referred to, collectively, in this Agreement herein as "*Developer*"), and the CITY OF CALISTOGA, a California municipal corporation ("*City*"). City and Developer are sometimes referred to in this Agreement as a "*Party*" and collectively as "*Parties*."

### RECITALS

- A. These Recitals use certain terms with initial capital letters that are defined in Article 1 of this Agreement. City and Developer intend to refer to these definitions when the capitalized terms are used in these recitals.
- B. Ira Carter and Lois Carter own in fee title to that certain real property located at 2400 Grant Street (APN 011-010-013, 011-010-014) in the City of Calistoga, County of Napa. 1881 Mora LLC owns that certain real property located at 1881 Mora Avenue (APN 011-021-002) in the City of Calistoga, County of Napa. These parcels are collectively referred to as the Property. The Property is more particularly described in Exhibit A attached to this Agreement and a part of it. BNK, LLC has an option to purchase the Property.
- C. To strengthen the public planning process, encourage private participation in comprehensive planning, make maximum efficient use of resources at the least economic cost to the public, and reduce the economic risk of development, the Legislature of the State of California enacted the Development Agreement Statute, which authorizes City to enter into an agreement with any person having a legal or equitable interest in real property regarding the development of such property.
- D. Pursuant to California Government Code §65865, City has adopted a Development Agreement Ordinance. This Agreement has been processed, considered and executed in accordance with that ordinance.
- E. The City wishes to support the subdivision of the Property and its development with homes. This Project, more particularly described in Exhibit B, will implement the City's General Plan and contribute to the City by providing a high quality residential subdivision and providing benefits beyond those available through regular project exactions.
- F. Prior to approval of this Agreement, City has taken the following actions in connection with the development of the Property:
1. California Environmental Quality Act Review. The environmental impacts of the Project, including the Existing Project Approvals have properly been reviewed and assessed by City pursuant to CEQA. On June 3, 2008, in accordance with the recommendation of City's Planning Commission, the City Council adopted a Mitigated Negative Declaration for the Project, including a Mitigation Monitoring and Reporting Program pursuant to Resolution No. 2008-053. The MMRP is attached as Exhibit C.

## ARTICLE 1. DEFINITIONS

In this Agreement, unless the context requires otherwise:

Section 1.01. "Applicable Law" means the Existing Rules, modified by Subsequently Adopted Rules to the extent permitted by this Agreement and Existing Project Approvals. Provided, Developer may consent to additional applications of Subsequently Adopted Rules without amendment of this Agreement as part of Subsequent Project Approvals.

Section 1.02. "CEQA" means the California Environmental Quality Act, Division 13 of the California Public Resources Code, Sections 21000 and following, and the Guidelines for the California Environmental Quality Act, Title 14 of the California Code of Regulations, Chapter 3, Sections 15000 and following.

Section 1.03. "Annual Review Report" shall mean a report, in the form attached as Exhibit J, filed by the Developer each year to begin the annual compliance review required by the Development Agreement Statute and the City's Development Agreement Ordinance.

Section 1.04. "Development Agreement Ordinance" means Chapter 17.39 of the Calistoga Municipal Code.

Section 1.05. "Development Agreement Statute" means California Government Code Sections 65864 through 65869.5

Section 1.06. "Development Impact Fees" means all fees now or in the future collected by the City from applicants for new development for the funding of public services, infrastructure, improvements or facilities, but not including taxes or assessments, or fees for the processing applications or permits or monitoring compliance with the conditions imposed on the Project. The fees included in this definition include, but are not limited, to those included in Chapters 3.20, 3.28, 17.08, and 17.10. Provided, the school impact fee referenced in Section 17.10.010 of the Calistoga Municipal Code are not Development Impact Fees, in that they are not established or collected by City.

Section 1.07. "Effective Date" is defined in Section 2.01.

