

147 Developer, or its successor in interest, the City may extend the Term for an additional period of
148 up to one (1) year, subject to the requirements of the Development Agreement Statute and City
149 ordinances.

150 B. Termination Following Expiration. Following the expiration of the Initial Term,
151 or the earlier completion of development of the Project and all of Developer's obligations in
152 connection therewith, this Agreement shall be deemed terminated and of no further force and
153 effect, subject, however, to the provisions of Section 10.09 of this Agreement. The expiration or
154 termination of this Agreement shall not limit any property rights of the Developer or its
155 successors that may exist independent of this Agreement.

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

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

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

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

168 **ARTICLE 3. DEVELOPMENT OF PROPERTY**

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

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

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

187 A. The Parties acknowledge and agree that City is restricted in its authority to limit
188 its police power by contract. The limitations, reservations and exceptions contained in this
189 Agreement are intended to reserve to City all of its police power which cannot be so limited. and
190 this Agreement shall be so construed.

191 B. Notwithstanding any other provision of this Agreement to the contrary, the
192 Applicable Law shall include the following Subsequently Adopted Rules:

193 (1) Review Costs. Fees and charges of every kind and nature imposed by the
194 City to cover actual costs to City of Project Approvals or for monitoring compliance with any
195 Project Approvals as such fees and charges are set, on a uniform basis, from time to time.

196 (2) Procedures. Regulations relating to hearing bodies, petitions,
197 applications, notices, findings, records, hearings, reports, recommendations, appeals and any
198 other matter of procedure, provided such procedures are uniformly applied on a city-wide basis
199 to substantially similar types of development projects and properties.

200 (3) California Building Codes. Regulations governing construction standards
201 and specifications including City's building code, plumbing code, mechanical code, electrical
202 code, fire code, and other applicable construction codes as then applicable in City at the time of
203 permit application. Upon Developer's written request, City may waive any future changes in
204 building and construction standards that City determines in its reasonable discretion are neither
205 necessary nor desirable to protect persons and property from health and safety perils, or to
206 advance other City General Plan policies, but only to the extent the City's Municipal Code allows
207 for such waivers.

208 (4) City Revenue Measures. All new taxes, fees, charges or assessments of
209 general application, including increases in the business license tax, or any other tax, fee, charge,
210 or assessment, which are not specifically or disproportionately targeted to the Project or
211 Property. Provided, only Development Fees established by the Existing Rules may be applied to
212 the Project or Property unless the are authorized by Paragraph 3.04 B.(5) below or by Section
213 5.01.

214 (5) Exigent Circumstances. Subsequently Adopted Laws which may be in
215 conflict with this Agreement and the Project Approvals to the extent

216 C. their adoption is required by State or Federal law or,

217 D. they are non-discriminatory with respect to the Project or the Property, or both,
218 and their adoption is reasonably necessary to comply with State or Federal law, or

219 E. the City determines they are necessary to protect against conditions that create a
220 substantial and demonstrable risk to physical health or safety, or

221 F. to pass-through rate impositions or increases established by other governmental or
222 quasi-governmental agencies.

223 (6) Utility Rules. Utility standards, rules and utility rates, fees and charges, as
224 more particularly described in Exhibit H. Provided, Developer's obligation to pay Utility
225 Connection Fees is limited as set forth in Article 5.

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

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

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

237 A. Change any land use designation or permitted use of the Property;

238 B. Limit or control the availability of public utilities, services or facilities or any
239 privileges or rights to public utilities, services, or facilities (for example, water rights, water
240 connections or sewage capacity rights, sewer connections, etc.) for the Project;

241 C. Limit or control the location, configuration or size of lots, buildings, structures, or
242 other improvements of the Project in a manner that is inconsistent with or more restrictive than
243 the limitations included in or imposed by the Project Approvals, Existing Law, or this
244 Agreement;

245 D. Limit or control the rate, timing, phasing or sequencing of the approval,
246 development or construction of all or any part of the Project in any manner, except as set forth in
247 this Agreement, Applicable Law or the Project Approvals;

248 E. Impose on the Project or Developer any fees or exactions other than those
249 permitted by this Agreement, Existing Law or the Project Approvals.

