**EXHIBIT A**

**ORDINANCE NO.**

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MORGAN HILL APPROVING A DEVELOPMENT AGREEMENT FOR APPLICATION DA-15-11: WATSONVILLE-HORDNESS (APNs 779-04-052, 067, 075 & 076)**

**THE CITY COUNCIL OF THE CITY OF MORGAN HILL DOES HEREBY ORDAINS AS FOLLOWS:**

**SECTION 1.** The California Government Code Sections 65864 thru 65869.5 authorizes the City of Morgan Hill to enter into binding Development Agreements with persons having legal or equitable interests in real property for the development of such property.

**SECTION 2.** The Council, pursuant to Chapter 18.78.070 B of the Morgan Hill Municipal Code, has found both USA application 06-01 and USA application 14-01 consistent with the criteria spelled out in subparagraph B and Council policy (CP 94-02).

**SECTION 3.** The City Council on December 7, 2011, pursuant to resolution 6502 approved of the inclusion of 67.39 acre area, which included the area for application USA 06-01: Watsonville- Hordness into the Urban Service Area, finding the inclusion would beneficially affect the general welfare of the city through the installation of half street improvements along the property frontage.

**SECTION 4.** The City Council hereby approves Development Agreement DA-15-11: Watsonville-Hordness as contained in the attached Exhibit "A" and by this reference incorporated herein. This document to be signed by the City of Morgan Hill and the property owner(s) set forth in detail the development schedule and the types of improvement required of the subject property. Said Agreement herein above referred to shall be binding on all future owners and developers as well as the present owners of the lands, and any substantial change can be made only after further public hearings before the Planning Commission and the City Council of this City.

**SECTION 5.** The City Council hereby finds that on the basis of the whole record before it (including the initial study and any comments received), that the development agreement as currently proposed is consistent with the initial study completed for USA 06-01 and will not have a significant effect on the environment beyond what was proposed and mitigated through Mitigated Negative Declaration adopted by the City Council on December 7, 2011. The custodian of the documents or other material which constitute the record shall be the Community Development Department.

**SECTION 6.** The City Council hereby finds that the development agreement approved by this ordinance is compatible with the goals, objectives, policies, and land uses designated by the General Plan of the City of Morgan Hill.

**SECTION 7.** Authority is hereby granted for the City Manager to execute all development agreements approved by the City Council during the Public Hearing Process.

**SECTION 8.** Severability. If any part of this Ordinance is held to be invalid or inapplicable to any situation by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance or the applicability of this Ordinance to other situations.

**SECTION 9.** Effective Date; Publication. This ordinance shall take effect thirty (30) days after the date of its adoption. The City Clerk is hereby directed to publish this ordinance pursuant to §36933 of the Government Code.

**SECTION 10.** Notice is hereby given that, pursuant to the Mitigation Fee Act, the City of Morgan Hill charges certain fees (as such term is defined in Government Code Section 66000) in connection with approval of your development project for the purpose of defraying all or a portion of the cost of public facilities related to your development project (Mitigation Fee Act Fees). These fees do not include fees for processing applications for governmental regulatory actions or approvals, or fees collected (a) under development agreements, or (b) as a part of your application for development allocations under the City's Residential Development Control System. The Mitigation Fee Act Fees applying to your project are listed in the schedule of fees provide. Notice is also hereby given that you have the opportunity to protest the imposition of the Mitigation Fee Act Fees within 90 days of the approval of the approval or conditional approval of your development project and that the 90-day approval period in which you may protest has begun. This right to protest does not apply to voluntary Residential Development Control System fees.

**THE FOREGOING ORDINANCE WAS INTRODUCED AT A MEETING OF THE CITY COUNCIL HELD ON THE 2nd DAY OF SEPTEMBER 2015, AND WAS FINALLY ADOPTED AT A MEETING OF THE CITY COUNCIL HELD ON THE DAY OF _____2015, AND SAID ORDINANCE WAS DULY PASSED AND ADOPTED IN ACCORDANCE WITH LAW BY THE FOLLOWING VOTE:**

**AYES: COUNCILMEMBERS:**
**NOES: COUNCILMEMBERS:**
**ABSTAIN: COUNCILMEMBERS:**
**ABSENT: COUNCILMEMBERS:**

**ATTEST:** **APPROVED:**

_____ _____

**IRMA TORREZ, City Clerk** **STEVE TATE, Mayor**

**CERTIFICATION**

**I, IRMA TORREZ, CITY CLERK OF THE CITY OF MORGAN HILL, CALIFORNIA,** do hereby certify that the foregoing is a true and correct copy of Ordinance No. , New Series, adopted by the City Council of the City of Morgan Hill, California at its regular

meeting held on the day of , 2015.

**WITNESS MY HAND AND THE SEAL OF THE CITY OF MORGAN HILL.**

DATE:_____

_____
IRMA TORREZ, City Clerk

**RECORDING REQUESTED BY AND**
**WHEN RECORDED MAIL TO:**

City of Morgan Hill
Community Development Agency
17575 Peak Avenue
Morgan Hill, CA 95037

RECORDING FEES EXEMPT
PURSUANT TO GOVERNMENT
CODE SECTION 27383

---

**DEVELOPMENT AGREEMENT**

**BY AND BETWEEN**

**THE CITY OF MORGAN HILL**

**AND**

**ROYAL OAKS ENTERPRISES INC. REGARDING**
**URBAN SERVICE AREA AMENDMENT, USA-06-01 & USA 14-01**
**WATSONVILLE ROAD-ROYAL OAKS /HORDNESS**

**EXHIBIT A**

DEVELOPMENT AGREEMENT
BY AND BETWEEN
THE CITY OF MORGAN HILL
AND
ROYAL OAKS ENTERPRISES INC.
REGARDING
URBAN SERVICE AREA AMENDMENTS (USA-06-01 AND USA 14-01) PROJECTS

This Development Agreement ("**Agreement**") is made and entered into on the below-stated "**Effective Date**" by and between the City of Morgan Hill, a California municipal corporation, (hereinafter "**City**"), and Royal Oaks Enterprises Inc, a California corporation and its successor and assigns (hereinafter, collectively, "**Developer**"), pursuant to section 65864 *et seq*. of the Government Code of the State of California and City's police powers. City and Developer are, from time to time, also hereinafter referred to individually as a "**Party**" and collectively as the "**Parties**."

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein and other considerations, the value and adequacy of which are hereby acknowledged, the Parties hereby agree as follows:

## RECITALS

A. To strengthen the public planning process, encourage private participation in comprehensive planning and reduce the economic risk of development, the Legislature of the State of California adopted Government Code sections 65864 *et seq*. ("**Development Agreement Statute**"), which regulates development agreements with any person having a legal or equitable interest in real property providing for the development of that property and establishes certain development rights in the property. In accordance with the Development Agreement Statute, and by virtue of its police powers, City has the authority to enter into development agreements, and has reflected that authority in its Morgan Hill Municipal Code (Section 1880 *et seq*.) ("**Enabling Ordinance**"). This Agreement has been drafted and processed pursuant to the Development Agreement Statute and the Enabling Ordinance.

B. Developer currently has a legal and/or equitable interest in that certain real property described in that certain legal description and shown upon that certain map attached hereto as Exhibit "A" & "B," respectively (the "**Legal Description and Property Map**"), which real property is hereinafter referred to as the "Property."

C. Developer has applied to City for a certain urban service area amendment described in more detail in that certain City file applications number USA-06-01 & USA 14-01 (the "Application") in order to include the Property and a portion of a parcel immediately north of to the Property, which adjacent parcel also is shown upon the Property Map, within City's urban service area (the "**Project**").

D. As of the Effective Date, various land use regulations, allotments, entitlements, grants, permits and other approvals have been adopted, issued, and/or granted by City relating to the Property (collectively "**Existing Approvals**"), including without limitation, all of the following:

1. **Environmental Assessment Application**; EA 06-10: Watsonville-Royal Oaks,

2. **General Plan Amendment**; GPA 07-02: Watsonville-Royal Oaks

3. **Zoning Amendment;** ZA 08-09: Watsonville-Royal Oaks

4. **Annexation:** ANX 13-01: Watsonville-Royal Oaks

The Existing Approvals are more particularly described in the **Mitigated Neg Dec,** and the ordinances and resolutions adopting the Existing Approvals.

