

## **DISPOSITION AND DEVELOPMENT AGREEMENT**

by and between the

**CITY OF MORGAN HILL,**

a California municipal corporation

and

**Brookfield Bay Area Holdings, LLC**

a California Limited Liability Company

regarding the

**HALE LUMBER SITE AND COMMUNITY & CULTURAL CENTER**

Dated: \_\_\_\_\_, 2017

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### LIST OF EXHIBITS

Exhibit A-1	Exiting Site Map
Exhibit A-2	Legal Description –Property
Exhibit B	Form of Grant Deeds (With Covenants)
Exhibit C	Schedule of Performance
Exhibit D-1	Form of Final Certificate of Completion
Exhibit D-2	Form of Partial Certificate of Completion
Exhibit E	Form of Easement Agreement
Exhibit F	Sale of City Property

### LIST OF EXHIBITS

## DISPOSITION AND DEVELOPMENT AGREEMENT

### HALE LUMBER AND ADJACENT PROPERTIES

THIS DISPOSITION AND DEVELOPMENT AGREEMENT ("**Agreement**") dated as of this \_\_\_\_ day of \_\_\_\_\_, 2017 ("**Date of Agreement**"), is entered into by and between the CITY OF MORGAN HILL, a California municipal corporation ("**City**"), and Brookfield Bay Area Holdings, LLC, a California Limited Liability Company ("**Brookfield**"), ("**Developer**"). Developer and City are sometimes referred to herein individually as a "Party", and collectively as the "Parties."

### RECITALS

The following Recitals are a substantive part of this Agreement; capitalized terms used herein and not otherwise defined are defined in Section 1.1 of this Agreement:

A. Robert and Linda Hammond, Trustees of the Robert and Linda Hammond Revocable Trust, Robert Hammond Jr., and Robert Taurig (collectively, the "**Hale Lumber Property Owners**") are the owners of that certain approximately two (2) acre real property located at the corner of East Dunne Avenue and Depot Street in Morgan Hill, California, designated as APN 726-13- 049 (the "**Hale Lumber Property**"). The Hale Lumber Property Owners currently operate a lumber yard, Hale Lumber, on the Hale Lumber Property.

B. City is the owner of (i) the Community and Cultural Center (the "**CCC**") located on that certain approximately eight (8) acre real property located at the corner of Dunne Avenue and Monterey Road in Morgan Hill California, designated as APN 726-13-052 (the "**CCC Property**") and (ii) Depot Street, a City street that runs north-south between East Main Avenue and East Dunne Avenue. The area encompassing the Hale Lumber and CCC Properties and Depot Street are shown on the attached map, attached hereto as Exhibit "A" and incorporated herein by this reference.

C. City has adopted a Downtown Specific Plan and an Infrastructure Precise Plan which envision the realignment of Depot Street to connect with Church Avenue, which is on the opposite (south side) of East Dunne Avenue from the CCC and Hale Lumber Properties. This realignment was also adopted in City's recent General Plan Update, entitled Morgan Hill 2035.

D. City is the owner in fee simple of Depot Street, the portion between East Dunne Avenue and East Fifth Street consisting of approximately .8 acre is a portion of this Project.

E. The Downtown Specific Plan, the Infrastructure Master Plan, and the General Plan 2035 guide development in Morgan Hill. These documents envision the realignment of Depot Street to connect to Church Avenue, improving transportation circulation and movement in the Downtown area. To realize this, City has been

examining opportunities that could lead to realignment of Depot Street by exploring development opportunities with adjacent properties.

F. Developer and City have entered into this Agreement for the purpose of memorializing an agreement between themselves to redevelop the sites as follows: 1) a housing development on the Hale Lumber Property, including the portion of the CCC Property to the east of the realigned Depot Street, and the vacated Depot Street, 2) the realignment of Depot Street to connect with Church Avenue, 3) the replacement of the parking spaces for the CCC Property including a multistory parking lot on the CCC Property and a parking lot on a portion of the Hale Lumber Property (the “**Project**”).

G. Developer will privately acquire the Hale Lumber Property from the Hale Lumber Property Owners. City will not be a party to this transaction and will not be a third party beneficiary of this transaction.

H. To implement the purposes of this Agreement, City desires to sell properties to Developer for fair market value and Developer desires to acquire the properties from City on an “As Is with All Faults” basis. To implement the purposes of this Agreement, Developer desires to sell property to the City for fair market value and City desires to acquire the properties from Developer on an “As Is with All Faults” basis.

I. Developer shall construct a two story parking garage on the CCC property. Developer shall realign Depot Street and construct the new Depot Street. Developer shall construct a parking surface on a portion of the Hale Lumber property for purposes of public parking.

J. The Project relies on the following analysis under the California Environmental Quality Act (“**CEQA**”) (set forth in Public Resources Code, section 21000 *et seq.*): Draft Master Environmental Impact Report for the Morgan Hill Downtown Specific Plan, as modified by the Final Master Environmental Impact Report for the Morgan Hill Downtown Specific Plan (“**DSP**”) (SCH #2008012025) (together, “**FEIR**”) certified by the City Council on November 18, 2009 by Ordinance No. 1956. This Project is further described in the Program Level Addendum for the Hale Lumber and Community and Cultural Center project (“**ADDENDUM**”). Collectively, the FEIR, DSP, and ADDENDUM are the “**CEQA Project Review**.”

K. On January 24, 2017, the City Planning Commission conducted a review pursuant to Government Code Section 65402 and determined that the Project described herein will facilitate implementation of the City’s General Plan.