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

253 Section 3.05. Regulation by Other Public Agencies. City and Developer acknowledge
254 and agree that other public agencies not within the control of City possess authority to regulate
255 aspects of the development of the Property separately from or jointly with City, and this
256 Agreement does not limit the authority of such other public agencies. Developer shall, at the
257 time required by Developer in accordance with Developer's construction schedule, apply for all
258 such other permits and approvals as may be required by other governmental entities in
259 connection with the development of, or the provision of services to, the Project. Developer shall
260 also pay all required fees when due to such public agencies. Developer acknowledges that City

261 does not control the amount of any such fees. City shall cooperate with Developer in
262 Developer's effort to obtain such permits and approvals; provided, however, City shall have no
263 obligation to incur any costs, without compensation or reimbursement, or to amend any City
264 policy, regulation or ordinance in connection therewith.

265 Section 3.06. Development Timing. The timetable for completion of the Project and
266 phasing schedule is set forth in Exhibit I.

267 Section 3.07. Life of Project Approvals. The term of any and all Project Approvals shall
268 automatically be extended for the longer of the Term, and any Extension, of this Agreement or
269 the term otherwise applicable to such Project Approvals.

270 Section 3.08. Initiatives and Referenda.

271 A. If any Subsequently Adopted Law is enacted or imposed by a citizen-sponsored
272 initiative or referendum, which would conflict with the Project Approvals or Applicable Law or
273 this Agreement, such Subsequently Adopted Law shall not apply to the Property or Project;
274 provided, however, the Parties acknowledge that City's approval of this Agreement is a
275 legislative action subject to referendum.

276 B. Without limiting the generality of any of the foregoing, no moratorium or other
277 limitation (whether relating to the rate, timing, phasing or sequencing of development) affecting
278 subdivision maps, building permits or other entitlements to use that are approved or to be
279 approved, issued or granted by City shall apply to the Property or Project, except under the
280 circumstances described in Government Code Section 65869.5 or in the event of an emergency
281 requiring such action.

282 C. Developer agrees and understands that City does not have authority or jurisdiction
283 over any other public agency's ability to grant governmental approvals or permits or to impose a
284 moratorium or other limitations that may affect the Project.

285 D. City shall cooperate with Developer and, at Developer's expense, shall undertake
286 such actions as may be necessary to ensure this Agreement remains in full force and effect. City,
287 except to submit to vote of the electorate initiatives and referendums required by law to be
288 placed on a ballot, shall not support, adopt or enact any Subsequently Enacted Law, or take any
289 other action which would violate the express provisions or spirit and intent of this Agreement or
290 the Project Approvals. Provided, Parties acknowledge the obligation of the City to defend any
291 challenge to the legality of voter-approved ballot measures.

292 Section 3.09. Environmental Mitigation. The Parties understand that the Project
293 Mitigated Negative Declaration is intended to be used not only in connection with the Existing
294 Project Approvals, but also in connection with the Subsequent Project Approvals needed for the
295 Project. City acknowledges its obligation, in connection with Subsequent Project Approvals, not
296 to require a supplemental or subsequent EIR, Mitigated Negative Declaration, or Negative
297 declaration, unless required by CEQA. To the extent supplemental or additional environmental
298 review is required in connection with Subsequent Project Approvals, Developer acknowledges
299 that City may require additional mitigation measures that were not required at the time this

300 Agreement was executed, but only to the extent that such additional mitigations are required by
301 CEQA.

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

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

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

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

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

333 Section 4.04. Processing Fees.

334 A. Developer shall pay City for its actual costs of application review, permit
335 issuance, monitoring, inspection, and processing for all Subsequent Approvals and the work
336 done pursuant to them. Actual costs shall be limited to (i) itemized City employee staff time,
337 billed at the hourly rates established annually by the Director of Finance, (ii) any invoices
338 payable to third-party providers of goods or services, (iii) any fees charged to the City by third-

339 party agencies for review or inspection of the Project. Any flat fees payable under City
340 ordinance or resolution shall be treated as deposits towards actual costs.

341 B. City may, in its sole discretion, contract with one (1) or more outside inspectors,
342 engineers, architects, attorneys, financial advisers, or other consultants (each a "Consultant" and
343 collectively "Consultants") to perform all or any portion of the application review, monitoring,
344 inspection, testing and evaluation services to be performed in connection with review,
345 construction and development of the Project. With respect to engineering review, in order to
346 accomplish the requisite monitoring, inspection, testing and evaluation of on-site private
347 facilities ("Engineering Inspections"), the City Manager, or his/her designee, in his/her
348 reasonable discretion may approve the retention of a design engineer under whose such direct
349 supervision the Engineering Inspections may be carried out, and who shall certify upon
350 completion of improvements, in a report which shall be submitted to City, that the improvements
351 are acceptable in form and substance to City, that such improvements were constructed in
352 conformance with the approved plans and specifications and that all such work was performed in
353 a workmanlike manner.