E. Morgan Hill Municipal Code section 18.78.070.A generally provides that City shall not apply to its Local Agency Formation Commission for amendments to City's urban service area until City's City Council finds that the amount of undeveloped, residentially developable land within City's existing urban service area is insufficient to accommodate five (5) years' worth of residential growth, but provides for an exception to this provision for desirable infill; and

F. "**Desirable Infill**" for the purposes of said section 18.78.070 means a tract of land of twenty (20) acres or less in size and abutted on at least two sides by City lands whose inclusion in City's urban service area would not unduly burden City services and would beneficially affect the general welfare of the citizens of City by promoting orderly and contiguous development by, among other things, facilitating the provision of infrastructure improvements through connection to existing infrastructure (such as improving streets in order to improve traffic circulation) that is installed within five (5) years of the date that the lands are added to City's urban service area or upon development, whichever first occurs; and

G. Said section 18.78.070 further provides that developer commitments to install such beneficial infrastructure improvements must be secured prior to any official action to add the subject lands to City's urban service area through a legally binding agreement, such as a development agreement, recorded against the affected real properties; and

H. In connection with the Applications for the Project, Developer desires for the Property to be considered as Desirable Infill pursuant to the provisions and requirements of said section 18.78.070 and, for this reason, proposes to install one-half street improvements to City standards along the Watsonville Road frontage beginning from and along the Property continuously (and including the frontage along APN 779-04-067) to the intersection of Watsonville Road and Monterey Road (approximately 1750 linear feet), as generally shown upon the Property Map, and to secure Developer's commitment to City to provide such street improvements through entrance into this Agreement, and City desires to secure Developer's commitment; and

I. For the reasons recited herein, Developer and City have determined that the Project is the type of development for which this Agreement is appropriate. This Agreement will help to eliminate uncertainty in planning, provide for the orderly development of the Project consistent with the planning goals, policies, and other provisions of the City's General Plan and City's Municipal Code, and otherwise achieve the goals and purposes for which the Development Agreement Statute was enacted.

J. On August 12, 2014, following a duly noticed and conducted public hearing, the Planning Commission of the City ("**Planning Commission**"), the hearing body for purposes of the Development Agreement Statute and the Enabling Ordinance, adopted Resolutions that affirmed CEQA compliance for this Agreement, adopted findings that this Agreement is consistent with the

City's General Plan and the Existing Approvals and recommended that a Development Agreement be approved by the City Council.

## ARTICLE 1

## ADMINISTRATION

**1.01 Effective Date.** On ____, 2015, following a duly noticed and conducted public hearing, the Morgan Hill City Council ("City Council") introduced Ordinance No. _____, an ordinance that affirms CEQA compliance, that adopts findings that this Agreement is consistent with the City's General Plan and the Existing Approvals, that approves this Agreement, and that directs this Agreement's execution by City ("Approving Ordinance"). The City adopted the Approving Ordinance on ____, 20__, the Approving Ordinance became effective thirty (30) days later, and the Parties signed the Agreement. The "Effective Date" in this Agreement shall be a date no earlier than the date that the Approving Ordinance became effective.

**1.02 Definitions.**

(a) The following terms, phrases and words shall have the meanings and be interpreted as set forth in this Section:

(1) "**Applicable Law**" shall have that meaning set forth in Section 2.01(a) of this Agreement.

(2) "**Existing Approvals**" shall have that meaning set forth in Recital paragraph D of this Agreement.

(3) "**Existing City Laws**" shall mean all City ordinances, resolutions, rules, regulations, guidelines, motions, practices and official policies governing land use, zoning and development, RDCS, permitted uses, density and intensity of use, maximum height, bulk and size of proposed buildings, and other City land use regulations in force and effect on the Effective Date of this Agreement.

(4) "**Impact Fees**" shall mean those fees imposed so that developments bear a proportionate share of the cost of public facilities and service improvements that are reasonably related to the impacts and burdens of the Project, adopted pursuant to Morgan Hill Municipal Code Chapter 3.56 and California Government Code Section 66001 et seq.

(5) "**Legal Effect**" shall mean the ordinance, resolution, permit, license or other grant of approval has been adopted by City and has not been overturned or otherwise rendered without legal and/or equitable force and effect by a court of competent jurisdiction, and all applicable administrative appeal periods and statutes of limitations have expired.

(6) "**New City Laws**" shall mean any and all City ordinances, resolutions, orders, rules, official policies, standards, specifications and other regulations, whether adopted or enacted by City, its staff or its electorate (through their powers of initiative, referendum, recall or otherwise) that is not a Subsequent Approval, that takes "**Legal Effect**" after the Effective Date of this Agreement, and that applies City wide.

(7) "**Project**" Project is defined in Recital C hereinabove. Notwithstanding the foregoing, any reference in this Agreement to the "Project" shall collectively mean and include the "Property" affected by the Project and the "Beneficial Infrastructure Improvements" described in Section 2.04 herein below because those Beneficial Infrastructure Improvements are required and necessary for the Project to proceed; provided however, that the Project to which this Agreement applies may occupy only a part of the Property and/or may be only a phase of a larger development on the Property.

(8) "**Project Approvals"** mean, collectively, the Project's Existing Approvals and the Subsequent Approvals.

(9) "**Property**" shall mean that certain real property consisting of a total of approximately 15 acres, 7.61 acres was included within the City Limits on March 4, 2014, APNs 779-04-001(now 779-04-076) and 779-04-056 (now 779-04-075) and 7.5 acres is the subject of USA application 14-01: Watsonville-Hordness (77904-052), as more particularly described and/or shown on Exhibit "A" to this Agreement. The intervening parcel owned by the Santa Clara Valley Water District (APN 779-04-067) is included in the USA application 14-01 and in the Agreement, but is not part of the "Property."

[(10) Deliberately left blank.]

(11) "**Second Notice"** shall have that meaning set forth in Section 4.07(c) of this Agreement.

(12) "**Subdivision Document**" means, pursuant to Government Code section 66452.6(a) and this Agreement, the term of any tentative map, vesting tentative map, parcel map, vesting parcel map, final map or vesting final maps, or any such new map or any amendment to any such map, or any resubdivision.

(13) "**Subsequent Approvals**" a**nd "Subsequent Approval**" mean those City permits, entitlements, approvals or other grants of authority (and all text, terms and conditions of approval related thereto), that may be necessary or desirable for the fulfillment of the Project, that are sought by Developer, and that are granted by City after the City Council adopts the Approving Ordinance (defined below), including without limitation, a City Resolution of Application for Annexation.

(b) To the extent that any defined terms contained in this Agreement are not defined above, then such terms shall have the meaning otherwise ascribed to them elsewhere in this Agreement, or if not in this Agreement then by controlling law.

**1.03 <u>Term Documents</u>.**

(a) The term ("**Term**") of this Agreement shall commence on the Effective Date and then shall continue (unless this Agreement is otherwise terminated, modified or extended as provided in this Agreement) until the earliest of: (1) five (5) years from the Effective Date, or (2) commencement of development of the Property, whichever first occurs; provided however that Developer's obligations under Sections 2.03 and 2.04 shall survive the termination of this Agreement until such obligations are fully performed and completed in accordance with this Agreement.

(b) If any "**Third Party Challenge**" (as that term is defined in Section 4.06(a) of this Agreement) is filed, then the Term of this Agreement shall be tolled for the period or periods of

time from the date of the filing of such litigation until the conclusion of such litigation by dismissal or entry of a final judgment ("**Litigation Tolling**"). Notwithstanding the foregoing, regardless of the number of Third Party Challenges that may be filed during the Term of this Agreement, the sum total of such Litigation Tolling shall not exceed five (5) years. The filing of any Third Party Challenge shall not delay or stop the development, processing or construction of the Project, or the approval or issuance of any Project Approvals, unless enjoined or otherwise controlled by a court of competent jurisdiction. The Parties shall not stipulate to the issuance of any such order unless mutually agreed to.

## ARTICLE 2

## APPLICABLE LAW

### 2.01 Applicable Law—Generally.

(a) As used in this Agreement, "**Applicable Law**" shall mean all of the items listed below in this Section 2.01, subject only to the conditions set forth in Section 2.02(c) of this Agreement. The order of their importance is the order in which they are listed (with highest importance listed first, second most important listed second, etc.); in the event of a conflict between them, their order shall determine which one controls (the one listed higher controlling over the one listed lower):

(1) All the provisions, terms and conditions of this Agreement.

(2) The Existing Approvals. Developer hereby waives any legal or equitable right to challenge administratively or judicially any Existing Approvals including conditions of those Existing Approvals. Such waiver includes any requirements for notice, acts of protest and/or right to litigation pursuant to the Mitigation Fee Act and/or any other applicable law.

(3) The Subsequent Approvals, provided such Subsequent Approvals are:

(i) In compliance with all controlling California law;

(ii) Mutually agreed to by the Parties; and

(iii) Duly enacted by City.

(4) The "Existing City Laws" that are not in conflict with this Agreement and the Project Approvals.

(5) Any "New City Laws" Developer is subject to under this Agreement; for example, as provided in, but not limited to, Section 2.09. Additionally, any New City Laws to which Developer elects to be subject pursuant to Section 2.09(e).

(b) The Parties acknowledge that the Subsequent Approvals may be processed in stages and therefore one or more Subsequent Approvals may be adopted and approved before other Subsequent Approvals needed for development of the Project are adopted and approved by City.