**The execution and performance of this Agreement is in the vital and best interests of City and the health, safety and welfare of its residents, and is in accord with the provisions of applicable federal, state, and local law.**

### A G R E E M E N T

NOW, THEREFORE, City and Developer hereby agree as follows:

1. **DEFINITIONS; REPRESENTATIONS AND WARRANTIES; CHANGE IN OWNERSHIP, MANAGEMENT AND CONTROL.**

1.1A Definitions.

**“Affiliate of Developer”** means an entity or person that is directly or indirectly controlling, controlled by, or under common control with Developer. For the purposes of this definition, “control” means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of an entity or a person, whether through the ownership of voting securities, by contract, or otherwise, and the terms “controlling” and “controlled” have the meanings correlative to the foregoing.

**“Agreement”** means this Disposition and Development Agreement between City and Developer.

**“As-Is Condition”** is defined in Section 2.27.

**“CEQA”** California Environmental Quality Act is defined in Recital J.

**“City”** means the City of Morgan Hill, a California municipal corporation.

**“City Council”** means the City Council of the City of Morgan Hill.

**“City Party”** means a City employee, agent or representative.

**“City’s Actual Knowledge”** or words to such effect shall mean the present, actual knowledge of Steve Rymer the City, excluding constructive knowledge or duty of inquiry, existing as of the Date of Agreement.

**“Claims”** means liabilities, obligations, orders, claims, damages, governmental fines or penalties, and expenses of defense with respect thereto, including reasonable attorneys’ fees and costs.

**“Close of Escrow”** is defined in Section 2.19.

**“Closing”** is defined in Section 2.19.

**“Commenced Construction of the City Infrastructure”** shall be deemed to have occurred when the Developer has completed plans, obtained all required permits and broken ground on the CCC parking structure and the realigned Depot Street.

**“Control”** is defined in Section 1.2.1.

**“Date of Agreement”** means the date first set forth above.

**“Day-to-Day Management”** means active, day-to day-management responsibilities for the activities of Developer.



**“Default”** means the failure of a Party to perform any action or covenant required by this Agreement and such failure continues beyond the applicable cure period following such defaulting Party’s receipt of Notice of such failure.

**“Developer”** means Brookfield Bay Area Holdings, LLC, a California Limited Liability Company as the sole initial member, and its permitted assignees and successors-in-interest.

**“Developer Conditions Precedent”** is defined in Section 2.14.

**“Documents”** is defined in Section 2.26.

**“Downtown Specific Plan”** or **“DSP”** is defined in Recital J.

**“Environmental Laws”** means, collectively: (i) the Comprehensive Environmental Response, Compensation and Liability Act, as amended, 42 U.S.C. § 9601, *et seq.*, (ii) the Hazardous Materials Transportation Act, as amended, 49 U.S.C. § 1801, *et seq.*, (iii) the Resource Conservation and Recovery Act, as amended, 42 U.S.C. § 6901, *et seq.*, (iv) the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1251, *et seq.*, (v) the Clean Air Act, as amended, 42 U.S.C. § 7401, *et seq.*, (vi) the Toxic Substances Control Act, as amended, 15 U.S.C. § 2601, *et seq.*, (vii) the Clean Water Act, as amended, 33 U.S.C. § 1251, *et seq.*, (viii) the Oil Pollution Act, as amended, 33 U.S.C. § 2701, *et seq.*, (ix) California Health & Safety Code § 25100, *et seq.* (Hazardous Waste Control), (x) the Hazardous Substance Account Act, as amended, Health & Safety Code § 25300, *et seq.*, (xi) the Unified Hazardous Waste and Hazardous Materials Management Regulatory Program, as amended, Health & Safety Code § 25404, *et seq.*, (xii) Health & Safety Code § 25531, *et seq.* (Hazardous Materials Management), (xiii) the California Safe Drinking Water and Toxic Enforcement Act, as amended, Health & Safety Code § 25249.5, *et seq.*, (xiv) Health & Safety Code § 25280, *et seq.* (Underground Storage of Hazardous Substances), (xv) the California Hazardous Waste Management Act, as amended, Health & Safety Code § 25170.1, *et seq.*, (xvi) Health & Safety Code § 25501, *et seq.*, (Hazardous Materials Response Plans and Inventory), (xvii) Health & Safety Code § 18901, *et seq.* (California Building Standards), (xviii) the Porter-Cologne Water Quality Control Act, as amended, California Water Code § 13000, *et seq.*, (xix) California Fish and Game Code §§ 5650-5656 and (xx) any other federal, state or local laws, ordinances, rules, regulations, court orders or common law related in any way to the protection of the environment, health or safety.

**“Escrow Agent”** means First American Title Insurance Company, 1737 North First Street, Suite 500, San Jose, California 95112 (\_\_\_\_\_, Escrow Officer).

**“Final Certificate of Completion”** is defined in Section 3.10.

**“Finally Complete”** or **“Final Completion”** [Need to fill this in]. Final completion of all City Infrastructure and acceptance by the City Council.

**“Force Majeure Delay”** is defined in Section 6.2.

**“FEIR”** is defined in Recital J.

**“Grant Deeds”** means the grant deeds for the conveyance of the properties from City to Developer or from the Developer to the City to be executed and recorded at the Closing substantially in the form attached hereto as Exhibit “B” and incorporated herein by this reference.

**“Hazardous Materials”** means any substance, material, or waste which is or becomes regulated by any local governmental authority, the State of California, or the United States Government under any Environmental Laws, including any material or substance which is defined as a “hazardous waste,” “extremely hazardous waste,” “restricted hazardous waste” or “hazardous substance” under any Environmental Laws.

**“Initial Litigation Challenge”** is defined in Section 6.20.

**“Municipal Code”** means the Morgan Hill Municipal Code.

**“Notice”** means a written notice in the form prescribed by Section 6.1.

**“Organizational Documents”** means the Certificate of Formation and Operating Agreement of the Developer, as the same may be amended from time to time.