Section 1.08. "Existing Rules" means the City ordinances, resolutions, rules, regulations, official policies, standards and specification in existence as of June 17, 2008. A list of Existing Rules applicable to the Project is attached as Exhibit G, but the failure to identify any Existing Rule in Exhibit G shall not affect its applicability to the Project.

Section 1.09. "Existing Project Approvals" means the City approvals set forth in full in Exhibit D.

Section 1.10. "Mitigation Monitoring and Reporting Program ("MMRP")" means the mitigation monitoring and reporting program adopted by the City pursuant to CEQA by Resolution No. 2008-053 and attached as Exhibit C.

Section 1.11. "Property" means that real property described in Exhibit A.

connection therewith, this Agreement shall be deemed terminated and of no further force and effect, subject, however, to the provisions of Section 10.09 of this Agreement. The expiration or termination of this Agreement shall not limit any property rights of the Developer or its successors that may exist independent of this Agreement.

Section 2.03. Developer Representations and Warranties. Developer represents and warrants to City that, as of the Effective Date, Developer is the fee owner of the Property. Developer further represents and warrant that:

A. No approvals or consents of any persons are necessary for the execution, delivery or performance of this Agreement by Developer or City and its respective managing members, except as have been obtained;

B. The execution and delivery of this Agreement and the performance of the obligations of Developer hereunder have been duly authorized by all necessary individual, limited liability company and/or general partnership action, and all necessary member approvals have been obtained; and

C. This Agreement is a valid obligation of Developer and is enforceable in accordance with its terms.

### **ARTICLE 3. DEVELOPMENT OF PROPERTY**

Section 3.01. Vested Rights. The Property is hereby made subject to the provisions of this Agreement. All development of or on the Property, or any portion thereof, shall be undertaken only in compliance with the Existing Project Approvals, Subsequent Project Approvals, Applicable Law and the provisions of this Agreement. Developer shall have a vested right to develop the Property in accordance with the Existing Project Approvals, the Subsequent Project Approvals, Applicable Law and this Agreement. The Project shall be subject to all Subsequent Project Approvals (which, upon final approval, shall be deemed part of the Existing Project Approvals hereunder).

Section 3.02. Applicable Law: Documentation. Applicable Law (defined in Section 1.01) shall apply to the development of the Property during the terms of this Agreement. Parties have prepared two sets of the Project Approvals and Existing Rules, one set for City and one set for Developer, to which shall be added, from time to time, Subsequent Project Approvals, so that if it becomes necessary in the future to refer to any of the Project Approvals or Existing Law, there will be a common set available to the Parties. Failure to include in the sets of Project Approvals and Existing Rules any ordinance, resolution, rule, regulation, official policy, standard or specification shall not affect the applicability of such rule, regulation, policy, standard or specification.

Section 3.03. Reservations of City Authority to Apply Subsequently Adopted Rules.

A. The Parties acknowledge and agree that City is restricted in its authority to limit its police power by contract. The limitations, reservations and exceptions contained in this



(7) Development Impact Fees. Except for those fees specifically described in this Agreement, payment of Development Impact Fees shall be as prescribed by the City's ordinances, resolutions and polices in place as of the effective date of this Agreement. Said fees shall be paid at the rate in place at the time of the effective date of this Agreement.

(8) Consistent Laws. Subsequently Adopted Laws which do not conflict with this Agreement or the Project Approvals, provided that they are not applied in a discriminatory manner against the Project or Property. Conflicting laws are described in Section 3.04 below.