(c) The Parties shall cooperatively assemble all of the necessary documents to memorialize, to the best of their abilities, the Existing Approvals, Existing City Laws, and the terms and conditions contained in this Agreement to assist Developer to maintain the documents

assembled and to provide a continuing reference source for the approvals granted and the ordinances, policies and regulations in effect on the Effective Date of this Agreement.

(d) Nothing contained herein will give Developer a vested right to develop the Property or to obtain a sewer connection for said Property in the absence of sewer capacity available to the Property.

**2.02 Vested Right to Applicable Law.**

(a) During the Term of this Agreement, Developer shall have the vested right to develop the Project subject only to, and in accordance with, the Applicable Law, and during the Term of this Agreement City shall have the right to regulate the development and use of the Project subject only to, and in accordance with, the Applicable Law. Nothing contained herein will give Developer a vested right to obtain a sewer connection for the Property in the absence of sewer capacity available to the Property.

(b) Under this Agreement, the Applicable Law will be an expanding body of law, such as, for example, when Subsequent Approvals are granted by City, and/or when Developer becomes subject to a New City Law pursuant to this Agreement.

**2.03 Project Impacts and Costs.**

(c) Agreement Subject to Project Mitigation Requirements. Notwithstanding any other express or implied term or condition of this Agreement (or the Existing Approvals) to the contrary, throughout the Term of this Agreement, the full and complete mitigation of all environmental (including any mitigation measure adopted pursuant to CEQA), physical, fiscal and other impacts of the Project and the Property, if any, on the community and on the City of Morgan Hill and its services, facilities, operations and maintenance (collectively, "**Project Mitigation**") shall be borne by and shall be the sole and exclusive responsibility of the Project (and the Developer who is the owner of same). Such Project Mitigation may be conditions of any Applicable Law or Project Approval and may include a mix of different approaches, including without limitation, Developer construction of and/or financing of such services, facilities, operations and maintenance through the payment of impact fees or other fees, taxes, levies, assessments, or other financing mechanisms including without limitation, reimbursement agreements, Landscaping and Lighting Districts, Mello-Roos Districts, Community Facilities Districts, Assessment Districts, Tax-Exempt and Taxable Financing Mechanisms, Maintenance Districts, Homeowners Associations, and participation in the Statewide Communities Infrastructure Program (collectively, "**Financing Mechanisms**"). The necessary scope and extent of such Project Mitigation, and which combination of Financing Mechanisms should be employed relating to such Project Mitigation to assure success of the Project Mitigation, shall be determined by City, in its sole and exclusive discretion, pursuant to appropriate City ordinance, resolution, regulations or procedures, taking into account and guided by the pre-existing rights of others in the existing and future public services and facilities (including their operations and maintenance) that Developer may seek to use. If no Financing Mechanism is available to fund the Project Mitigation, then the Project shall not progress forward.

(d) Impact Fees. In addition to any agreed-upon Project-specific requirements as set forth in Section 2.04 and as part of the Project's sole and exclusive obligation (and the Developer's as the owner of same) to cover Project Mitigation, Developer shall pay all Impact Fees and in the amounts in legal effect at the time any such Impact Fees become due and payable as provided for in the City's Municipal Code.

(e) Processing Fees. In addition to any agreed-upon Project-specific requirements, the Project (including Developer as owner of same) shall be responsible for the costs to City of processing any and all Developer-requested land use approvals, including without limitation, environmental studies required under CEQA and other similar requests for City permits and entitlements, when such costs are incurred by City. City shall impose those funding requirements needed to ensure that the processing costs to the City are fully covered by the Project (including D**eveloper as owner of same).**

2.04 Project-Specific Requirements.

(f) The following Project-specific requirements set forth in Exhibit "C," Beneficial Infrastructure Improvements," attached hereto and incorporated herein by this reference, are voluntarily offered to City and assumed as obligations by Developer in order for the Project to beneficially affect the general welfare of the citizens of the City by promoting orderly and contiguous development that facilitates the provision of infrastructure improvements that connect to existing infrastructure in the area of the Project, all as required by Morgan Hill Municipal Code section 18.78.070 ("Project Specific Requirements"). These Project Specific Requirements are not Project Mitigation within the meaning of Section 2.03 of this Agreement or otherwise imposed to mitigate environmental impacts of the Project. Developer hereby agrees that these Project Specific Requirements are not subject to credit, refund or reimbursement or prohibition under otherwise applicable City, state or federal law and waives any such right to credit, refund, reimbursement or prohibition. Instead, these Project Specific Requirements are voluntarily offered and assumed by Developer in order for the Project to qualify as desirable infill pursuant to the provisions of Morgan Hill Municipal Code section 18.78.070.

(g) The Developer's applications USA 06-01 and USA 14-01 and approval actions (as reflected in the official records, including agendas and minutes of the City Planning Commission and City Council) shall be incorporated into this Agreement; provided however, that the Parties hereto recognize that the Project under this Agreement may constitute only part of the ultimate development of the Property to which said application and approvals apply.

**2.05 Construction Codes.**

With respect to the development of any or all of the Project or the Property, Developer shall be subject in connection with any construction activity, if any, to the California Building Code and all those other State-adopted construction, fire and other codes applicable to improvements, structures, and development, and the applicable version or revision of said codes by local City action (collectively referred to as "**Construction Codes**") in place at that time that a plan check application for a building, grading or other permit subject to such Construction Codes is submitted to City for approval, provided that such Construction Codes have been adopted by City and are in effect on a City-wide basis.

**2.06 Timing of Development.**

(h) Securing Building Permits and Beginning Construction. Developer agrees to secure required building and other permits and to begin construction of the Project in accordance with the time requirements set forth in Exhibit "C," "Beneficial Infrastructure Improvements" and in accordance with the Construction Codes, as these exist on the Effective Date. Developer acknowledges and understands that time is of the essence in the performance of Developer's obligations under this Agreement.

(i) Progress Reports Until Construction of Project is Complete. Developer shall make reports on the progress of construction of the Project in such detail and at such time as the Community Development Director of the City of Morgan Hill reasonably requests.

(j) City of Morgan Hill to Receive Construction Contract Documents. If the City reasonably requests copies of contracts or documents for the purpose of determining the amount of any bond to secure performance under said contracts, Developer agrees to furnish such documents to the City and the City agrees to maintain the confidentiality of such documents and not disclose the nature or extent of such documents to any person or entity to the extent allowed under and in conformance with the requirements of the California Public Records Act.

(k) Certificate of Completion. Within thirty (30) days after completion to the City's satisfaction of the Project, City shall provide Developer with an instrument in recordable form certifying completion of the Project. Upon issuance of the certificate of completion for the Project, this Development Agreement shall be deemed terminated as to the entire Project.

**2.07 Improvements.**

In any instance where Developer is required to install improvements (including the Beneficial Infrastructure Improvements described in Exhibit B), Developer shall obtain City approval of the plans and specifications and the timing and manner of the installation of improvements, and provided Developer has supplied all information required by City, City shall review and act on the application for such approval with good faith and in a reasonable manner. Where the actual cost of any improvement exceed Developer's estimated cost or commitment, Developer shall be solely responsible for all improvements costs in excess of those approved by City.

**2.09 New City Laws.**

(l) City may apply any New City Law to the Project that is not in conflict with this Agreement and the Applicable Law it describes. City shall not apply any New City Law to the Project that is in conflict with this Agreement and the Applicable Law it describes, nor otherwise reduces the development rights or assurances provided by this Agreement.

(m) If City determines that it has the right under this Agreement to impose/apply a New City Law on the Property/Project, it shall send written notice to Developer of that City determination (**"Notice of New City Law"**). Upon receipt of the Notice of New City Law, if Developer believes that such New City Law is in conflict with this Agreement, Developer may send written notice to the City of the alleged conflict within thirty (30) days of receipt of City's Notice of New Law ("**Objection to New City Law**"). Developer's Objection to New City Law shall set forth the factual and legal reasons why Developer believes City cannot apply the New City Law to the Property/Project. City shall respond to Developer's Objection to New City Law ("**City Response**") within thirty (30) days of receipt of said Developer Objection to New City Law. The City Response shall set forth the factual and legal reasons why City believes it can apply the New City Law to the Project. Thereafter, the Parties shall meet and confer within thirty (30) days of the date of Developer's receipt of the City Response (the "**Meet and Confer Period**") with the objective of attempting to arrive at a mutually acceptable solution to this disagreement. Within fifteen (15) days of the conclusion of the Meet and Confer Period, City shall make its determination, and shall send written notice to Developer of that City determination. If City determines to "impose/apply" the

New City Law to the Project, then Developer shall have a period of ninety (90) days from the date of receipt of such City determination within which to file legal action challenging such City action. In other words, a 90-day statute of limitations regarding Developer's right to judicial review of the New City Law shall commence upon Developer's receipt of City's determination following the conclusion of the Meet and Confer Period. If upon conclusion of judicial review of the New City Law (at the highest judicial level sought and granted), the reviewing court determines that Developer is not subject to the New City Law, such New City Law shall cease to be a part of the Applicable Law, and City shall return Developer to the position Developer was in prior to City's application of such New City Law (*e.g.*, City return fees, return dedications, etc.). The above-described procedure shall not be construed to interfere with City's right to adopt or apply the New City Law with regard to all other areas of City (excluding the Project).