354 C. City shall establish a deposit account for the Developer. The developer deposit
355 account agreement shall provide for an initial deposit of funds and a method for periodic
356 replenishment as expenses are incurred so that a sufficient balance remains to cover currently
357 accruing costs.

358 Section 4.05. New Fees and Charges for Major Changes. Any variation, modification,
359 change or amendment to the Project, the Existing Approvals, the Subsequent Project Approvals
360 that is inconsistent with this Development Agreement and requires its amendment shall entitle
361 City to impose new and/or increased Development Impact Fees and exactions on the amended
362 part of the Project, but only on the portion of the Project that is the subject of the Development
363 Agreement amendment or is otherwise inconsistent with this Development Agreement and only
364 to the extent that the variation, modification, change or amendment is part of a City-wide
365 adopted fee.

366 **ARTICLE 5. UTILITIES**

367 Section 5.01. Allocation of Water and Wastewater Services. City hereby agrees and that
368 the Project shall be and hereby is deemed to be exempt from the City Growth Management
369 System pursuant to Section 19.020.050 F and that the water and sewer service allocations set
370 forth in Exhibit H are hereby made to the Project. City agrees that unless prohibited by a
371 moratorium lawfully adopted by another governmental agency, or by action taken by the City in
372 accordance with Section 3.03, no change in Existing Rules shall reduce or eliminate these
373 allocations.

374 Section 5.02. Will-Serve Obligation. The allocations of water and wastewater capacity
375 in Article 5 shall constitute the "will serve" obligation of City with respect to the Project. Said
376 "will serve" obligation of City is vested by this Development Agreement. The water and waste
377 water allocations set forth in Exhibit H shall constitute the allocation for the Project, as that term
378 is defined in the City's Municipal Code. Any needed additional allocation of water or
379 wastewater service capacity to the Project or the Property shall be subject to the Growth

380 Management provisions of the City's Municipal Code, if any, in effect at the time of such
381 request. This provision shall supersede any conflicting City codes or regulations in effect as of
382 the Effective Date.

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

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

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

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

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

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

414 Section 7.03. Notice of Default to Mortgagee. If City receives a notice from a
415 Mortgagee requesting a copy of any notice of default given Developer hereunder and specifying
416 the address for service thereof, then City agrees to use its best efforts to deliver to such
417 Mortgagee, concurrently with service thereon to Developer, any notice given to Developer with
418 respect to any claim by City that Developer has committed an event of default, and if City makes
419 a determination of noncompliance hereunder, City shall likewise use its best efforts to serve

420 notice of such noncompliance on such Mortgagee concurrently with service thereon on
421 Developer. Each Mortgagee shall have the right during the same period available to Developer
422 to cure or remedy, or to commence to cure or remedy, the event of default claimed or the areas of
423 noncompliance set forth in City's notice. If a Mortgagee shall be required to obtain possession in
424 order to cure any default, then vis-à-vis the Mortgagee, the time to cure shall be tolled so long as
425 the Mortgagee is attempting to obtain possession, including by appointment of a receiver or
426 foreclosure but in no event may this period exceed one hundred twenty (120) days from the
427 City's notice.

428 Section 7.04. Estoppel Certificate.

429 A. Either party may, at any time, and from time to time, deliver written notice to the
430 other party requesting such party to certify in writing that, to the knowledge of the certifying
431 party, (i) this Development Agreement is in full force and effect and a binding obligation of the
432 parties, (ii) this Development Agreement has not been amended or modified or, if so amended or
433 modified, identifying the amendments or modifications, and (iii) the requesting party is not in
434 default in the performance of its obligations under this Development Agreement, or if in default,
435 to describe therein the nature and extent of any such defaults. The requesting party may
436 designate a reasonable form of certificate (including a lender's form) and the party receiving a
437 request hereunder shall execute and return such certificate or give a written, detailed response
438 explaining why it will not do so within thirty (30) days following the receipt thereof. The City
439 Manager shall be authorized to execute any certificate requested by Developer hereunder.