**“Partial Certificate of Completion”** is defined in Section 3.10.

**“Permitted Transfer”** is defined in Section 1.22.

**“Planning Commission”** means the Planning Commission of the City of Morgan Hill.

**“Project”** is defined in Recital F.

**“Project Agreements”** means this Agreement and the Grant Deeds (once recorded).

**“Project Approvals”** means all of the discretionary approvals by the City Council or Planning Commission which will permit the Project in its entirety to proceed.

**“Property Claims”** is defined in Section 2.30.

**“Reports”** is defined in Section 2.26.

**“Schedule of Performance”** means the Schedule of Performance attached hereto as Exhibit “C” and incorporated herein by this reference, setting out the dates and/or time periods by which certain obligations set forth in this Agreement must be accomplished.

**“Substantially Complete”** or **“Substantial Completion”** shall be deemed to have occurred when (i) Substantial completion of all City Infrastructure as reasonably determined by the City Manager.

**“Title Company”** means First American Title Insurance Company.

**“Transfer”** means any assignment or transfer of this Agreement or the Property or any portion thereof or any interest therein.

**“Title Policy”** is defined in Section 2.23.

**“Unrecorded Agreements”** is defined in Section 2.26.

1.1B Representations and Warranties.

1.1.1 City Representations. City represents and warrants to Developer as follows:

(a) Authority. City is a California municipal corporation with full right, power, and lawful authority to perform its obligations hereunder, and the execution, delivery, and performance of this Agreement by City has been fully authorized by all requisite actions on the part of the City Council.

(b) No Conflict. City’s execution, delivery, and performance of its obligations under this Agreement will not constitute a default or a breach under any contract, agreement, or order to which City is a party or by which City is bound.

(c) No Litigation or Other Proceeding. To City’s Actual Knowledge, no litigation or other proceeding (whether administrative or otherwise) is outstanding or has been threatened which would prevent, hinder, or delay the ability of City to perform its obligations under this Agreement, or that would adversely affect the Property or the ability of Developer to develop the same as contemplated by this Agreement.

(d) No City Bankruptcy. City is not the subject of any bankruptcy proceeding, and no general assignment or general arrangement for the benefit of creditors or the appointment of a trustee or receiver to take possession of all or substantially all of City’s assets has been made.

(e) Right to Possession. No person or entity other than City has the right to use, occupy, or possess the City Properties, or any portion thereof. City shall not enter into any lease or other agreement respecting use, occupancy, or possession of the Property or any portion thereof without the written consent of Developer.

(f) Condition of Property. City has no notice of any pending or threatened action or proceeding arising out of the condition of the City Properties or any alleged violation of any Environmental Laws. Except as otherwise disclosed by City, to City’s Actual Knowledge, the Property is in compliance with all Environmental Laws.

Until the expiration or earlier termination of this Agreement, City shall, upon learning of any fact or condition which would cause any of the warranties and

representations in this Section 1.1.1 not to be true, immediately give written Notice of such fact or condition to Developer. The foregoing representations and warranties shall survive each Closing for a period of 12 months.

1.1.2 Developer's Representations. Developer represents and warrants to City as follows:

(g) Authority. Developer is a limited liability company duly organized in the State of Delaware and qualified to do business and in good standing under the laws of the State of Delaware. The Organizational Documents provided (or to be provided) by Developer to City are true and complete copies of the originals, as may be amended from time to time. Developer has full right, power and lawful authority to undertake all of its obligations hereunder and the execution, performance and delivery of this Agreement by Developer has been fully authorized by all requisite company actions on the part of Developer.

(h) No Conflict. Developer's execution, delivery, and performance of its obligations under this Agreement will not constitute a default or a breach under any contract, agreement, or order to which Developer.

(i) No Litigation or Other Proceeding. To Developer's current actual knowledge, no litigation or other proceeding (whether administrative or otherwise) is outstanding or has been threatened which would prevent, hinder, or delay the ability of Developer to perform its obligations under this Agreement.

(j) No Developer Bankruptcy. Developer is not the subject of any bankruptcy proceeding, and no general assignment or general arrangement for the benefit of creditors or the appointment of a trustee or receiver to take possession of all or substantially all of Developer's assets has been made.

Until the issuance of a Final Certificate of Completion or earlier termination of this Agreement, Developer shall, upon learning of any fact or condition which would cause any of the warranties and representations in this Section 1.1.2 not to be true, immediately give written Notice of such fact or condition to City. The foregoing representations and warranties shall survive each Closing and continue until issuance of a Final Certificate of Completion.

1.2 Change in Ownership, Management and Control of Developer. The qualifications and identity of Developer are of particular concern to City. It is because of those unique qualifications and identity that City has entered into this Agreement with Developer.

1.2.1 Additional Matters. Except for Permitted Transfers as provided in Section 1.2.2, the term "Transfer" for the purposes of this Section 1.2.1 shall include any significant change in the Control of Developer by any method or means. The term "**Control**" as used in the immediately preceding sentence, shall mean the power to direct the Day-to-Day Management of Developer, and it shall be a presumption that control with

respect to a corporation or limited liability company is the right to exercise, directly or indirectly, more than 50% of the voting rights attributable to the controlled corporation or limited liability company, and, with respect to any individual, partnership, trust, other entity, or association, control is the possession, indirectly or directly, of the power to direct or cause the direction of the Day-to-Day Management of the controlled entity. An assignment of this Agreement to an Affiliate of Developer, shall be subject to prior review and approval by the City Manager (which approval shall not be unreasonably withheld, conditioned or delayed). Any Transfers, except those delineated below shall be subject to prior review and approval by the City Manager (which approval shall not be unreasonably withheld, conditioned or delayed).