(n) Developer in its sole and absolute discretion may elect to have applied to the Project a New City Law that is not otherwise a part of the Applicable Law, subject to the limitations set forth in this subdivision (d). In the event Developer so elects to be subject to a New City Law that is not otherwise a part of the Applicable Law, Developer shall provide notice to City of that election and thereafter such New City Law shall be part of the Applicable Law. In no event shall any New City Law become part of the Applicable Law if it would relieve Developer from, or impede Developer's compliance with, Developer's obligations under this Agreement, including without limitation Developer's obligations of full "Project Mitigation" under Section 2.03 and Other Project Specific Requirement" under Section 2.04. Further, for the purposes of this Agreement, the "New City Laws" Developer may elect to be subject to pursuant to this Section shall not mean nor include any or all individual development agreements with other developers (including without limitation such development agreements' term and conditions, exhibits, etc.) executed before or after the Effective Date of this Agreement.

(o) City shall not be precluded from adopting and applying New City Laws to the Project to the extent that such New City Laws are specifically required to be applied by State or Federal laws or regulations, and implemented through the Federal, State, regional and/or local level) ("**Mandated New City Laws**"), including without limitation those provisions in the Development Agreement Statute concerning property located in a flood hazard zone (Gov. Code § 65865.5), or that such New City Laws are necessitated by or arise from a declaration of City, local, state or federal declaration of a state of emergency.

(p) In the event that an administrative challenge and/or legal challenge (as appropriate) to a Mandated New City Laws preventing compliance with this Agreement is brought and is successful in having the Mandated New City Law determined to not apply to this Agreement, this Agreement shall remain unmodified and in full force and effect.

## ARTICLE 3

## PROCESSING

### 3.01 Processing.

(a) This Agreement does not provide Developer with any right to the approval of Subsequent Approvals nor to develop or construct the Project beyond that which is authorized in the Existing Approvals. For any Subsequent Approvals necessary for the Project, this Agreement simply provides a process by which such Subsequent Approvals may be processed by Developer, and later included into this Agreement, if and only if such Subsequent Approvals are compliant with all controlling California law (including proper Planning and Zoning Law and CEQA compliance),

have secured approval of the Parties, and are adopted/approved by City, which shall retain all lawful discretion in this regard. That public review process is ongoing, and following the City's adoption of this Agreement, that public review process shall continue. Nothing in this Agreement shall be construed to limit the authority or obligation of City to hold necessary public hearings, or to limit the discretion of City or any of its officers or officials with regard to the Project Approvals that legally require the exercise of discretion by City. City's discretion as to the granting of Subsequent Approvals shall be the discretion afforded by the Applicable Law.

(b) Upon submission by Developer of any and all necessary and required applications for Subsequent Approvals and payment of any and all appropriate processing and other fees as provided in this Agreement, City shall use its best efforts to promptly commence and diligently complete all steps necessary to acting on the requested Subsequent Approvals, including, but not limited to, (i) the holding of any and all required public hearings and notice for such public hearings, and (ii) the granting of the requested approval to the extent that it is consistent with Applicable Law.

**3.02 Significant Actions by Third Parties Necessary to Implement the Approvals.**

(a) At Developer's sole discretion, Developer shall apply for such other permits, grants of authority, agreements, and other approvals from other private and/or public and quasi-public agencies, organizations, associations or other entities ("**Other Entity**") as may be necessary to the development of, or the provision of services and facilities to, the Project ("**Other Permits**").

(b) City shall cooperate with Developer in its endeavors to obtain any Other Permits and shall, from time to time, at the request of Developer, join with Developer in the execution of such permit applications and agreements as may be required to be entered into with any such other agency.

(c) In the event that any such Other Permit is not obtained from an Other Entity within the time permitted by law for such other entity to act and such circumstance materially deprives Developer of the ability to proceed with development of the Project or any portion thereof, or materially deprives City of a bargained-for public benefit of this Agreement, then, in such case, and at the election of either party, Developer and City shall meet and confer with the objective of attempting to mutually agree on solutions that may include alternatives, Subsequent Approvals, or an amendment(s) to this Agreement to allow the development of the Project to proceed with each Party substantially realizing its bargained-for benefit there from.

**3.03 Administrative Amendments.**

(d) Upon the written request of Developer for an amendment or modification of this Agreement or a Project Approval, the City Manager or his designee shall determine: (1) whether the requested amendment or modification is minor; and (2) whether the requested amendment or modification is consistent with this Agreement and the Applicable Law. If the City Manager or his designee finds that the proposed amendment or modification is both minor and consistent with this Agreement and the Applicable Law, the City Manager or his designee may approve the proposed amendment or modification without notice and public hearing. Such minor amendments or modifications approved pursuant to this Section shall not constitute subsequent discretionary approvals subject to further CEQA review. Any minor amendment must be made in writing signed by the City Manager (and approved by the City Attorney) of the City and by the Developer. After approval and signatures from the City Manager and the Developer, the amendment shall be recorded with the Santa Clara county recorder.

(e) For the purpose of this Agreement, a minor amendment shall include any minor extension, postponement or amendment of the time for commencement of construction or completion of the Project.

(f) A "minor amendment" shall not include any of the following:

(i) Any material amendment or modification, or elimination of provisions required pursuant to the Morgan Hill Municipal Code and California Government Code Section 65865.2, or its successor legislation, including provisions relating to: (1) the duration or term of this Agreement, (2) the permitted uses of the subject Property, (3) the density or intensity of uses, (4) the maximum height and size of proposed buildings, (5) provisions for reservation or dedication of land for public purposes, (6) general location of the uses or proposed buildings or (7) the relation of the Project to adjacent properties; or

(ii) Any material amendment or modification or eliminations of provisions set forth in Article 2 of this Agreement or Exhibit C to this Agreement or any reduction in fees or Project Mitigations hereunder.

### 3.04 Amendments.

Any request by Developer for an amendment or modification to this Agreement or a Project Approval that is determined to be not minor by the City Manager or his designee shall be subject to the applicable substantive and procedural provisions of the City's General Plan, zoning, subdivision, and other applicable land use ordinances and regulations (i.e., City review and approval) in effect when such an amendment or modification request is approved.

## ARTICLE 4

## DEFAULT, VALIDITY PROVISIONS, ASSIGNMENT

### 4.01 Defaults.

(a) Any failure by City or Developer to perform any material term or provision of this Agreement, which failure continues uncured for a period of sixty (60) days (or 150 days for a Mortgagee (as that term is defined in Section 4.10(a)) following written notice of such failure from the other Party (unless such period is extended by written mutual consent) ("**Notice of Default**"), shall constitute a default under this Agreement ("**Default**"). Any Notice of Default shall specify the nature of the alleged failure and, where appropriate, the manner in which such alleged failure satisfactorily may be cured. If the nature of the alleged failure is such that it cannot reasonably be cured within such 60-day period (or 150 days for a Mortgagee), then the commencement of the cure within such time period, and the diligent prosecution to completion of the cure thereafter, shall be deemed to be a cure within such 60-day period (or 150 days for a Mortgagee). If the alleged failure is cured, then no Default shall exist and the noticing Party shall take no further action. If the alleged failure is not cured, then a Default shall exist under this Agreement and the non-defaulting Party may exercise any of the remedies available under this Article.

(b) No failure or delay in giving notice of default shall constitute a waiver of default; provided, however, that the provision of written notice and opportunity to cure shall

nevertheless be a prerequisite to the enforcement or correction of any default. Waiver of a breach or default under this Agreement shall not constitute a continuing waiver or a waiver of a subsequent breach of the same or any other provision of this Agreement.

**4.02 Actions During Cure Period.**

(a) During any cure period and during any period prior to any delivery of notice of failure or default, the Party charged shall not be considered in default for purposes of this Agreement. If there is a dispute regarding the existence of a default, the Parties shall otherwise continue to perform their obligations hereunder, to the maximum extent practicable in light of the disputed matter and pending its resolution or formal termination of the Agreement as provided herein.

(b) City will continue to process in good faith development applications during any cure period, but need not approve any such application if it relates to an alleged default of Developer hereunder.

**4.03 Resolution of Disputes.**

(c) In the event either Party is in default under the terms of this Agreement, the other Party may elect, in its sole and absolute discretion, to pursue any of the following courses of action: (i) waive such default; (ii) pursue administrative remedies as provided herein; (iii) pursue judicial remedies as provided for herein; and/or (iv) terminate this Agreement.