440 B. Developer and City acknowledge that a certificate hereunder may be relied upon
441 by tenants, transferees, investors, partners, bond counsel, underwriters, bond holders and
442 Mortgagees. A request for an estoppel certificate shall clearly indicate that failure of the
443 receiving Party to respond within the thirty (30) day period will lead to a second and final
444 request and failure to respond to the second and final request within fifteen (15) days of receipt
445 thereof shall be deemed approval of the estoppel certificate. Failure of either Party to execute an
446 estoppel certificate shall not be deemed a default by that Party, provided that in the event the
447 Party to whom the request is sent does not respond within the required thirty (30) day period, the
448 requesting Party may send a second and final request, and failure by the responding Party to
449 respond within fifteen (15) days from receipt thereof (but only if the requesting Party's request
450 contains a clear statement that failure by the responding Party to respond within this fifteen (15)
451 day period shall constitute an approval) shall be deemed approval by the Parties of the estoppel
452 certificate and may be relied upon as such by the requesting Party, tenants, transferees, investors,
453 bond counsel, underwriters, bond holders and Mortgagees.

454 **ARTICLE 8. COOPERATION AND IMPLEMENTATION**

455 Section 8.01. Subsequent Project Approvals. Developer and City acknowledge and
456 agree that Developer intends to submit applications for Subsequent Project Approvals, In
457 connection with any Subsequent Discretionary Approvals, the City shall exercise its discretion in
458 accordance with Applicable Law, the Project Approvals and, as provided by this Agreement,
459 including the reservations of authority set forth in Section 3.04.

460 Section 8.02. Acquisition of Land Owned by Third Parties. In any instance where
461 Developer is required to construct any public improvement on land not owned by Developer,
462 Developer, at its sole cost and expense, shall acquire or fund the acquisition of, the real property
463 interests necessary for the construction of such public improvements. If requested by Developer,
464 where the affected property owner has rejected an offer by Developer based upon market value
465 as determined by an appraisal prepared by a City approved appraiser in cooperation with City,
466 and upon Developer's provision of adequate funding, City shall promptly and timely negotiate
467 and seek the purchase of the necessary real property interests to allow Developer to construct the
468 public improvements as required by the Project Approvals. Under these circumstances, in
469 accordance with the procedures established by law, including Government Code
470 Section 66462.5(a), requiring approval of a final map where neither the subdivider nor public
471 agency has an interest in land sufficient to allow offsite improvements to be constructed or
472 installed where City fails to acquire the necessary property interests by negotiation, City shall
473 consider use of its power of eminent domain to acquire such real property interests. Developer
474 shall pay all costs associated with such acquisition or condemnation proceedings. Nothing
475 herein is intended to or shall prejudice or commit City regarding any findings and determinations
476 required to be made in connection with adoption of a resolution of necessity.

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

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

482 Section 8.05. Cooperation in the Event of Legal Challenge.

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

499 B. In addition, City shall have the right, but not the obligation, to contest or defend
500 such litigation challenges, in the event that Developer elects not to do so. If City elects to contest
501 or defend such litigation challenges, Developer shall be obligated to bear any of City's related

502 costs and expenses, including City's attorney fees, and shall indemnify, defend, and hold
503 harmless City and its officials and employees from and against any claims, losses, or liabilities
504 assessed or awarded against City by way of judgment, settlement, or stipulation.

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

506 Section 9.01. Assignment.

507 A. City Approval Required. No sale, transfer or assignment of all or a portion of the
508 Property, or creation of a joint venture or partnership, shall require the amendment of this
509 Agreement. Developer shall have the right to sell, assign, or transfer this Agreement with all its
510 rights, title and interests therein to any person, firm or corporation at any time during the term of
511 this Agreement without written approval by City, provided that Developer also sells all or a
512 portion of its interest in the Property, subject to the approval of the City, which approval shall
513 not be unreasonably withheld.

514 B. Notice; Qualifications. Developer shall provide the City with written notice of
515 any intent to sell, assign, or transfer all or a portion of the Property and all or any portion of its
516 interest in this Agreement at least sixty (60) days in advance of such proposed action and furnish
517 written evidence of the proposed transferee's ability to, and experience in the development and
518 operation of projects similar to Project, together with such other information as the City shall
519 reasonably request. The City's consent shall be deemed given if the City has not provided written
520 consent or objection within sixty days of receiving the notice and copy of the assignment and
521 information described above. Assignment of the Agreement shall not release Developer of its
522 obligations under this Agreement absent the express written consent of the City.