1.2.2 Permitted Transfers. Notwithstanding any other provision of this Agreement to the contrary, each of following Transfers are permitted and shall not require City consent under this Section 1.2.2 (each, a “**Permitted Transfer**”):

(a) Any lien or encumbrance on the Residential Project to secure the funds necessary for acquisition, construction, and/or permanent financing of the Project;

(b) Permanent financing of a portion of the Project following its Substantial Completion; or

(c) Dedications and grants of easements and rights of way required in accordance with the Project Approvals.

1.2.3 Subsequent Equity Transfers. Any admission of new equity partner(s) for one or more Project components.

1.2.4 Subdivision Maps Required. Developer shall file all required tentative and Final Maps on the dates listed in the Schedule of Performance.

### 1.3 Obligations of the Developer

1.3.1 Entitlement Applications. Developer shall cooperate with City in the preparation, submittal, and processing of a Precise Plan that explores the feasibility of the desired project on the CCC Property and Depot Street. The Precise Plan submittal shall consist of Architectural Review applications along with any required environmental documents/reports concerning the proposed Project.

1.3.2 Residential Development. If approved by the City and subject to reasonable conditions, Developer shall construct up to 65 residential dwelling units on the residential site (i.e., portion of Depot Street and Hale Lumber site).

1.3.3 Parking Construction. If approved by the City, Developer shall replace Morgan Hill Community and Cultural Center (“CCC”) parking and on-street parking on a 1:1 basis resulting in a total of 256 parking spaces.

1.3.4 CCC on-site and offsite Parking. If approved by the City, Developer shall replace parking by building a parking garage on the remaining CCC parking lot space and surface parking. The parking structure shall be designed to accommodate solar panels. Of the 256 spaces no more than 33 parking spaces will be replaced off site on a portion of the existing Hale property which shall be dedicated to the City in fee. The remaining parking lot and surface parking at the CCC shall consist of approximately 1.5 acres.

1.3.5 Developer Expense. Pay for all City entitlements, requirements and permits, including preparation of all CEQA documentation for the entire (public and private) Project.

1.3.6 Entitlements. File for Project Entitlement Applications for the entire Residential Project and City Infrastructure (including, but not limited to: zoning, subdivision map, general plan designation modification and site review) immediately following approval of DDA and submit these no later than August, 15, 2017.

1.3.7 Final Map. By January 15, 2018 Developer shall apply for and if approved by the Final Map for this Project the City shall by June 15, 2018 complete and record the Final Map and execute the Subdivision Improvement Agreement.

1.3.8 Construction Timeline. Developer shall work with City to develop a construction timeline that minimizes impact to CCC parking.

1.3.9 Construction of Parking Facilities and Depot Street. Construction of parking facilities and Depot Street realignment shall begin in 2018.

1.3.10 City Infrastructure Construction by Developer. If approved by the City, Developer shall construct the following infrastructure: Depot Street realignment, CCC parking multistory parking lot and parking on Developer Property (collectively "**City Infrastructure**"). The Depot Street realignment will result in an approximately .7 acre realigned street within this Project.

1.3.11 Temporary Parking. Developer shall provide temporary parking to users of the CCC during construction of the Project and during construction of the City Infrastructure. This shall include replacement of not less than 200 spaces or the affected parking that is no longer available to the public, whichever is less. Temporary Parking shall be provided concurrently with any activity by Developer which limits access to existing parking on Depot Street or at the CCC.

1.3.12 Residential Project Timeline. If approved by the City, commencement of the Residential Project shall occur no later than 5 years of the date of the Date of the Agreement. Two, one-year extensions can be obtained by Developer making payments of \$100,000 for each year requested, as long as all public facilities have been constructed.

1.3.13 Developer Conveyance. Developer shall convey to the City an approximately .3 acre portion of the Hale Lumber Property for Fair Market Value of \$568,458 based upon \$43.50 per square foot valuation. Should the size of the portion of the parcel be increased or decreased the payment by City shall be adjusted based upon the \$43.50 per square foot calculation.

1.3.14 Developer Purchase. Developer shall purchase from City a portion of Depot Street and a portion of the CCC parking lot from City as described below for fair market value.

#### 1.4 Obligations of the City.

1.4.1 Vacation of Depot Street. Subject to applicable hearing and notice requirements, City shall vacate Depot Street from approximately 5<sup>th</sup> Street to Dunne Avenue, once the former street is relocated.

1.4.2 City Process. City shall process all entitlements, zone change, and general plan change, following application from the Developer with the City retaining discretion on all items.

1.4.3 Sale of City Property. Once vacated, City shall sell for fair market value of \$1,705,374, based upon \$43.50 per square foot valuation an approximately .9 acre portion of existing Depot Street to be made part of the Residential Project development site. City shall also sell for fair market value of \$1,326,402 a portion of the Community Cultural Center parking lot identified on Exhibit F of approximately .7 acres, based upon the \$43.50 per square foot valuation. Should the size of the portion of the parcel be increased or decreased the payment by City shall be adjusted based upon the \$43.50 per square foot calculation.

1.4.4 City Reimbursement for construction of Public Improvement Imposed as a Condition of Project Approval. City shall reimburse Developer not to exceed \$2 million to pay for the actual costs associated with public improvements including construction of replacement parking spaces and/or the realignment of Depot Street approximately 230 feet from the existing East Dunne Avenue and Depot Street intersection. In no event shall this City Reimbursement exceed the actual cost of the Public Improvements. Reimbursement by City shall be made within 30 days of submission of proof of expenditure by Developer and verification that the reimbursed amount does not exceed the actual cost of the public improvement. City Filing. City shall file for zone changes and General Plan Amendment (if required) for City properties to the appropriate residential designation.

