

Executive Summary of Draft Development Agreement  
Planning Commission

This attachment summarizes some of the important terms of the proposed Development Agreement ("DA") between the City and developers of the Vineyard Oaks residential subdivision.

**The Development:** VINEYARD OAKS (or its successor) receives the vested right, during the 5-year term of the Development Agreement, to subdivide approximately 18 acres of land in accordance with the City land use approvals being considered by the Planning Commission in conjunction with the Development Agreement.

The project includes:

- 15 residential lots, each of which may be developed with a single family dwelling, an accessory dwelling unit, and accessory structures.
- Associated traffic and circulation improvements, including a dedicated pedestrian pathway
- Payment of an in-lieu fee to the City's Affordable Housing Trust Fund.

**Term:** The term of the Agreement is five years; it can be extended for an additional year. During the term of the Agreement, the applicant can rely on the City's current zoning for its property. New laws that do not conflict with the project will be applicable to it.

**Special Benefits to City:**

In addition to the City fees and normal subdivision improvements required by City ordinances, resolutions, and policies, VINEYARD OAKS will provide to the City as special benefits from the Development Agreement:

- An additional \$800,000 for recreational and cultural facilities, which when added to the required Quality of Life payments will total \$845,000.
- Grant Street improvements from Mora Avenue to Garnett Creek Court.

The project will also provide a \$600,000 in-lieu payment to the Calistoga Affordable Housing Fund.

**Fees, Financing, Timing:**

- Affordable Housing Fund payment:
    - \$100,000 will be paid by the Developer before recordation of the final map.
- Each of the residential lots will be subject to a lien for its proportionate share of the \$500,000 balance.
- Interest will be due on the note at a rate that is 2% higher per year than the interest rate the City earns on its funds invested with the California Local Agency Investment Fund (LAIF.)
  - The lien amount will be due on the earlier of issuance of the building permit for home construction or four years from the effective date of the development agreement.

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- Additional Recreational Funds Payment:
  - The entire \$800,000 will be paid before recordation of the final map.
- Other Development Impact Fees:
  - The project will pay all existing development impact fees at the rates in effect on the effective date of the Development Agreement.
- Processing and Review Fees: The Developer will pay actual costs of review and processing, whether by City staff or outside consultants.

Water and Wastewater Allocations and Connection Fees:

- Water and Waste Water Connection fees are fixed, for the term of the Development Agreement, at the rate at the rate in when the final subdivision map is recorded. 9.75 acre fee of potable water is reserved for the project, and 6.21 acre feet of waste water treatment capacity.
- Twenty five percent (25%) of the connection fees will be paid before recordation of the final map.
- Each of the residential lots will be subject to a lien for its proportionate share of the balance.
- The lien amount will be due on the earlier of issuance of the building permit for home construction or four years from the effective date of the development agreement.

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AND WHEN RECORDED RETURN TO:

City of Calistoga  
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Calistoga, CA 94515  
Attention: City Clerk

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**DEVELOPMENT AGREEMENT**

**BY AND AMONG**

**THE CITY OF CALISTOGA**

**AND**

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

**(VINEYARD OAKS SUBDIVISION)**

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**LIST OF EXHIBITS:**

- Exhibit A. Property Description
- Exhibit B. Project Description
- Exhibit C. Mitigation Monitoring and Reporting Program
- Exhibit D. Existing Project Approvals
- Exhibit E. Anticipated Subsequent Project Approvals
- Exhibit F. Special Public Benefits
- Exhibit G. Existing Rules
- Exhibit H. Utility Capacity Allocation and Connection Fees
- Exhibit I. Timetable
- Exhibit J. Annual Review Report

**DRAFT**

1 **DEVELOPMENT AGREEMENT**

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

9 **RECITALS**

10 A. These Recitals use certain terms with initial capital letters that are defined in  
11 Article 1 of this Agreement. City and Developer intend to refer to these definitions when the  
12 capitalized terms are used in these recitals.

13 B. Ira Carter and Lois Carter own in fee title to that certain real property located at  
14 2400 Grant Street (APN 011-010-013, 011-010-014) in the City of Calistoga, County of Napa.  
15 1881 Mora LLC owns that certain real property located at 1881 Mora Avenue (APN 011-021-  
16 002) in the City of Calistoga, County of Napa. These parcels are collectively referred to as the  
17 Property. The Property is more particularly described in Exhibit A attached to this Agreement  
18 and a part of it. BNK, LLC has an option to purchase the Property.

19 C. To strengthen the public planning process, encourage private participation in  
20 comprehensive planning, make maximum efficient use of resources at the least economic cost to  
21 the public, and reduce the economic risk of development, the Legislature of the State of  
22 California enacted the Development Agreement Statute, which authorizes City to enter into an  
23 agreement with any person having a legal or equitable interest in real property regarding the  
24 development of such property.

25 D. Pursuant to California Government Code §65865, City has adopted a  
26 Development Agreement Ordinance. This Agreement has been processed, considered and  
27 executed in accordance with that ordinance.

28 E. The City wishes to support the subdivision of the Property and its development  
29 with homes. This Project, more particularly described in Exhibit B, will implement the City's  
30 General Plan and contribute to the City by providing a high quality residential subdivision and  
31 providing benefits beyond those available through regular project exactions.

32 F. Prior to approval of this Agreement, City has taken the following actions in  
33 connection with the development of the Property:

34 1. California Environmental Quality Act Review. The environmental  
35 impacts of the Project, including the Existing Project Approvals have properly been reviewed  
36 and assessed by City pursuant to CEQA. On \_\_\_\_\_, 2008, in accordance with the  
37 recommendation of City's Planning Commission, the City Council adopted a Mitigated Negative

38 Declaration for the Project, including a Mitigation Monitoring and Reporting Program pursuant  
39 to Resolution No. \_\_\_\_\_. The MMRP is attached as Exhibit C.