(d) Except as otherwise specifically stated in this Agreement, either Party may, in addition to any other rights or remedies, institute legal action to cure, correct, or remedy any default by another Party to this Agreement, to enforce any covenant or agreement herein, to enjoin any threatened or attempted violation hereunder, or to seek specific performance. It is expressly understood and agreed that the sole legal remedy available to Developer for a breach or violation of this Agreement by City shall be a legal action in mandamus, specific performance, and/or other injunctive or declaratory relief to enforce the provisions of this Agreement, and that Developer shall not be entitled to bring an action for damages including, but not limited to, lost profits, consequential damages or other economic damages. For purposes of instituting a legal action under this Agreement, any City Council determination under this Agreement shall be deemed a final agency action.

(e) The Parties agree to meet and confer regarding any dispute, in an effort to agree on utilizing Judicial Arbitration Mediation Services ("**JAMS**") for Alternative Dispute Resolution ("**ADR**"). However, no party shall be required to use JAMS or ADR.

**4.04 Periodic Review.**

(f) The City is authorized to review performance by Developer under this Agreement at least four times per year, at which time the Developer is required to demonstrate good faith compliance with the terms of this Agreement.

(g) If, as a result of such periodic review, the City finds and determines, on the basis of substantial evidence, that Developer has not complied in good faith with the terms or conditions of this Agreement, the City may terminate this Agreement or take any other appropriate enforcement action in law or equity.

**4.05 Force Majeure Delay, Extension of Times of Performance.**

(h) Performance by any Party hereunder shall be excused, waived or deemed not to be in default where delays or defaults are due to acts beyond a Party's control such as war, insurrection, strikes, walkouts, riots, floods, earthquakes, fires, casualties, acts of God, unexpected acts of governmental entities other than City, including revisions to capacity ratings of the wastewater plant by the Regional Water Quality Control Board, the State Water Resources Board, enactment of conflicting State or Federal laws or regulations, or litigation (including without limitation litigation contesting the validity, or seeking the enforcement or clarification of this Agreement whether instituted by the Developer, City, or any other person or entity) (each a "**Force Majeure Event**").

(i) Any Party claiming a delay as a result of a Force Majeure Event shall provide the other Party with written notice of such delay and an estimated length of delay. Upon the other Party's receipt of such notice, an extension of time shall be granted in writing for the period of the Force Majeure Event, or longer as may be mutually agreed upon by the Parties, unless the other Party objects in writing within ten (10) days after receiving the notice. In the event of such objection, the Parties shall meet and confer within thirty (30) days after the date of objection to arrive at a mutually acceptable solution to the disagreement regarding the delay. If no mutually acceptable solution is reached, any Party may take action as permitted in this Agreement.

**4.06 Third Party Legal Actions.**

(j) In the event of any administrative, legal or equitable action or other proceeding instituted by any person, entity or organization (that is not a Party to this Agreement) challenging the validity of this Agreement, any Project Approvals, or the sufficiency of any environmental review under CEQA ("**Third Party Challenge**"), the Parties shall cooperate with each other in good faith in the defense of any such challenge.

(k) City shall have the option to defend such Third Party Challenge or to tender the complete defense of such Third Party Challenge to the Developer ("**Tender**"). If City chooses to defend the Third Party Challenge or Developer refuses City's Tender, City shall control all aspects of the defense and Developer shall pay City's attorneys fees and costs (including related court costs).

(l) If Developer accepts City's Tender, Developer shall control all aspects of the defense and shall pay its own attorneys fees and costs (including related court costs), and shall indemnify and hold harmless City against any and all third-party fees and costs arising out of such Third Party Challenge. If City wishes to assist Developer when Developer has accepted the Tender, Developer shall accept that assistance and City shall pay City's own attorneys fees and costs (including related court costs) ("**City Costs**"), and Developer shall pay its own attorneys fees and costs (including related court costs), and shall indemnify and hold harmless City against any and all third-party fees and costs arising out of such Third Party Challenge (such third party fees and costs shall not include City Costs).

(m) If any part of this Agreement or any Project Approval is held by a court of competent jurisdiction to be invalid, the City shall: (1) use its best efforts to sustain and/or re-enact that part of this Agreement and/or Project Approval; and (2) take all steps possible to cure any inadequacies or deficiencies identified by the court in a manner consistent with the express and implied intent of this Agreement, and then adopting or re-enacting such part of this Agreement and/or Project Approval as necessary or desirable to permit execution of this Agreement and/or Project Approval.

**4.07 Estoppel Certificate.**

(n) Any Party may, at any time, and from time to time, deliver written notice to any other Party, and/or to the Developer's lender, requesting such Party to certify in writing that, to the knowledge of the certifying Party:

(1) This Agreement has not been amended or modified either orally or in writing or if so amended, identifying the amendments.

(2) The Agreement is in effect and the requesting Party is not known to be in default of the performance of its obligations under this Agreement, or if in default, to describe therein the nature and amount of any such defaults.

(o) This written certification shall be known as an "**Estoppel Certificate.**" A Party receiving a request hereunder shall execute and return such Estoppel Certificate within ten (10) days following the receipt of the request, unless the Party, in order to determine the appropriateness of the Estoppel Certificate, promptly commences and proceeds to conclude an Annual Review. The Parties acknowledge that an Estoppel Certificate may be relied upon by Assignees and other persons having an interest in the Project, including holders of mortgages and deeds of trust. The City Manager shall be authorized to execute an Estoppel Certificate for City.

(p) If a Party fails to deliver an Estoppel Certificate within the ten (10) day period, as provided for in Section 4.07(b) above, the Party requesting the Estoppel Certificate may deliver a second notice (the "**Second Notice**") to the other Party stating that the failure to deliver the Estoppel Certificate within ten (10) working days following the receipt of the Second Notice shall constitute conclusive evidence that this Agreement is without modification and there are no unexcused defaults in the performance of the requesting Party. Failure to deliver the requested Estoppel Certificate within the ten (10) working day period shall then constitute conclusive evidence that this Agreement is in full force and effect without modification and there are no unexcused defaults in the performance of the requesting Party.

**4.08 Assignment/Covenants Run with the Land.**

(q) Right to Assign. Developer shall have the right to sell, assign, or transfer this Agreement with all its rights, title and interests therein to any person, firm or corporation acquiring an interest in the Project or Property (or portion thereof associated with the Project) at any time during the term of this Agreement ("**Assignee**"). Developer shall provide City with written notice of any assignment or transfer of all or a portion of the Property no later than thirty (30) days prior to such action, which notice shall include specific portions of the Project or Property to be assigned and the proposed form of assignment. Any proposed assignment shall be subject to the express written consent of City, which consent shall not be unreasonably withheld, delayed or conditioned. City's approval of a proposed assignment or transfer shall be based upon the proposed assignee's reputation, experience, financial resources and access to credit and capability to successfully carry out the development of the Property to completion. The written assignment, assumption or release of rights or obligations with respect to a portion of the Project or of the Property shall specify the portion of the Project or Property and the rights assigned and obligations assumed, and shall be approved by the City Attorney. The express written assumption by an Assignee of the obligations and other terms and conditions of this Agreement with respect to the Property or such portion thereof sold, assigned or transferred shall relieve Developer of such obligations so assumed. Any such assumption of Developer's obligations under this Agreement shall be deemed to be to the satisfaction of the City Attorney if executed in the form as may be approved by the City Attorney.

(r) Release Upon Assignment. Upon assignment, in whole or in part, and the express written assumption by the Assignee of such assignment, of Developer's rights and interests under this Agreement, Developer shall be released from its obligations with respect to the Property/Project (or any portion thereof), and any lot, parcel, or portion thereof so assigned to the extent arising subsequent to the effective date of such assignment. A default by any Assignee shall only affect that portion of the Property/Project owned by such Assignee and shall not cancel or diminish in any way Developer's rights or obligations hereunder with respect to the assigned portion of the Property/Project not owned by such Assignee. The Assignee shall be responsible for the reporting and annual review requirements relating to the portion of the Property/Project owned by such Assignee, and any amendment to this Agreement between City and Assignee shall only affect the portion of the Property/Project owned by such Assignee.

(s) Covenants Run with the Land. This Agreement and all of its provisions, agreements, rights, powers, standards, terms, covenants and obligations shall be binding upon the Parties and their respective heirs, successors (by merger, consolidation, or otherwise) and assigns, devisees, administrators, representatives, lessees, and all other persons or entities acquiring the Project and/or Property, any lot, parcel or any portion thereof, or any interest therein, whether by sale, operation of law or in any manner whatsoever, and shall inure to the benefit of the Parties and their respective heirs, successors (by merger, consolidation or otherwise) and assigns. All of the provisions of this Agreement shall be enforceable during the Term as equitable servitudes and constitute covenants running with the land pursuant to applicable law, including, but not limited to Civil Code section 1468. This Agreement shall not be binding upon any consumer, purchaser, transferee, devisee, assignee, or any other successor of Developer acquiring a completed residential unit comprising all or part of the Project ("**Consumer"**) unless such Consumer is specifically bound by a provision of this Agreement or by a separate instrument or Agreement.