1.4.5 City Reimbursement. If the City imposes a condition of approval that developer shall construct public facilities in addition to the City Infrastructure, and should the City further provide public funding for such public facilities, the City funding shall not exceed the actual costs of the public infrastructure.

1.4.6 Measure A Allocations. City shall formally reserve 65 Downtown residential allocations in accordance with Measure A for the Brookfield residential development by City Council action on February 15, 2017 or prior to March 1, 2017.

1.4.7 Allocation of Sewage Treatment Payment Credits to Developer. The City has a sewer credit program available to all developers within the former downtown redevelopment area on a first come, first served basis. The City shall allocate sewage treatment payment credits to developer for 65 units concurrently with approval of this Agreement by the City Council. These sewer treatment payment credits must be used within the Residential Project Timeline.

1.4.8 Vesting Tentative Map. City shall process a Vesting Tentative Map for the Residential Project.

1.4.9 Financing Mechanisms. City shall hold any necessary TEFRA hearings and/or execute documents required of the local jurisdiction to facilitate the establishment of public financing district for fees and infrastructure if requested by Developer.

1.4.10 Impact Fee Financing Program. City will permit Developer to utilize the City's impact fee financing program for a period of not to exceed a total loan period of ten years.

## **2. SALE OF PROPERTY AND INFRASTRUCTURE IMPROVEMENTS.**

2.1 Sale of Property. Subject to the terms, covenants and conditions of this Agreement, Developer shall construct certain City infrastructure and City shall deed certain City properties to Developer and Developer shall deed the Developer Property to City.

2.2 City Conveyance to Developer. City shall convey to Developer a portion the current Depot Street alignment and a portion of the CCC Property (collectively "**City Properties**") such that Developer is provided an additional approximately 1.6 acres to add to the Residential Project.

2.2.1 Encroachment Permit. Developer shall obtain an encroachment permit for implementation of Infrastructure projects that occur on City owned land and comply with City's Encroachment permit requirements.

2.3 Developer Conveyance to City. Developer shall convey to City a portion of the current Hale Lumber Property ("**Developer Property**") of approximately .3 acres to be used by the City for parking. Developer shall construct the parking lot on the Developer Property.

2.4 No Default. Developer shall not be in Default under this Agreement or the other Project Agreements, and no event shall have occurred which with the passage of



time or giving of Notice or both would constitute a Default by Developer hereunder or under any of the other Project Agreements.

2.5 Execution and Delivery of Documents. City and Developer shall have executed and acknowledged the Grant Deeds for the City Properties and the Developer Property, and Developer shall have executed (and, where appropriate, acknowledged), and delivered into escrow all other documents that Developer is required to deliver into escrow pursuant.

2.6 Delivery of Funds. In connection with the closing of the City Properties and the Developer Property, Developer shall have completed the appropriate infrastructure and acknowledgement of same by the City shall be deposited into escrow. Both parties shall deposit into escrow all costs, recording fees, and other closing costs as are necessary to comply with each of their obligations under this Agreement.

2.7 Evidence of Available Funds. Developer and City shall demonstrate evidence of available funds.

2.8 Insurance. Developer shall have provided proof of insurance as required by Section 3.7 below.

2.9 Equity Funding/Construction Loan. Developer shall have delivered to the City evidence that the equity commitments or acquisition and/or construction loan, if any for the construction of infrastructure, shall have closed or shall be ready to close concurrently with the Closing.

2.10 Demolition and Grading Permits. Developer shall have submitted complete applications for all demolition and grading permits necessary for the Developer to perform the work for the Initial Site Preparation for the applicable Project, and such permits shall be ready to be issued by the City subject only to payment of applicable fees.

2.11 Other Project Construction Permits. Developer shall have submitted complete applications for all construction permits necessary for Developer to construct the applicable infrastructure, and a grading permit for such infrastructure shall be ready to be issued by the City subject only to payment of applicable fees.

2.12 Organizational Documents. Developer shall have submitted the Organizational Documents for Developer confirming that the Developer is a valid Limited Liability Corporation formed as a Delaware LLC.

2.13 Subdivision Map. The City Council shall have approved (if required by law) and Developer shall have recorded or be prepared to record (to the extent required by law) the recordable Final Map.

2.14 Developer Conditions Precedent Developer's obligation to proceed with the exchange of the City Properties, exchange of the Developer Property and construction of infrastructure for City pursuant to the terms of this Agreement is subject to the fulfillment

or waiver by Developer of each of the conditions precedent described below ("**Developer Conditions Precedent**"). The Developer Conditions Precedent are solely for the benefit of Developer and shall be fulfilled or waived, if applicable, within the time periods provided for herein. Developer Conditions Precedent are: 1. Construction of the realigned Depot Street; 2. Construction of the CCC Parking Lot; 3. Construction of parking on the portion of the Hale parcel. 4. Conveyance of the Hale Parcel of the City. Should any of these conditions precedent not be met, Developer shall provide performance and labor and improvement bonds to the City to cover the full costs of all construction prior to closing.

2.15 No Default by City. City shall not be in Default under this Agreement or the other Project Agreements, and no event shall have occurred which with the passage of time or giving of Notice or both would constitute a default by City hereunder or under the other Project Agreements.

2.16 Execution and Delivery of Documents by City. City and Developer shall have executed and acknowledged the Grant Deeds for the applicable transaction, and City shall have executed (and, where appropriate, acknowledged) and delivered into escrow all other documents that City is required to deliver into escrow pursuant.

2.16.1 Project Approvals. The Project Approvals shall be final and non-appealable, and if any appeals, legal challenges, requests for rehearing, or referenda have been filed or instituted, such appeals, legal challenges, requests for rehearing, or referenda shall have been fully and finally resolved in a manner acceptable to Developer in its sole and absolute discretion and such that no further appeals, legal challenges, requests for rehearing, or referenda are possible.