40 2. Existing Project Approvals. Existing Project Approvals have been granted  
41 as set forth in full in Exhibit D.

42 G. Subsequent to approval of this Agreement, City anticipates that applications for  
43 Subsequent Project Approvals will be submitted to implement the Project. A list of anticipated  
44 Subsequent Project Approvals is set forth in Exhibit E.

45 H. The City Council finds that this Agreement furthers the public health, safety and  
46 general welfare and is consistent with the General Plan and that there is no applicable specific  
47 plan. City and Developer have further determined that the Project is a development for which  
48 this Agreement is appropriate. This Agreement will eliminate uncertainty regarding Existing  
49 Project Approvals and Subsequent Project Approvals, thereby encouraging planning for,  
50 investment in and commitment to development of the Property. Continued use and development  
51 of the Property in accordance with this Agreement is anticipated to provide substantial benefits  
52 and contribute to the vitality of the City, thereby achieving the goals and purposes for which the  
53 Development Agreement Statute was enacted:

54 1. Provide for the orderly development of the Property and the surrounding  
55 community.

56 2. Provide Special Public Benefits not available without a development  
57 agreement as set forth in Exhibit F.

58 I. The City Council further finds and determines that the tentative map for the  
59 subdivision of the Property complies with the provisions of Government Code Section 66473.7.  
60 Because the City's water system has fewer than 5,000 service connections, specific findings are  
61 required for a residential subdivision that will increase the number of such connections by ten  
62 percent (10%) or more. The subdivision of the Property will create fifteen (15) residential lots,  
63 each of which may contain a principal dwelling and an accessory unit, for a maximum of thirty  
64 (30) new residential connections. This will not increase the number of connections by ten  
65 percent (10%), therefore no further findings are required under Section 66473.7.

66 J. The Parties intend through this Agreement to allow Developer and its authorized  
67 successors to develop the Project in accordance with the Existing Project Approvals and the  
68 Applicable Law, and with any Subsequent Project Approvals.

69 K. The City Council has conducted all necessary proceedings in accordance with  
70 City's rules and regulations for the approval of this Agreement.

71 K. On \_\_\_\_\_, 2008, the City Council, at a duly noticed public  
72 hearing, adopted Ordinance No. \_\_\_\_\_, approving and authorizing the execution of this  
73 Agreement.



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**AGREEMENT**

NOW, THEREFORE, in consideration of the promises, covenants and provisions set forth herein, the receipt and adequacy of which is hereby acknowledged, the parties agree as follows:

**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 \_\_\_\_\_, 200\_. 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.

110 Section 1.10. "Mitigation Monitoring and Reporting Program ('MMRP')" means the  
111 mitigation monitoring and reporting program adopted by the City pursuant to CEQA by  
112 Resolution \_\_\_\_\_ and attached as Exhibit C.

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

114 Section 1.12. "Project Approvals" means Existing Project Approvals and Subsequent  
115 Project Approvals.

116 Section 1.13. "Subsequent Discretionary Approvals" shall mean all Subsequent Project  
117 Approvals, including amendments of the Project Approvals, improvement agreements,  
118 architectural review permits, use permits, Final Subdivision Maps, development agreements, re-  
119 subdivisions, and any amendments to, or repealing of, any of the foregoing are Subsequent  
120 Discretionary Approvals.

121 Section 1.14. "Subsequent Project Approvals" means the additional land use approvals,  
122 entitlements and permits necessary to operate the project, a partial list of which is set forth in  
123 Exhibit E.

124 Section 1.15. "Subsequent Ministerial Approvals" means permits or approvals that are  
125 required by Applicable Law and that are to be issued upon compliance with uniform, objective  
126 standards and regulations. Subsequent Ministerial Approvals generally include, but are not  
127 limited to, applications for road construction permits or authorizations; grading and excavation  
128 permits; building permits, including electrical, plumbing, mechanical, Title 24 Electrical, and  
129 Title 24 Handicap permits or approvals; certificates of occupancy; encroachment permits; water  
130 connection permits; and any other similar permits required for the development and operation of  
131 the Project. Parties acknowledge that under California state law, under some circumstances,  
132 grading or building permits may be discretionary.

133 Section 1.16. "Subsequently Adopted Rules" means City ordinances, resolutions, rules,  
134 regulations, official policies, standards and specification that came in to effect  
135 after \_\_\_\_\_, 2008.

136 Section 1.17. "Utility Connection Fees" shall mean the water service connection fee and  
137 waste water connection fee established in Chapter 13.18 of the Calistoga Municipal Code, in the  
138 amounts set forth in Exhibit H.

## 139 **ARTICLE 2. EFFECTIVE DATE AND TERM**

140 Section 2.01. Effective Date. This Agreement shall become effective upon the date that  
141 the ordinance approving this Agreement takes effect that is \_\_\_\_\_, 2008.

142 Section 2.02. Term.

143 A. Initial Term and Discretionary Extension The Initial Term of this Agreement  
144 shall commence upon the Effective Date and shall extend for a period of five (5) years thereafter.  
145 The Term has been established by the Parties as a reasonable estimate of the time required to  
146 develop the Project, including all on- and off-site public improvements. Upon application by the

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 they 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 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 1780.

## 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 or 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 or trust beneficiary or mortgagee ("*Mortgagee*"), 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  
01 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.