523 **ARTICLE 10. DEFAULT; REMEDIES; AMENDMENT; TERMINATION**

524 Section 10.01. Breach. Subject to extensions of time under Section 10.06 or by mutual
525 consent in writing, the failure or delay by either Party to perform any term or provision of this
526 Agreement shall constitute a breach of this Agreement. In the event of alleged breach of any
527 terms or conditions of this Agreement, the Party alleging such breach shall give the other Party
528 notice in writing specifying the nature of the breach and the manner in which said breach or
529 default may be satisfactorily cured, and the Party in breach shall have thirty (30) days following
530 such notice ("**Cure Period**") to cure such breach, except that in the event of a breach of an
531 obligation to make a payment, the Party in breach shall have ten (10) days to cure the breach. If
532 the breach is of a type that cannot be cured within thirty (30) days, the breaching Party shall,
533 within a thirty (30) day period following notice to the non-breaching Party, notify the non-
534 breaching Party of the time it will take to cure such breach which shall be a reasonable period
535 under the circumstances ("**Extended Cure Period**"); commence to cure such breach; and be
536 proceeding diligently to cure such breach. Subject to the provisions of Section 10.06, the
537 Extended Cure Period shall in no event exceed one hundred twenty (120) days unless otherwise
538 agreed by the parties. During the Cure Period or Extended Cure Period, the Party charged shall
539 not be considered in default for purposes of termination or institution of legal proceedings; but
540 the City's right to refuse to issue a permit or Subsequent Project Approval, under Section 10.03,
541 shall not be limited by this provision. The failure of any Party to give notice of any breach shall
542 not be deemed to be a waiver of that Party's right to allege any other breach at any other time.

543 Section 10.02. Default. If the breaching Party has not cured such breach within the Cure
544 Period or the Extended Cure Period, if any, such Party shall be in default ("**Default**"), and the
545 non-breaching Party, at its option, may terminate the Agreement, institute legal proceedings
546 pursuant to this Agreement and shall have such remedies as are set forth in Section 10.04 below.
547 City may only terminate this Agreement pursuant to a duly adopted resolution of the City
548 Council

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

556 Section 10.04. Remedies.

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

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

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

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

579 Section 10.05. Annual Review.

580 A. The City Manager shall, at least every twelve (12) months during the term of this
581 Agreement, review the extent of good faith substantial compliance by the Developer with the

582 terms and conditions of this Agreement. Such periodic review shall be limited in scope to
583 compliance with the terms and conditions of this Agreement pursuant to California Government
584 Code Section 65865.1 and the City's Development Agreement Ordinance. Developer shall have
585 the duty to initiate each annual review by submitting an Annual Review Report. Developer
586 shall demonstrate good faith compliance with the terms and conditions of this Agreement and
587 provide such other information as may be reasonably requested by the City Manager and deemed
588 by him or her to be required in order to ascertain compliance with this Agreement. The costs of
589 notice and related costs incurred by the City for the annual review conducted by the City
590 pursuant to this Section shall be borne by the Developer.

591 B. Following such review, the City Manager shall set the matter as an agenda item at
592 a regularly scheduled Council meeting, giving an advance copy of the report and notice of the
593 time and place of such meeting to the Developer. If the City Manger is not satisfied the
594 Developer has demonstrated good faith compliance with all the terms and conditions of this
595 Agreement, or for any other reason, the City Manager shall advise the City Council of this
596 opinion.

597 C. The City Council shall afford the Developer an opportunity to respond to the
598 report of the City Manager and may continue the review from time to time as necessary.

599 D. Failure of the City to conduct an annual review shall not constitute a waiver by
600 the City of its rights to otherwise enforce the provisions of this Agreement nor shall the
601 Developer have or assert any defense to such enforcement by reason of any such failure to
602 conduct an annual review.

603 Section 10.06. Enforced Delay; Extension of Time of Performance. Subject to the
604 limitations set forth below, performance by either party hereunder shall not be deemed to be in
605 default, and all performance and other dates specified in this Agreement shall be extended, where
606 delays are due to: war; insurrection; strikes; lockouts; riots; floods; earthquakes; fires; casualties;
607 acts of God; acts of the public enemy; epidemics; quarantine restrictions; freight embargoes;
608 governmental restrictions or priority; litigation; unusually severe weather; acts or omissions of
609 the other Party; or acts or failures to act of any other public or governmental agency or entity
610 (other than the acts or failures to act of City which shall not excuse performance by City but
611 which may excuse performance by Developer). An extension of time for any such cause shall be
612 for the period of the enforced delay and shall commence to run from the time of the
613 commencement of the cause (but in any event shall not exceed a cumulative total of three (3)
614 years), if notice by the party claiming such extension is sent to the other party within thirty (30)
615 days of the commencement of the cause. Developer acknowledges that adverse changes in
616 economic conditions, either of Developer specifically or the economy generally, changes in
617 market conditions or demand, and/or inability to obtain financing or other lack of funding to
618 complete the work of on-site and off-site improvements shall not constitute grounds of enforced
619 delay pursuant to this Section 10.06. Developer expressly assumes the risk of such adverse
620 economic or market changes and/or financial inability, whether or not foreseeable as of the
621 Effective Date.