Section 3.04. Conflicting Subsequent Law. A Subsequently Adopted Law shall be deemed to conflict with this Agreement if it would accomplish any of the following results, either by specific reference to the Project or as part of a general enactment which applies to or affects the Project:

- A. Change any land use designation or permitted use of the Property;
- B. Limit or control the availability of public utilities, services or facilities or any privileges or rights to public utilities, services, or facilities (for example, water rights, water connections or sewage capacity rights, sewer connections, etc.) for the Project;
- C. Limit or control the location, configuration or size of lots, buildings, structures, or other improvements of the Project in a manner that is inconsistent with or more restrictive than the limitations included in or imposed by the Project Approvals, Existing Law, or this Agreement;
- D. Limit or control the rate, timing, phasing or sequencing of the approval, development or construction of all or any part of the Project in any manner, except as set forth in this Agreement, Applicable Law or the Project Approvals;
- E. Impose on the Project or Developer any fees or exactions other than those permitted by this Agreement, Existing Law or the Project Approvals.

A conflicting Subsequently Adopted Rule is only applicable to the Project or Property only as provided in the Existing Project Approvals, in Section 3.03 above, or elsewhere in this Agreement.

Section 3.05. Regulation by Other Public Agencies. City and Developer acknowledge and agree that other public agencies not within the control of City possess authority to regulate aspects of the development of the Property separately from or jointly with City, and this Agreement does not limit the authority of such other public agencies. Developer shall, at the time required by Developer in accordance with Developer's construction schedule, apply for all such other permits and approvals as may be required by other governmental entities in connection with the development of, or the provision of services to, the Project. Developer shall also pay all required fees when due to such public agencies. Developer acknowledges that City does not control the amount of any such fees. City shall cooperate with Developer in Developer's effort to obtain such permits and approvals; provided, however, City shall have no

Section 3.10. State and Federal Law. As provided in section 65869.5 of the Development Agreement Statute, this Agreement shall not preclude the applicability to the Project of changes in laws, regulations, plans or policies, to the extent that such changes are specifically mandated and required by changes in State or Federal laws or by changes in laws, regulations, plans or policies of special districts or other governmental entities, other than the City, created or operating pursuant to the laws of the State of California ("Changes in the Law"). In the event Changes in the Law prevent or preclude compliance with one or more provisions of this Agreement, the Parties shall meet and confer in good faith in order to determine whether such provisions of this Agreement shall be modified or suspended, or performance thereof delayed, as may be necessary to comply with Changes in the Law, and City and Developer shall agree to such action as may be reasonably required, but the Parties shall attempt to preserve the original intent of this Agreement to the maximum extent feasible. This Agreement and the Project Approvals shall remain in full force and effect unless and until amended in accordance with the requirements of this Agreement, and, in any event, this Agreement and the Project Approvals shall remain in full force and effect to the extent the same are not inconsistent with such laws or regulations. Nothing in this Agreement shall preclude City or Developer from contesting by any available means (including administrative or judicial proceedings) the applicability to the Project any such Changes in the Law. Notwithstanding the foregoing, if Changes in the Law preclude or substantially limit or delay performance in a manner that makes the Project economically infeasible, the Party adversely affected, in its sole and absolute discretion, may terminate this Agreement by providing written notice of such termination to the other Party.

#### **ARTICLE 4. DEVELOPER COMMITMENT AND SPECIAL PUBLIC BENEFITS**

Section 4.01. Special Public Benefits to the City. As consideration for the City's promises under the Agreement, Developer agrees to make the payments for affordable housing, recreational purposes and street improvements, as set forth in Exhibit F.

Section 4.02. Taxes, Charges, Assessments, Fees and Exactions. Developer agrees to pay all taxes, charges, fees, assessments and exactions which are payable by Developer under this Agreement and the Applicable Law.

Section 4.03. Utility Connection Fee. City may charge and Developer agrees to pay all Utility Connection Fees as set forth in Article 5.

Section 4.04. Processing Fees.

A. Developer shall pay City for its actual costs of application review, permit issuance, monitoring, inspection, and processing for all Subsequent Approvals and the work done pursuant to them. Actual costs shall be limited to (i) itemized City employee staff time, billed at the hourly rates established annually by the Director of Finance, (ii) any invoices payable to third-party providers of goods or services, (iii) any fees charged to the City by third-party agencies for review or inspection of the Project. Any flat fees payable under City ordinance or resolution shall be treated as deposits towards actual costs.