Permits. Subject to payment of the applicable fees, City shall be ready to issue the demolition and grading permit(s) necessary for the Developer to perform the work for the Initial Site Preparation for the applicable portion of the Project.

Title Policy. The Title Company shall, upon payment of Title Company's regularly scheduled premium, be irrevocably committed to issue the Title Policies upon recordation of the Grant Deeds subject only to the Pre-Approved Exceptions or the Condition of Titles.

Absence of Proceedings. There shall be an absence of any condemnation, environmental or other pending governmental or any type of administrative or legal proceedings with respect to the City Properties, Developer Property, CCC Property or the Residential Project, or applicable part thereof, which would materially and adversely affect Developer's intended uses of the Property or the development or value of the Property, or applicable part thereof.

2.16.2 No Material Adverse Change. There shall not have occurred between the Date of Agreement and the Closing any material adverse change to the physical, environmental or title condition of the Property, or applicable part thereof.

2.16.3 No Leases or Parties in Possession. City shall have demonstrated to Developer the ability to deliver fee title to the City Properties to Developer free and clear of any tenants, lessees, licensees or any third party occupants or parties in possession, and executed the Title Company's standard form Commercial Owner's Affidavit.

2.17 Escrow. The parties will open an escrow for the conveyance of the City Properties to Developer and the Developer Property to City. Within five days following City's notice of acceptance of infrastructure to Escrow the escrow shall close and both properties shall be conveyed to their appropriate final owners.

2.18 Costs of Escrow. All customary fees, charges, and costs chargeable by Escrow Agent for the escrows including recording fees, document fees, title insurance premiums, and documentary transfer taxes, if any, due with respect to the conveyance of the City Properties to Developer and the Developer Property to City shall be paid by Developer or the City, as the case may be, in accordance with the custom in Santa Clara County; provided, however, the City shall take all actions and pay all charges and costs (if any) required by Section 2.6.

2.18.1 Escrow Instructions. This Agreement constitutes the joint escrow instructions of Developer and City with respect to the conveyances of the City Properties to Developer and the Developer Property to City, and the Escrow Agent to whom these instructions are delivered is hereby empowered to act under this Agreement. Insurance policies for fire or casualty are not to be transferred. To the extent that substantial funds aside from those to cover the costs of escrow are received in the escrow shall be deposited in interest-bearing accounts for the benefit of the depositing Party in any state or national bank doing business in the State of California. All disbursements shall be made by check or wire transfer from such accounts. If, in the opinion of either Party, it is necessary or convenient in order to accomplish the Closing, such Party may provide supplemental escrow instructions; provided that if there is any inconsistency between this Agreement and the supplemental escrow instructions, then the provisions of this Agreement shall control. The Closing shall take place as set forth as described herein. Escrow Agent is instructed to release City's and Developer's escrow closing statements to the respective parties.

2.18.2 Authority of Escrow Agent. Escrow Agent is authorized to, and shall:

(a) For the City Properties, charge City for that portion of the premium of the Title Policy allocable to a CLTA standard owner's policy of title insurance and charge Developer for the any excess premium of the Title Policy allocable to extended coverage, including any endorsements requested by Developer.

(b) For the Developer Property, charge Developer for that portion of the premium of the Title Policy allocable to a CLTA standard owner's policy of title insurance and charge City for the any excess premium of the Title Policy allocable to extended coverage, including any endorsements requested by City.

(c) Charge Developer for escrow fees associated with the closing of the purchase and sale of the City Properties, as applicable. Charge City for escrow fees associated with the closing of the purchase and sale of the Developer Property, as applicable

(d) Charge City or Developer, as the case may be, all other charges and costs referred to in Section 2.18.

(e) Disburse funds, if any, to City and record the Grant Deed for both City Properties, as applicable, when both the Developer Conditions Precedent for the Project have been fulfilled or waived in writing by Developer and City, as applicable and after City has provided notice of acceptance of all infrastructure; or Developer has provided bonds to the City in amount to completely cover the costs of construction of all of the public improvements.. Immediately following recordation of all Grant Deed, Escrow Agent shall record any other recordable documents delivered into escrow for the Closing.

(f) Do such other actions as necessary, including obtaining and issuing the Title Policies, to fulfill its obligations under this Agreement.

(g) Direct City and Developer to execute and deliver any instrument, affidavit, and statement, and to perform any act, reasonably necessary to comply with the provisions of FIRPTA, if applicable, and any similar state act and regulations promulgated thereunder.

(h) Prepare and file with all appropriate governmental or taxing authorities uniform settlement statements, closing statements, tax withholding forms including IRS 1099-S forms, and be responsible for withholding taxes, if any such forms are provided for or required by law.

2.19 Closing. The escrow for conveyance of the City Properties and the Developer Properties close (each, a “**Close of Escrow**”) within 30 days after the satisfaction, or waiver by the appropriate Party, Developer Conditions Precedent, and acceptance of the City of all Developer constructed City Infrastructure., or Developer has provided the City bonds to cover the costs of all City Infrastructure For purposes of this Agreement, a “**Closing**” shall mean the time and day all Grant Deeds are recorded with the Santa Clara County Recorder.

## 2.20 Delivery of Documents and Closing Funds.

2.20.1 At or before the Closing, Developer and City as applicable to their respective parcels shall deposit into escrow the following items with respect to City Properties and the Developer Property:

(a) Funds in an amount necessary to consummate the Closing, including the applicable escrow costs, respectively;

(b) executed and acknowledged Grant Deed for each parcel;

(c) an original executed Preliminary Change of Ownership Report for each Property;

(d) a duly executed non-foreign certification for the Property in accordance with the requirements of Section 1445 of the Internal Revenue Code of 1986, as amended, for each property;

(e) a duly executed California Form 593-W Certificate for the Property or comparable non-foreign person affidavit each property; and

(f) a Commercial Owner's Affidavit in the standard form of the Title Company for each property.