622 Section 10.07. Amendment. This Agreement may be amended as provided in the
623 Development Agreement Ordinance and Development Agreement Statute. Modifications of

624 Project Approvals and other changes to the Project or its timing specifically authorized by this
625 Agreement as consistent with it, do not require amendment to this Agreement unless specifically
626 required by the Development Agreement Ordinance or Development Agreement Statute.

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

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

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

658 **ARTICLE 11. MISCELLANEOUS PROVISIONS**

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

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

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

667 Section 11.04. Severability. If any term or provision of this Agreement, or the
668 application of any term or provision of this Agreement to a particular situation, is held by a court
669 of competent jurisdiction to be invalid, void or unenforceable, the remaining terms and
670 provisions of this Agreement, or the application of this Agreement to other situations, shall
671 continue in full force and effect unless amended or modified by mutual consent of the parties.
672 Notwithstanding the foregoing, if any material provision of this Agreement, or the application of
673 such provision to a particular situation, is held to be invalid, void or unenforceable, the party
674 adversely affected may (in its sole and absolute discretion) terminate this Agreement by
675 providing written notice of such termination to the other party.

676 Section 11.05. Construction. Each reference in this Agreement to this Agreement or any
677 of the Existing Project Approvals or Subsequent Ministerial or Discretionary Approvals shall be
678 deemed to refer to the Agreement, Project Approval or Subsequent Ministerial or Discretionary
679 Approval as it may be amended from time to time, whether or not the particular reference refers
680 to such possible amendment. Section headings in this Agreement are for convenience only and
681 are not intended to be used in interpreting or construing the terms, covenants or conditions of this
682 Agreement. This Agreement has been reviewed and revised by legal counsel for both City and
683 Developer, and no presumption or rule that ambiguities shall be construed against the drafting
684 party shall apply to the interpretation or enforcement of this Agreement. Unless the context
685 clearly requires otherwise, (i) the plural and singular numbers shall each be deemed to include
686 the other; (ii) the masculine, feminine, and neuter genders shall each be deemed to include the
687 others; (iii) "shall," "will," or "agrees" are mandatory, and "may" is permissive; (iv) "include,"
688 "includes" and "including" are not limiting and shall be construed as if followed by the words
689 "without limitation," and (v) "days" means calendar days unless specifically provided otherwise.

690 Section 11.06. Covenants Running with the Land. All of the provisions, agreements,
691 rights, powers, standards, terms, covenants and obligations contained in this Agreement shall be
692 binding upon the Parties and their respective heirs, successors (by merger, consolidation or
693 otherwise) and assigns, devisees, administrators, representatives, lessees, and all of the persons or
694 entities acquiring the Property or any portion thereof, or any interest therein, whether by
695 operation of law or in any manner whatsoever, and shall inure to the benefit of the Parties and
696 their respective heirs, successors (by merger, consolidation or otherwise) and assigns. All of the
697 provisions of this Development Agreement shall be enforceable as equitable servitudes and
698 constitute covenants running with the land pursuant to applicable law, including, but not limited
699 to, Section 1468 of the Civil Code of the State of California. Each covenant to do or refrain from
700 doing some act on the Property hereunder (a) is for the benefit of the Property and is a burden
701 upon the Property, (b) runs with the Property, (c) is binding upon Developer and each successive
702 owner during its ownership of the Property or any portion thereof, and each person or entity
703 having any interest therein derived in any manner through any owner of the Property, or any
704 portion thereof, and shall benefit the Property hereunder, and each other person or entity
705 succeeding to an interest in the Property. Every person who now or hereafter owns or acquires
706 any right, title or interest in or to any portion of the Project or the Property is and shall be
707 conclusively deemed to have consented and agreed to every provision contained herein, whether

708 or not any reference to this Development Agreement is contained in the instrument by which
709 such person acquired an interest in the Project or the Property.