**4.09 Encumbrances on the Property.**

The parties hereto agree that this Agreement shall not prevent or limit Developer, in any manner, at Developer's sole and absolute discretion, from encumbering the Property, or any portion thereof or any improvements thereon with any Mortgage securing financing with respect to the construction, development, use or operation of the Project. Mortgagee may require certain modifications to this Agreement, and City shall negotiate in good faith any such request for modification or subordination.

**4.10 Obligations and Rights of Mortgage Lenders.**

(t) The holder of any mortgage, deed of trust or other security arrangement with respect to the Property, or any portion thereof ("**Mortgagee**"), shall not be obligated under this Agreement to construct or complete improvements or to guarantee such construction or completion, but shall otherwise be bound by all of the terms and conditions of this Agreement that pertain to the Property or such portion thereof in which it holds an interest.

(u) Each Mortgagee shall be entitled to receive written notice from City of results of the annual review to be done pursuant to Section 4.04 and any default by Developer under this Agreement, provided such Mortgagee has informed City of its address for notices. Each Mortgagee shall have a further right, but not an obligation, to cure such default in accordance with the default and default cure provisions in Sections 4.01, 4.02, and 4.03 of this Agreement. In the event Developer (or any permitted Assignee) becomes subject to an order for relief under any chapter of Title 11 of the United States Code (the "**Bankruptcy Code**"), the cure periods provided for a Mortgagee in Section 4.01(a) of this Agreement shall be tolled for so long as the automatic stay of

section 362 of the Bankruptcy Code remains in effect as to Developer (or any permitted Assignee); provided, however, if City obtains relief from the automatic stay under Bankruptcy Code section 362 to declare any default by or exercise any remedies against Developer (or any permitted Assignee), the tolling of any Mortgagee's cure period shall automatically terminate on the earlier of: (i) the date that is sixty days after entry of the order granting City relief from the automatic stay, or (ii) the date of the entry of an order granting Mortgagee relief from the automatic stay. Each Mortgagee shall be entitled to receive written notice from City of the filing of any motion by City in which City seeks relief from the automatic stay of section 362 of the Bankruptcy Code to declare any default by or exercise any remedies against Developer (or any permitted Assignee).

(v) Any Mortgagee who comes into possession of the Property, or any portion thereof, pursuant to a foreclosure of a mortgage or a deed of trust, or deed in lieu of such foreclosure, shall take the Property, or such portion thereof, subject to any pro rata claims for payments or charges against the Property, or such portion thereof, that have accrued prior to the time such holder comes into possession. In addition, any Mortgagee who comes into possession of the Property or any portion thereof, pursuant to a foreclosure of mortgage or deed of trust, or deed in lieu of such foreclosure, shall, subject to Section 4.10(a) above, be a permitted Assignee and, as such, shall succeed to all the rights, benefits and obligations of Developer under this Agreement.

(w) Nothing in this Agreement shall be deemed to be construed to permit or authorize any such holder to devote the Property, or any portion thereof, to any uses, or to construct any improvements thereof, other than those uses and improvements provided for or authorized by this Agreement, subject to all of the terms and conditions of this Agreement.

### 4.11 Compliance with Government Code Section 65867.5.

In accordance with the requirements of Government Code section 65867.5, City and Developer agree that any tentative subdivision map(s) for the Project is hereby made subject to a condition that a sufficient water supply shall be available. Proof of the availability of a sufficient water supply shall be secured in accordance with the provisions of Government Code section 66473.7.

### 4.12 Termination.

This Agreement shall terminate upon the expiration of the Term, as set forth in Section 1.03(a), or at such other time as this Agreement is terminated in accordance with the terms hereof, whichever occurs first. Upon termination of this Agreement, the City shall record a notice of such termination, in a form satisfactory to the City Attorney that the Agreement has been terminated.

## ARTICLE 5

## GENERAL PROVISIONS

### 5.01 Miscellaneous.

(a) Preamble, Recitals, Exhibits. References herein to "this Agreement" shall include the Preamble, Recitals and all of the exhibits of this Agreement.

(b) Requirements of Development Agreement Statute. The permitted uses, density and/or intensity of use, maximum height and size of buildings and other structures, provisions for reservation or dedication of land, and other terms and conditions applicable to the Project shall be those set forth in the Applicable Law. As Subsequent Approvals are adopted and

therefore become part of the Applicable Law, the Subsequent Approvals will refine the permitted uses, density and/or intensity of use, maximum height and size of buildings and other structures, provisions for reservation or dedication of land, and other terms and conditions applicable to the Project.

(c) Governing Law and Attorneys' Fees. This Agreement shall be construed and enforced in accordance with the laws of the State of California and legal actions commenced under or pursuant to this Agreement shall be brought in Santa Clara Superior Court. Should any legal action be brought by a Party for breach of this Agreement or to enforce any provision herein, the prevailing party of such action shall be entitled to reasonable attorneys' fees, court costs, and such other costs as may be fixed by the court.

(d) Project as a Private Undertaking. No partnership, joint venture, or other association of any kind between Developer, on the one hand, and City on the other hand, is formed by this Agreement. The development of the Property is a separately undertaken private development. The only relationship between City and Developer is that of a governmental entity regulating the development of private Property and the owners of such private Property.

(e) Indemnification. Developer shall hold City, its elective and appointive boards, commissions, officers, agents, and employees, harmless from any liability for damage or claims for damage for personal injury, including death, as well as from claims for property damage which may arise from Developer's contractors, subcontractors', agents' or employees' operations on the Project, whether such operations be by Developer or by any Developer's contractors, subcontractors, or by any one or more persons directly or indirectly employed by, or acting as agent for Developer or any of Developer's contractors or subcontractors. Developer shall indemnify and defend City and its elective and appointive boards, commissions, officers, agents and employees from any suits or actions at law or in equity for damages caused, or alleged to have been caused, by reason of any of the aforesaid operations and Developer shall pay all reasonable attorney's fees and costs that the City may incur. City does not, and shall not, waive any rights against Developer which it may have by reason of the aforesaid hold-harmless requirement of Developer because of the acceptance of improvements by City, or the deposit of security with City by Developer. The aforesaid hold-harmless requirement of Developer shall apply to all damages and claims for damages of every kind suffered, or alleged to have been suffered, by reason of any of the aforesaid operations referred to in this subsection, regardless of whether or not City has prepared, supplied or approved of, plans and/or specifications for the subdivision. Notwithstanding anything herein to the contrary, Developer’s indemnification of City shall not apply to the extent that such action, proceedings, demands, claims, damages, injuries or liability is based upon the active negligence of the City. Developer shall, during the life of this Agreement take out and maintain insurance coverage with an insurance carrier authorized to transact business in the State of California as will protect the Developer or any Contractor or any Subcontractor or anyone directly or indirectly employed by any of them or by anyone for whose acts any of them may be liable, from claims for damages because of bodily injury, sickness, disease, or death of their employees or any person other than their employees, or for damages because of injury to or destruction of tangible property, including loss of use resulting therefrom. The minimum limits of liability for such insurance coverage which shall include comprehensive general and automobile liability, including contractual liability assumed under this agreement, shall be as follows:

Limit of Liability for Injury or Accidental Death:

Per Occurrence . . . . . $1,000,000

Limit of Liability for Property Damage:

Aggregate Liability for Loss . . . . . $1,000,000

Such liability insurance policies shall name the City as an additional insured, by separate endorsement, and shall agree to defend and indemnify the City against loss arising from operations performed under this agreement and before permitting any Contractor or Subcontractors to perform work under this agreement, the Subdivider shall require Contractor or Subcontractors to furnish satisfactory proof that insurance has been taken out and is maintained similar to that provided by the Subdivider as it may be applied to the Contractor's or Subcontractor's work.

(f) Interpretation/Construction. This Agreement has been reviewed and revised by legal counsel for both Developer and City, and any rule or presumption that ambiguities shall be construed against the drafting Party shall not apply to the interpretation or enforcement of this Agreement. The standard of review of the validity and meaning of this Agreement shall be that accorded legislative acts of City. As used in this Agreement, and as the context may require, the singular includes the plural and vice versa, and the masculine gender includes the feminine and neuter and vice versa.

(g) Notices.

(1) All notices, demands, or other communications that this Agreement contemplates or authorizes shall be in writing and shall be personally delivered or mailed to the respective Party as follows:

If to City:
City Clerk
17575 Peak Avenue
Morgan Hill, CA 95037
Tel: (408) 779-7271
Tel: (408) 779-7259
Fax: (408) 779-3117

With a Copy To:
City Attorney
17575 Peak Avenue
Morgan Hill, CA 95037
Tel: (408) 779-7271
Fax: (408) 779-1592

If to Developer:
Mr. Don Hordness
Royal Oaks Enterprises, Inc.
P.O. Box 447
Morgan Hill, CA 95038

With a Copy To:
Ms. Gloria Ballard
P.O. Box 1029
Morgan Hill, CA 95038

(2) Any Party may change the address stated herein by giving notice in writing to the other Parties, and thereafter notices shall be addressed and transmitted to the new address. Any notice given to the Developer as required by this Agreement shall also be given to any lender which requests that such notice be provided. Any lender requesting receipt of such notice shall furnish in writing its address to the Parties to this Agreement.