2.20.2 At each Closing, City and Developer shall each deposit such other instruments as are reasonably required by the Title Company or otherwise required to close the escrow and consummate the conveyance of the Property in accordance with the terms hereof.

2.21 Condition of Title. Developer and City will work together in good faith to remove exceptions to the title policy or agree to accept the exceptions.

2.22 Title Insurance. Concurrently with recordation of each Grant Deed, the Title Company shall issue to the appropriate Party such policy of title insurance for the Property, which at appropriate Party's option may be an ALTA extended coverage owner's policy (or if requested by the appropriate Party a CLTA standard owner's policy of title insurance with survey exceptions) (each, a "**Title Policy**") as may be required by the appropriate Party, and/or the appropriate Party's lenders or other institutions that may be providing financing for the Project, together with such endorsements as are reasonably requested by the appropriate Party and/or the appropriate Party's lenders or other institutions, insuring that the appropriate Party has a valid fee ownership interest in the Property, subject only to Pre-Approved Exceptions and the Condition of Title. The Title Policy for each Property shall be in the amount as specified by the appropriate Party. The premium for each Title Policy, plus any additional costs related thereto (except for such costs to remove any title exceptions agreed to be removed by the appropriate Party, which shall be at the appropriate Party's sole cost), including the cost of surveys, and any endorsements requested by appropriate Party shall be paid by the appropriate Party.

2.24 Property Taxes and Assessments. Ad valorem taxes and assessments levied, assessed, or imposed on the City Properties or the Developer Property for any period prior to the applicable Closing, if any, shall be paid by appropriate Party. Ad valorem taxes and assessments levied, assessed, or imposed on the Property acquired by either Party or any other improvements thereon, for the period after the applicable Closing shall be paid by the appropriate Party.

2.25 Access to Property. Prior to the Closing, City shall cooperate to enable representatives of Developer to obtain the right of access to all portions of the City Property for the purposes of implementing this Agreement. Developer agrees to provide

written Notice to City at least twenty-four (24) hours prior to undertaking any studies or work upon the City Property. Developers shall indemnify, defend, protect, and hold City harmless from any Claims arising out of the acts, omissions, negligence, or willful misconduct of Developer or its employees, agents, contractors, subcontractors, or representatives in connection with such studies and investigations, except for Claims arising from or related to any pre-existing condition on or of the City Property or Claims to the extent caused by the active negligence or willful misconduct of Developer or its employees, agents, contractors, or representatives. In addition, in the event Developer causes any damage to any portion of the Property, Developer shall promptly restore the Property as nearly as possible to the physical condition existing immediately prior to Developer's entry onto the Property. Developer shall deliver to City, within ten (10) days of receipt thereof, a complete copy of any written investigation, test, report or study which Developer conducts, or causes to be conducted, with respect to the involved City Property.

2.26 Documents. The Parties represent and warrants that, to the best of their current actual knowledge, as of the Date of Agreement, the Parties have furnished each other with copies or provided each other with access to any and all material existing surveys, inspection reports, environmental and/or hazardous material reports, and any other data, reports, studies, agreements, correspondence, and other writings (collectively, "**Reports**") pertaining to the physical, environmental, and/or title condition of the Property, or applicable portion thereof, and the use and development of the Property, or applicable portion thereof, which are in Developer's possession or control. The Parties also represent and warrant that, each has furnished each other with copies of any and all unrecorded leases, service contracts, easements, licenses, and/or other unrecorded agreements (collectively, "**Unrecorded Agreements**," and with the Reports, "**Documents**") affecting the Property, or portion thereof. The Parties shall notify each other in writing of any material changes to any Documents of which Developer becomes aware before Closing. Developer shall terminate any and all Unrecorded Agreements prior to Closing.

2.27 AS-IS CONVEYANCE. SUBJECT TO SATISFACTION OF THE DEVELOPER CONDITIONS PRECEDENT, CITY SPECIFICALLY ACKNOWLEDGES AND AGREES THAT DEVELOPER IS CONVEYING AND CITY IS TAKING TITLE TO AS OF THE APPLICABLE CLOSING THE DEVELOPER PROPERTY, AS APPLICABLE, ON AN "AS IS WITH ALL FAULTS" BASIS, CONDITION AND STATE OF REPAIR INCLUSIVE OF ANY AND ALL FAULTS AND DEFECTS, LEGAL, PHYSICAL, OR ECONOMIC, WHETHER KNOWN OR UNKNOWN, AS MAY EXIST AS OF THE CLOSING ("**AS-IS CONDITION**") AND THAT, EXCEPT AS OTHERWISE EXPRESSLY SET FORTH IN THIS AGREEMENT, THE REPORTS OR THE DOCUMENTS, CITY IS NOT RELYING ON ANY REPRESENTATIONS OR WARRANTIES FROM DEVELOPER, OFFICERS, AGENTS, EMPLOYEES, REPRESENTATIVES OR ATTORNEYS AS TO ANY MATTERS CONCERNING THE PROPERTY. DEVELOPER SPECIFICALLY ACKNOWLEDGES AND AGREES THAT CITY IS CONVEYING AND DEVELOPER IS TAKING TITLE TO AS OF THE APPLICABLE CLOSING THE CITY PROPERTIES, AS APPLICABLE, ON AN "AS IS WITH ALL FAULTS" BASIS,