Section 5.03. Utility Fees, Charges, and Exactions. Developer shall pay all utility fees, charges, and exactions as set forth in the Applicable Rules, provided, Utility Connection Fees shall be in the amounts and for the capacities set forth in Exhibit H.

## **ARTICLE 6. DEVELOPMENT STANDARDS AND REQUIREMENTS**

Section 6.01. Compliance with State and Federal Law. Developer, at its sole cost and expense, shall comply with requirements of, and obtain all permits and approvals required by, regional, State and Federal agencies having jurisdiction over the Project. Developer shall defend (with counsel reasonably acceptable to the City), indemnify, assume all responsibility for, and hold harmless City and its officers, officials, employees, volunteers, agents and representatives from and against any and all present and future liabilities, obligations, orders, claims, damages, fines, penalties and expenses (including attorneys' fees and costs) arising out of or in any way connected with Developer's or its contractors' obligations, if any, to comply with all Prevailing Wage Laws, including all claims that may be made by contractors, subcontractors or other third party claimants pursuant to Labor Code sections 1726 and 1781.

## **ARTICLE 7. MORTGAGEE PROTECTION AND ESTOPPEL CERTIFICATE**

Section 7.01. Mortgagee Protection. This Agreement shall be superior and senior to any lien placed upon the Property or any portion thereof after the date of recording the Agreement, including the lien of any deed of trust or mortgage ("*Mortgage*"). Notwithstanding the foregoing, no breach hereof shall defeat, render invalid, diminish or impair the lien of any Mortgage made in good faith and for value, but all of the terms and conditions contained in this Agreement shall be binding upon and effective against and shall run to the benefit of any person or entity, including any deed of trust beneficiary or mortgagee ("*Mortgagee*"), who acquires title or possession to the Property, or any portion thereof, by foreclosure, trustee's sale, deed in lieu of foreclosure or otherwise.

Section 7.02. Mortgagee Not Obligated. Notwithstanding the provisions of Section 6.01 above, no Mortgagee shall have any obligation or duty under this Agreement to construct or complete the construction of improvements, or to guarantee such construction or completion; provided, however, that a Mortgagee shall not be entitled to devote the Property to any use except in full compliance with the Project Approvals nor to construct any improvements thereon or institute any uses other than those uses or improvements provided for or authorized by the Agreement, or otherwise under the Project Approvals.

Section 7.03. Notice of Default to Mortgagee. If City receives a notice from a Mortgagee requesting a copy of any notice of default given Developer hereunder and specifying the address for service thereof, then City agrees to use its best efforts to deliver to such Mortgagee, concurrently with service thereon to Developer, any notice given to Developer with respect to any claim by City that Developer has committed an event of default, and if City makes a determination of noncompliance hereunder, City shall likewise use its best efforts to serve notice of such noncompliance on such Mortgagee concurrently with service thereon on Developer. Each Mortgagee shall have the right during the same period available to Developer to cure or remedy, or to commence to cure or remedy, the event of default claimed or the areas of noncompliance set forth in City's notice. If a Mortgagee shall be required to obtain possession in

as determined by an appraisal prepared by a City approved appraiser in cooperation with City, and upon Developer's provision of adequate funding, City shall promptly and timely negotiate and seek the purchase of the necessary real property interests to allow Developer to construct the public improvements as required by the Project Approvals. Under these circumstances, in accordance with the procedures established by law, including Government Code Section 66462.5(a), requiring approval of a final map where neither the subdivider nor public agency has an interest in land sufficient to allow offsite improvements to be constructed or installed where City fails to acquire the necessary property interests by negotiation, City shall consider use of its power of eminent domain to acquire such real property interests. Developer shall pay all costs associated with such acquisition or condemnation proceedings. Nothing herein is intended to or shall prejudice or commit City regarding any findings and determinations required to be made in connection with adoption of a resolution of necessity.