(h) Recordation. The Clerk of the City shall record, within ten (10) days after the Effective Date, a copy of this Agreement in the Official Records of the Recorder's Office of Santa Clara County. Developer shall be responsible for all recordation fees, if any.

(i) Severability. If any term or provision of this Agreement, or the application of any term or provision of this Agreement to a specific situation, is found to be invalid, void, or unenforceable, the remaining terms and provisions of this Agreement, or the application of this Agreement to other situations, shall continue in full force and effect.

(j) Jurisdiction. The interpretation, validity, and enforcement of the Agreement shall be governed by and construed under the laws of the State of California.

(k) Entire Agreement. This Agreement, including these pages and all the exhibits (set forth below) inclusive, and all documents incorporated by reference herein, constitute the entire understanding and agreement of the Parties.

(l) Signatures. The individuals executing this Agreement represent and warrant that they have the right, power, legal capacity, and authority to enter into and to execute this Agreement on behalf of the respective legal entities of Developer and City. This Agreement may be executed in multiple originals, each of which is deemed to be an original.

(m) Counterparts. This Agreement may be executed in several counterparts, each of which shall be deemed an original, and all such counterparts shall together constitute one and the same instrument.

(n) Exhibits. The following exhibits are attached to this Agreement and are hereby incorporated herein by this reference for all purposes as if set forth herein in full:

***Exhibit A Legal Description of all parcels***

***Exhibit B Map of all parcels***

***Exhibit C Beneficial Infrastructure Improvements***

5.02 Limitations on Time to Challenge Validity of this Agreement. Developer shall have ninety (90) days from the date of the City Council approved this Agreement to commence and effect service of summons of any action or proceeding to attack, review, set aside, void or annul this Agreement or any part of this Agreement. Thereafter, all persons are barred from any action or proceeding or any defense of invalidity or unreasonableness of the decision of the proceedings, acts or determinations, including any provision of this Agreement or the enforcement hereof.

5.03 Notice of 90-day Right to Protest. Developer is hereby notified that Developer shall have ninety (90) days from the date of the imposition of any fees, dedications, reservations, or other exactions, to file a protest of the imposition of any such fees, dedications, reservations or other exactions; provided however that any challenge to the validity of any provisions of this Agreement, including Project Mitigations Project Specific Requirements, shall be subject to Section 5.02 and that this notice of the right to protest shall not supplant, extend or start anew any protest period already commenced pursuant to previous notices.

IN WITNESS WHEREOF, City and Developer have executed this Agreement as of the date first hereinabove written.

**CITY OF MORGAN HILL:**

s/_____
_____
Steve Rymer
City Manager

Date: _____

**Attest:**

s/_____
Michelle Wilson, Deputy Ci
_____
_____
Deputy City Clerk

**DEVELOPER:**
Royal Oaks Enterprises, Inc.,
a California corporation

s/_____
Don Hordness, President

*Corporate entities must provide a second signature:*

s/_____

_____
Linda Abdilla, Secretary/Treasurer
Date:

**Approved as to Form:** s/_____

_____
Renee A. Gurza
City Attorney
Date: _____

**(ALL SIGNATURES, EXCEPT CITY CLERK AND CITY ATTORNEY, MUST BE ACKNOWLEDGED BY A NOTARY**

IN WITNESS WHEREOF, City and Developer have executed this Agreement as of the date first hereinabove written.

**CITY OF MORGAN HILL:**

s/_____

Steve Rymer
City Manager

Date: _____

**Attest:**

s/_____
Michelle Wilson, Deputy Ci

Deputy City Clerk

**Approved as to Form:**

s/_____

Renee A. Gurza
City Attorney
Date: _____

**DEVELOPER:**
Royal Oaks Enterprises, Inc.,
a California corporation

s/_____
Don Hordness, President

*Corporate entities must provide a second signature:*

s/_____

Linda Abdilla, Secretary/Treasurer
Date:

**(ALL SIGNATURES, EXCEPT CITY CLERK AND CITY ATTORNEY, MUST BE ACKNOWLEDGED BY A NOTARY**

**EXHIBIT A**
Legal Description of the Property

PLANNING DEPT.
FEB 09 2006
CITY OF MORGAN...

**EXHIBIT "A"**
**LEGAL DESCRIPTION**

All that certain Real Property situated in the County of Santa Clara, State of California, as described in Deed to Royal Oaks Enterprises, Inc., recorded June 16, 2005 as Document Number 18423964, Santa Clara County Records, said Lands being a portion of Lots 1, 2, 27, 28 & 29 as shown on that certain map entitled "Map of the Llagas Subdivision in Rancho San Francisco De Las Llagas", recorded in Book "N" of Maps, Page 12, Santa Clara County Records, more particularly described as follows:

Beginning at a point on the centerline of Watsonville Road, where said line is intersected by the Southwesterly line of Monterey Road; thence from said Point of Beginning South 32°35'00" West, 1700.23 feet along said centerline of Watsonville Road; thence leaving said line South 51°40'00" East, 953.92 feet; thence North 38°20'00" East, 411.77 feet to the Northeasterly line of the Lands of the Santa Clara Valley Water District as described in the deed recorded in Book 7340 of Official Records, Page 426; thence along the Northeasterly lines of said Lands North 51°40'00" West, 72.56 feet; thence North 38°20'00" East, 80.34 feet; thence North 51°40'00" West, 659.54 feet; thence North 38°20'00" East, 999.57 feet; thence South 51°40'00" East, 125.00 feet; thence North 38°20'00" East, 200.00 feet to said Southwesterly line of Monterey Road; thence along last said line North 51°40'00" West, 515.29 feet to the Point of Beginning.

**See Exhibit "B" attached hereto and made a part hereof.**
**END OF DESCRIPTION.**

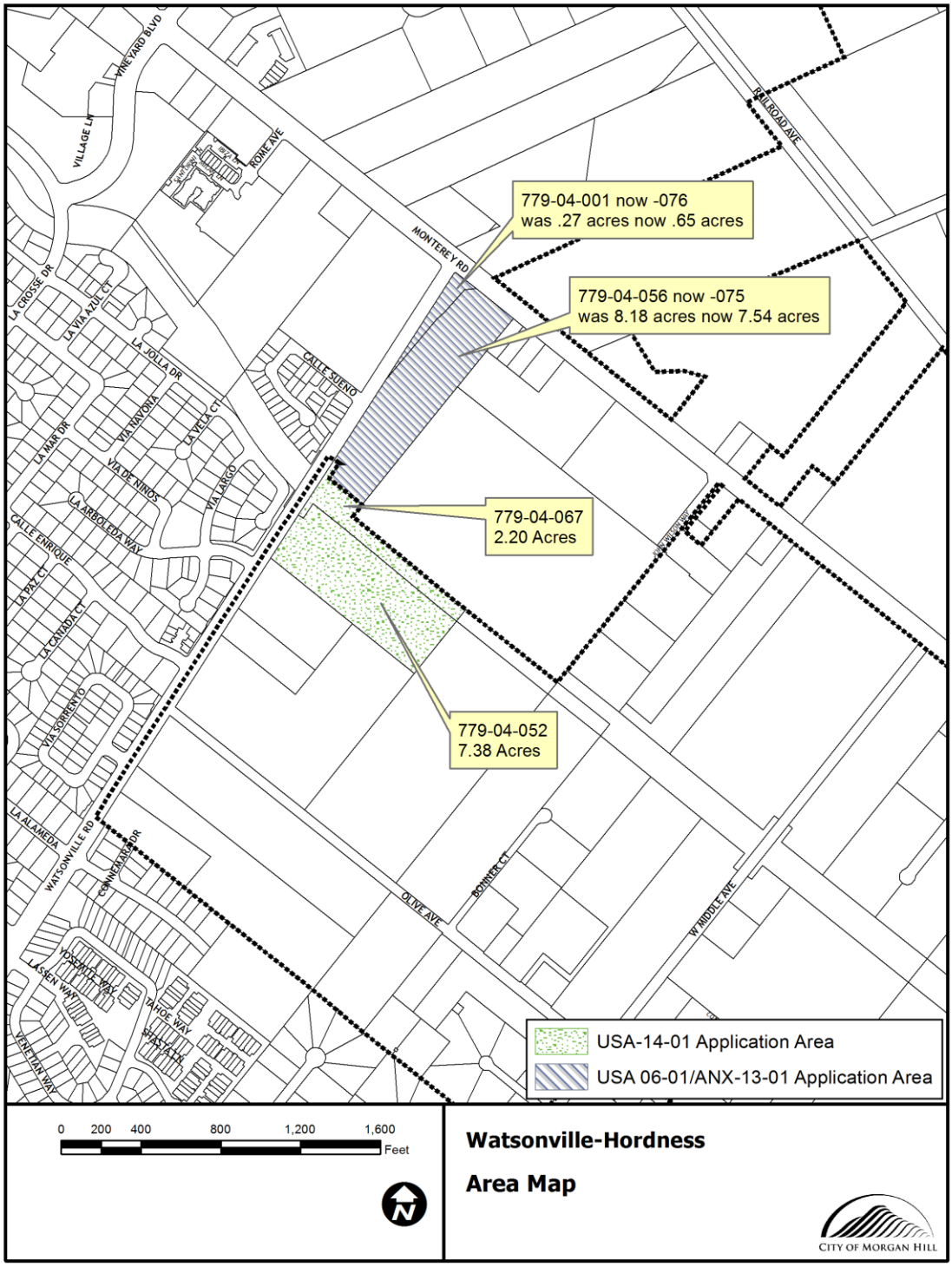
This description was prepared by me or under my direction in conformance with the requirements of the Land Surveyors' Act.