710 Section 11.07. Notices. Written notices and other written communications by and
711 between the Parties shall be addressed as follows and shall be deemed received on (a) the date
712 such communication is personally delivered; (b) the first normal business hour following the
713 physical receipt of the entire document by the receiving party's facsimile machine; or (c) five
714 days after a registered or certified letter, properly addressed and with postage prepaid, is
715 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

1881 Mora LLC

BNK LLC

With a copy to:

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

CITY:

City of Calistoga, a municipal corporation

By: _____
City Manager

Date Signed: _____

Approved as to Form:

By: _____
City Attorney

Attest:

By: _____
City Clerk

DEVELOPER:

Ira Carter, an individual

Lois Carter, an individual

BNK LLC, a California limited liability company

By: _____

Name: _____

Its: _____

By: _____

Name: _____

Its: _____

1881 MORA LLC, a California limited liability company:

By: _____

Name: _____

Its: _____

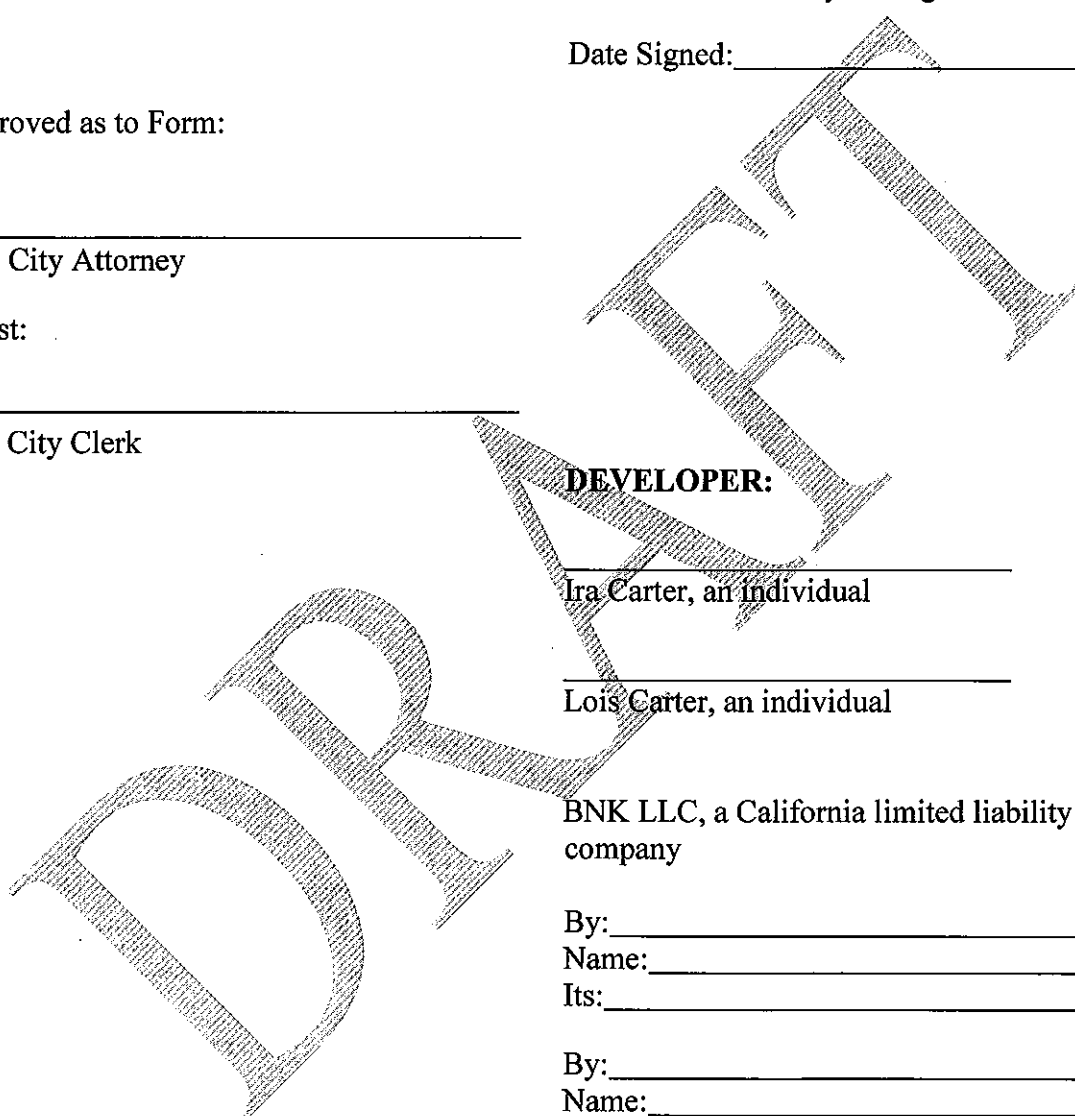


EXHIBIT A

Legal Description of Property

The land herein referred to is situated in the State of California, County of Napa, City of Calistoga, and is described as follows:

Commencing at a point on the Northeastern line of Grant Street, distant thereon South 59° East 20.045 chains from the point of intersection thereof with the Southeastern line of Greenwood Avenue, running thence along said line of Grant Street, South 59° East 8.005 chains; and thence North 30¼° East 22.37 chains; thence North 58¾° West 8.005 chains; and thence South 30¼° West 22.37 chains, more or less, to the point of commencement.

Being Lot 3 and a portion of Lot 4 as the same are shown upon that certain Map entitled, "Map of W.F. Fisher Tract, Calistoga, Napa Co. Cal", filed April 17, 1897 in the office of the County Recorder of said Napa County.

APN 011-010-013 & 014

The land herein referred to is situated in the State of California, County of Napa, City of Calistoga, and is described as follows:

Being Lots 4, 5 and 6 as the same shown upon that certain Map entitled, "Silverado Tract No. 252", filed in Book 2 of Record Maps at Page 2 in the Office of the County Recorder of said Napa County

APN 011-022-002

Exhibit A

EXHIBIT B

Project Description

The Applicant proposes to subdivide the properties into 15 lots for single-family residential uses and associated ancillary residential uses, which may include light agricultural uses such as cultivation of vineyards. The Applicant seeks to be able to build the infrastructure (i.e. roadways and utilities) in a single phase. Upon recordation of the Final Map, the residential units will be developed as market conditions allow. Ultimately, each home site will be placed within an established building envelope that has been purposefully designed by Howard Backen of Backen & Gillam Architecture. The proposed sizes of the homes will likely range between four- to five-bedrooms and up to and over 4,000 square feet, including all outbuildings.

Vehicular circulation will be provided via tree lined public roadways (Valencia Lane and Hawthorne Place). Pedestrian circulation will be provided via a 5-foot sidewalk contain within a non-exclusive public pedestrian easement along Valencia Place, offset approximately 4 feet of the right-of-way and via a 5-foot sidewalk contained in the Hawthorne right-of-way.

The slope of the existing property is approximately 0.5-percent from the back of the properties to Grant Street. The project site is 400-feet east of Garnett Creek, which is where the storm runoff will be released.

The project also includes a request for a lot line adjustment with lands to the east located at 1881 Mora Avenue (APN 001-021-002). This lot line adjustment is being requested in order to adjust approximately 13,507 square feet of land for the purposes of installing public utilities and to provide for emergency vehicle access (EVA) to Mora Avenue.

The overall proposed subdivision design integrates open space areas upon entering the project along Grant Street to provide significant setbacks from the street. As designed, the Applicant proposes to preserve existing non-irrigated deep-rooted vines on several of the lots and relocated the vines where warranted. To preserve significant trees on the property and to provide aesthetic interest, a slightly curved public roadway with two roundabouts in the center of the roadway will be development.

Water and wastewater service will be provided by the City's water and wastewater systems. To assist the City in resolving an on-going drainage problem in the project area, the Applicant is proposing to take drainage west to Garnett Creek instead of directing the runoff south through the Napa County Fairgrounds.

In addition to the aforementioned project components, this project includes implementation of General Plan Objective H-3.1, P 3 by amending Chapter 17.08 of the Zoning Ordinance to provide an alternative means for residential projects to satisfy the affordable housing requirements. As such, the project sponsors and the City have drafted certain terms for consideration through the Development Agreement. These terms include the payment of money into the Calistoga Housing Trust Fund in-lieu of providing 20% of the resulting homes at an affordable rate.

Exhibit B

The project sponsors will also be providing funds for infrastructure and recreational purposes. Funds will be provided for recreational purposes, above the amount normally collected as a Quality of Life Development Impact Fee, and additional funds will be paid for certain Grant Street roadway improvements beyond the normally required subdivision improvements.

DRAFT