Section 8.03. Other Government Permits. City shall cooperate with Developer, to the extent appropriate and as permitted by law, in Developer's efforts to obtain, as may be required, permits and approvals from other governmental entities.

Section 8.04. Mitigation Measures. Developer and City shall comply with the Mitigation and Monitoring and Reporting Program as it applies to the Project.

Section 8.05. Cooperation in the Event of Legal Challenge.

A. In the event any legal or equitable action or proceeding is instituted by a third party challenging the validity of any provision of this Agreement or the procedures leading to its initial adoption or the initial issuance of any of the Existing Project Approvals, and any Subsequent Project Approvals, Developer reserves the right to withdraw its application for the Project. If Developer elects not to withdraw its application, Developer agrees to hire litigation counsel to diligently defend Developer and the City in any such action or proceeding and to bear the cost of litigation expenses of any joint defense, including but not limited to, attorneys' fees incurred by the City and the Developer. Developer further agrees that it shall pay for any legal fees actually incurred by the City in providing advice or oversight or assistance in defense of any Third-Party legal challenge. Developer agrees to pay such fees within thirty (30) days of receiving any written demand therefore which may be made from time to time during the course of such litigation challenges, including City's own legal counsel fees and court costs. Developer further agrees to indemnify and hold City harmless from and against any and all claims for damages including recovery of the third party's litigations expenses, including attorney's fees, regardless of Developer's withdrawal of its application. If Developer elects not to contest such litigation challenges, then the City shall have no obligation to contest such challenges.

B. In addition, City shall have the right, but not the obligation, to contest or defend such litigation challenges, in the event that Developer elects not to do so. If City elects to contest or defend such litigation challenges, Developer shall be obligated to bear any of City's related costs and expenses, including City's attorney fees, and shall indemnify, defend, and hold harmless City and its officials and employees from and against any claims, losses, or liabilities assessed or awarded against City by way of judgment, settlement, or stipulation.

**ARTICLE 9. ASSIGNMENT, TRANSFER AND NOTICE**

City may only terminate this Agreement pursuant to a duly adopted resolution of the City Council

Section 10.03. Withholding of Permits. In the event of a Default by Developer, or following notice of breach by Developer and during the Cure Period or Extended Cure Period, upon a finding by the City Planning Director that Developer is in serious and substantial breach, City shall have the right to refuse to issue any permits or other approvals to which Developer would otherwise have been entitled pursuant to this Agreement. This provision is in addition to and shall not limit any actions that City may take to enforce the conditions of the Project Approvals.

Section 10.04. Remedies.

A. In the event of a Default by City or Developer, the non-defaulting Party shall have the right to terminate this Agreement upon giving notice of intent to terminate pursuant to Government Code Section 65868 and regulations of City implementing such section. Following notice of intent to terminate, the matter shall be scheduled for consideration and review in the manner set forth in Government Code Section 65867 and City regulations implementing said section. Following consideration of the evidence presented in said review before the City Council, either Party alleging Default by the other Party may give written notice of termination of this Agreement to the other Party. Termination of this Agreement shall be subject to the provisions of Section 10.09 hereof.

B. City's determination of Developer's breach under this agreement is not subject to review by any form of writ, whether administrative or ordinary mandate.

C. City and Developer agree that in the event of Default by City, the sole remedy for Developer shall be specific performance of this Agreement. In no event shall Developer be entitled to damages. If City issues an Approval pursuant to this Agreement in reliance upon a specified condition being satisfied by Developer in the future, and if Developer then fails to satisfy such condition, City shall be entitled to specific performance for the purpose of causing Developer to satisfy such condition.

D. In addition to any other rights or remedies, either Party may institute legal action to cure, correct or remedy any Default, to enforce any covenants or agreements herein, to enjoin any threatened or attempted violation hereof, or to obtain any other remedies consistent with the purpose of this Agreement except as limited by subsections 10.04 A and B above. Any such legal action shall be brought in the Superior Court for Napa County, California.