_____ _____
Andrew S. Chafer, PLS 8005 Date
Expires: 12/31/2006

Prepared by the firm of MH Engineering Company, Morgan Hill, CA

***EXHIBIT B (REVISED)***

***Map of the Property***



# EXHIBIT C

## BENEFICIAL INFRASTRUCTURE IMPROVEMENTS

### I. The following conditions apply to former APN 779-04-001 & 056 (now APN 779-04-075):

To achieve the benefit promised by Developer and for which the City Council granted approval to USA application USA 06-01: Watsonville-Royal Oaks, the Developer shall reimburse the City for certain public improvement costs (**$214,911.00)** along a portion of the Watsonville and Monterey Road frontages of Royal Oak Enterprises, which were associated with the construction of the Butterfield Boulevard extension to Watsonville Road. The costs that Developer owes to City pursuant to this Section of Exhibit C are as follows, which costs Developer shall pay in full to the City on or before September 3, 2018:

| DESCRIPTION | QUANTITY | UNIT | UNIT PRICE | TOTAL |
|---|---|---|---|---|
| Clearing and Grubbing | 27,728 | SF | $0.50 | $13,864.00 |
| Roadway Pavement (AB and AC) | 17,589 | SF | $5.00 | $87,945.00 |
| Box Culvert/wing-retaining walls | 37 | LF | $2,500.00 | $92,500.00 |
| Curb/Gutter | 192 | LF | $15.00 | $2,880.00 |
| Guardrail | 160 | LF | $23.00 | $3,680.00 |
| Storm Drain Pipe | 90 | LF | $41.00 | $3,690.00 |
| Storm Drain Inlet | 1 | LS | $3,650.00 | $3,650.00 |
| Street Light | 1 | EA | $4,500.00 | $4,500.00 |
| Striping bike lane | 445 | LF | $0.60 | $267.00 |
| Sidewalk incl. ADA Ramp | 250 | SF | $6.00 | $1,500.00 |
| Lane Divide Stripping | 725 | LF | $0.60 | $435.00 |
| | | | | **$214,911.00** |

## EXHIBIT C *(*Continued)

## BENEFICIAL INFRASTRUCTURE IMPROVEMENTS

**II. The following conditions apply to APN 779-04-075 and APN 779-04-076 for the required frontage public improvements all of which improvements Developer shall fully and timely complete on or before the dates listed in the schedule set forth in paragraph 6 below to the reasonable satisfaction of City's Director of Public Works, to the extent the improvements have not already been constructed as part of the City's Butterfield Road Extension project:**

1. Along the Watsonville Road frontage, Developer shall dedicate the balance if any, of 55 feet of public street right-of-way to the centerline of Watsonville Road.
2. Along the Watsonville Road frontage, Developer shall widen/reconstruct 55 feet to the centerline of the street approximately 690 feet of street improvements to meet arterial standards to include:
   a. Curb,
   b. Gutter,
   c. Sidewalk,
   d. Full asphalt concrete pavement section per City Standards to the centerline of the street,
   e. Provide signage and striping as required by City Standards and as directed by Public Works.
3. Along the Watsonville Road frontage, Developer shall install LED 70 light standards as required by City Standards.
4. Along the Watsonville frontage, Developer shall relocate the overhead utilities (Rule 20) to an overhead location out of the path of expanded Watsonville Road.
5. Behind the street right of way frontage of Watsonville Road, Developer shall dedicate a 10 feet wide public service easement (PSE).
6. To complete the public improvement requirements within the specified five year period from the date of inclusion in the USA, the following milestones must be met:

**Milestone/Deadline**

   a. Developer to prepare all plans and coordinate with public utilities for Rule 20/ **January 2016 to December 2016**
   b. Submit public improvement plans for Project frontages/ **January 2, 2017**
   c. Submit Rule 20 plans (undergrounding overhead utilities/ **January 2, 2017**
   d. Improvement Agreement routed to Developer/ **March 6, 2017**
   e. Improvement Agreement, bonds, and insurance returned to City/ **March 31, 2017**
   f. Public Improvement Plans completed/ **April 28, 2017**
   g. Rule 20 plans completed/ **May 26, 2017**
   h. City Council approval of Improvement Plans and Agreement/ **June 2017**
   i. Agreement executed following City Council approval/ **June 2017**

*EXHIBIT C* Continued

**BENEFICIAL INFRASTRUCTURE IMPROVEMENTS**

**Milestone/Deadlines continued**

j. Pre-construction meeting/
**June 2017**
k. Start Construction/
**July 2017**
l. End Construction/
**June 2018**
m. City to provide punch list items/
**July 2018**
n. Provide City Warranty bond/
**August 2018**
o. August complete punch list items/
**August-September 2018**
p. Acceptance of public improvements/
**October 2018**

**III. As part of the proposed Urban Service Area application USA 14-01 for Royal Oaks Enterprises: APN 779-04-052 and -067 Developer is subject to and shall comply with the following conditions which apply for the required frontage public improvements, and Developer shall complete such improvements by the end of the fifth (5th) year of the inclusion of the Property within the Urban Service Area boundary and shall comply with the timetable set forth in paragraph 4 below, all to the satisfaction of City's Director of Public Works:**

1. Along the Watsonville Road frontage of APN 779-04-052, Developer shall dedicate the balance of 55 feet of public street right-of-way to the centerline of Watsonville Road.
2. Along the Watsonville Road frontage (including the frontage along APN 779-04-067), Developer shall widen/reconstruct 55 feet to the centerline of the street approximately 600 feet of street improvements to meet arterial standards to include:
    a. Curb,
    b. Gutter,
    c. Sidewalk,
    d. Full asphalt concrete pavement section per City Standards to the centerline of the street,
    e. Provide signage and striping as required by City Standards and as directed by Public Works,
    f. Install LED 80 light standards as required by City Standards,
    g. Developer shall relocate the overhead utilities (Rule 20) to an overhead location out of the path of expanded Watsonville Road.
3. Behind the street right of way frontage of Watsonville Road of APN 779-04-052, Developer shall dedicate a 10 feet wide public service easement (PSE).

Note: The SCVWD bridge structure has been built to the ultimate width to accommodate four travel lanes, a center median and bike lanes per the City's current circulation element. Therefore, no additional widening of the bridge structure shall be required by the applicant. The street widening improvements on either side of the bridge will need to transition from 37 feet to 55 feet (from centerline) within the District's property

## ***EXHIBIT C* Continued**

## BENEFICIAL INFRASTRUCTURE IMPROVEMENTS

4. To complete the public improvement requirements set forth herein, Developer shall comply with the following milestones**:**

**Milestone from Date of Inclusion into the USA**

a. Developer to prepare all plans and coordinate with public utilities for Rule 20
**Year 2 – Year 3**
b. Submit public improvement plans for Project frontages
**Year 3 – 1 month**
c. Submit Rule 20 plans (undergrounding overhead utilities
**Year 3 – 1 month**
d. Improvement Agreement routed to Developer
**Year 3 – 3 months**
e. Improvement Agreement, bonds, and insurance returned to City
**Year 3 – 3 months**
f. Public Improvement Plans completed
**Year 3 – 5 months**
g. City Council approval of Improvement Plans and Agreement
**Year 3 – 6 months**
h. Agreement executed following City Council approval
**Year 3 – 6 months**
i. Pre-construction meeting
**Year 3 – 6 months**
j. Start Construction
**Year 3 – 7 months**
k. End Construction
**Year 4 – 8 months**
l. City to provide punch list items
**Year 4 – 9 months**
m. Provide City Warranty bond
**Year 4 – 9 months**
n. August complete punch list items
**Year 4 – 10 months**
o. Acceptance of public improvements
**Year 4 – 11 months**