Section 10.05. Annual Review.

A. The City Manager shall, at least every twelve (12) months during the term of this Agreement, review the extent of good faith substantial compliance by the Developer with the terms and conditions of this Agreement. Such periodic review shall be limited in scope to compliance with the terms and conditions of this Agreement pursuant to California Government Code Section 65865.1 and the City's Development Agreement Ordinance. Developer shall have the duty to initiate each annual review by submitting an Annual Review Report. Developer

Section 10.08. Resolution of Disputes. With regard to any dispute involving the Project, the resolution of which is not provided for by this Agreement or Applicable Law, Developer shall, at City's request, meet with City and/or City shall, at Developer's request, meet with Developer. The parties to any such meetings shall attempt in good faith to resolve any such disputes. Nothing in this Section 10.08 shall in any way be interpreted as requiring that Developer and City and/or City's designee reach agreement with regard to those matters being addressed, nor shall the outcome of these meetings be binding in any way on City or Developer unless expressly agreed to by the parties to such meetings.

Section 10.09. Termination; Surviving Provisions. This Agreement shall terminate upon the expiration of the Term or when the Property has been fully developed and all of the obligations of City and Developer in connection therewith as set forth in this Agreement are satisfied as reasonably determined by City. Upon completion of performance of the parties or termination of this Development Agreement, a written statement acknowledging such completion or termination shall be recorded by City in the Official Records of Napa County, California. In the event this Agreement is terminated, neither party shall have any further rights or obligations hereunder, except for those obligations of Developer set forth in Sections 6.01 (Compliance with State and Federal Law), 8.05 (Cooperation in the Event of Legal Challenge), and 10.10 (Indemnity and Hold Harmless).

Section 10.10. Indemnity and Hold Harmless. Developer shall indemnify and hold City and its elected and appointed officers, agents, employees, and representatives harmless from and against any and all claims, costs, liabilities and damages (including attorneys fees and costs) for any bodily injury, death, or property damage resulting directly or indirectly from the approval or implementation of this Agreement, the development and construction of the Project by or on behalf of Developer, or from any operations performed under this Agreement, whether such operations were performed by Developer or any of Developer's contractors, subcontractors, agents or employees, except to the extent such claims, costs and liabilities arise from the active negligence or willful misconduct of City, its elected and appointed officers, agents, employees, representatives, contractors or subcontractors. This Section 10.10 shall not apply to suits or actions brought by Developer for default of this Agreement or to suits or actions brought by any person or entity arising from the sole active negligence or willful misconduct of City or its elected or appointed representatives, officers, agents and employees.

## **ARTICLE 11. MISCELLANEOUS PROVISIONS**

Section 11.01. Incorporation of Recitals and Introductory Paragraph. The Recitals contained in this Agreement, and the introductory paragraph preceding the Recitals, are hereby incorporated into this Agreement as if fully set forth herein.

Section 11.02. Exhibits. The Exhibits referenced in this Agreement and attached to it are incorporated in to this Agreement.

Section 11.03. Findings. City hereby finds and determines that execution of this Agreement furthers public health, safety and general welfare and that the provisions of this Agreement are consistent with the General Plan.

Section 11.07. Notices. Written notices and other written communications by and between the Parties shall be addressed as follows and shall be deemed received on (a) the date such communication is personally delivered; (b) the first normal business hour following the physical receipt of the entire document by the receiving party's facsimile machine; or (c) five days after a registered or certified letter, properly addressed and with postage prepaid, is deposited in the United States mail:

If to City: Planning and Building Director  
City of Calistoga  
1232 Washington Street  
Calistoga, CA 94515

With Copies to: City Manager  
City of Calistoga  
1232 Washington Street  
Calistoga, CA 94515

and Michelle Marchetta Kenyon, Esq.  
McDonough, Holland & Allen, PC  
1901 Harrison Street, 9th Floor  
Oakland, CA 94612-3501

If to Developer: Ira and Lois Carter  
3131 Ozzie Court  
Carmichael, CA 95608

1881 Mora LLC  
765 Market Street, #28D  
San Francisco, CA 94103

BNK LLC  
P.O. Box 190  
Kenwood, CA 95452

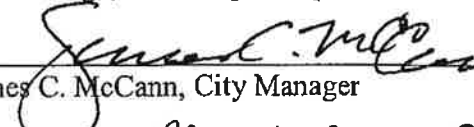
With a copy to:

Any party may at any time, by giving ten (10) days written notice to the other parties, may designate a new address for notices.

Section 11.08. Entire Agreement, Counterparts and Exhibits. This Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original. This Agreement, together with the attached Exhibits, constitutes the final and exclusive understanding and agreement of the parties and supersedes all negotiations or previous agreements of the parties with respect to all or any part of the subject matter hereof. The Exhibits attached to this Agreement are incorporated herein for all purposes:

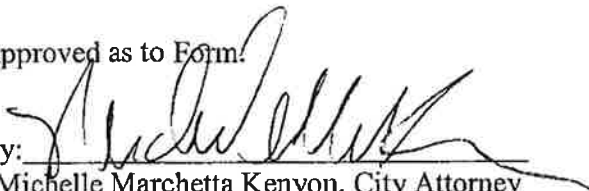
**CITY:**

City of Calistoga, a municipal corporation

By:   
James C. McCann, City Manager

Date Signed: March 9, 2009

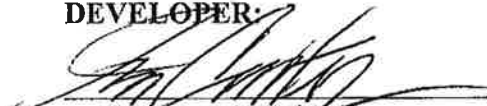
Approved as to Form:

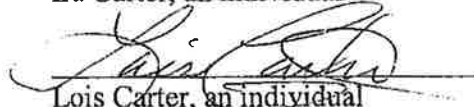
By:   
Michelle Marchetta Kenyon, City Attorney

Attest:


By:   
Susan Sneddon, City Clerk

**DEVELOPER:**

  
Ira Carter, an individual

  
Lois Carter, an individual

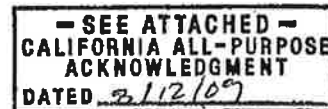
BNK LLC, a California limited liability company

By:   
Name: Eduardo de Nagel  
Its: MANAGING PARTNER

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

1881 MORA LLC, a California limited liability company:

By: Signature deliberately omitted-Property transferred to other Parties prior to execution \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_





STATE OF CALIFORNIA )  
 )  
COUNTY OF NAPA )

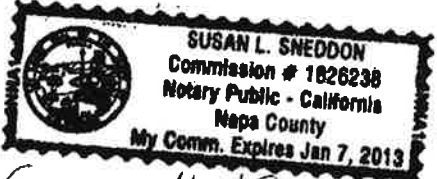
On 3-11-09, 2008 before me, Susan L. Sneddon, the  
(Date) Here Insert Name and Title of the Officer  
undersigned, personally appeared Edward W. Nagel  
Name(s) of Signer(s)

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

I certify under PENALTY OR PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.  
Signature Susan L. Sneddon  
Signature of Notary Public

Place Notary Seal Above



STATE OF CALIFORNIA )  
 )  
COUNTY OF NAPA )

Comm # 1826238  
My Comm Expires 1-7-13  
707-942-2807

On \_\_\_\_\_, 2008 before me, \_\_\_\_\_, the  
(Date) Here Insert Name and Title of the Officer  
undersigned, personally appeared \_\_\_\_\_  
Name(s) of Signer(s)

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

I certify under PENALTY OR PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.  
Signature \_\_\_\_\_  
Signature of Notary Public

Place Notary Seal Above