CONDITION AND STATE OF REPAIR INCLUSIVE OF ANY AND ALL FAULTS AND DEFECTS, LEGAL, PHYSICAL, OR ECONOMIC, WHETHER KNOWN OR UNKNOWN, AS MAY EXIST AS OF THE CLOSING ("**AS-IS CONDITION**") AND THAT, EXCEPT AS OTHERWISE EXPRESSLY SET FORTH IN THIS AGREEMENT, THE REPORTS OR THE DOCUMENTS, DEVELOPER IS NOT RELYING ON ANY REPRESENTATIONS OR WARRANTIES FROM CITY, OFFICERS, AGENTS, EMPLOYEES, REPRESENTATIVES OR ATTORNEYS AS TO ANY MATTERS CONCERNING THE PROPERTY

2.28 Independent Investigation. Developer acknowledges, agrees, represents, and warrants that, prior to Closing, Developer will have been given a full opportunity to obtain, review, inspect, and investigate each and every aspect of the City Properties, either independently or through agents of the Developer's choosing, including the following:

- (a) The size and dimensions of the Property;
- (b) The availability and adequacy of water, sewage, fire protection, and any utilities serving the Property;
- (c) All matters relating to title including extent and conditions of title to the Property, taxes, assessments, and liens;
- (d) All legal and governmental laws, statutes, rules, regulations, ordinances, limitations on title, restrictions or requirements concerning the Property including zoning, use permit requirements and building codes;
- (e) Natural hazards, including flood plain issues, currently or potentially concerning or affecting the Property;
- (f) The physical, legal, economic, and environmental condition and aspects of the Property, and all other matters concerning the conditions, use or sale of the Property, including any permits, licenses, agreements, liens, zoning reports, engineers' reports, and studies and similar information relating to the Property. Such examination of the condition of the Property has included examinations for the presence or absence of Hazardous Materials as Developer deemed necessary or desirable;
- (g) Any easements and/or access rights affecting the Property;
- (h) Any contracts and other documents or agreements affecting the Property; and
- (i) All other matters of material significance affecting the Property.

2.29 Disclaimers. Developer acknowledges and agrees that except as expressly set forth in this Agreement: (a) neither City, nor any City Party, has made any

representations, warranties, or promises to Developer, or to anyone acting for or on behalf of Developer, concerning the condition of the City Properties or any other aspect of the Properties; (b) the condition of the Properties has been independently evaluated by Developer prior to the Closing; and (c) any information including any engineering reports, architectural reports, feasibility reports, marketing reports, title reports, soils reports, environmental reports, analyses, or data or other similar reports, analyses, data or information of whatever type or kind, if any, which Developer has received or may hereafter receive from City or any City Party were and are furnished without warranty of any kind and on the express condition that Developer has made its own independent verification of the accuracy, reliability and completeness of such information and that Developer may rely on the foregoing at its own risk.

2.30 Waivers and Releases. Developer hereby waives and releases City and City Parties, as of the Closing for the City Properties, from any Claims or other compensation whatsoever, in law or equity, of whatever kind or nature, whether known or unknown, direct or indirect, foreseeable or unforeseeable, absolute or contingent, now existing or which may in the future arise, including lost business opportunities or economic advantage, and special and consequential damages, arising out of, directly or indirectly, or in any way connected with: (a) all warranties of whatever type or kind (excepting therefrom warranties set forth in Section 1.1.1 above) with respect to the physical or environmental condition of the Properties, whether express (except as set forth in Section 1.1.1), implied or otherwise, including those of fitness for a particular purpose, tenantability, habitability or use; (b) use, management, ownership or operation of the City Properties, whether before or after Closing; (c) the physical, environmental or other condition of the Properties; (d) the application of, compliance with or failure to comply with any and all Applicable Laws with respect to the Properties; (e) Hazardous Materials in, on, or under the Properties; and (vi) the As-Is Condition of the Properties; the foregoing are collectively referred to as “**Property Claims**”.

Notwithstanding the foregoing to the contrary, the release and waiver of Property Claims set forth in this Section 2.30 shall not apply to (a) any Property Claims to the extent arising from the active negligence or willful misconduct of City or any City Party, (b) any breaches or Defaults by City of any covenants, agreements, representations, or warranties set forth in this Agreement, (c) any breaches or Defaults by City of any other Projects Agreements to which City is a party, or (d) any fraud committed by City or any City Party.

### 3. DEVELOPMENT OF THE PROJECT.

3.1 Entitlement Applications. Developer shall cooperate with City in the preparation, submittal, and processing of a Precise Plan that explores the feasibility of the desired project on the CCC Property and Depot Street. The Precise Plan submittal shall consist of complete Architectural Review applications along with any required environmental documents/reports concerning the proposed project.



3.2 Development of Project Infrastructure.The Developer shall construct and develop the City Infrastructure in accordance with this Agreement. All such work related to the City Infrastructure shall be performed by licensed contractors.

3.3 Schedule of Performance.Subject to Developer obtaining all required permits, entitlements, and governmental approvals as set forth in the Schedule of Performance, Developer shall commence and complete construction of the City Infrastructure, as applicable, and satisfy all of Developer's other obligations under this Agreement within the times established therefor in the Schedule of Performance, as the same shall be extended by Force Majeure Delays (to the extent provided in Section 6.2). The Schedule of Performance is subject to revision from time to time as mutually agreed upon in writing between Developer and the City Manager or his or her designee.

3.4 Costs of City Infrastructure Development.All the costs of site preparation (including demolition and removal of all temporary structures or improvements involving the City Infrastructure), planning, designing, constructing and developing the City Infrastructure, incurred by Developers shall be borne solely by Developer, with the City's reimbursement as described in Section 1.4.4.

3.5 Permits.Developer, at its expense, shall exercise commercially reasonable efforts to secure or cause to be secured any and all permits and approvals which may be required by City and any other governmental agency having jurisdiction over the applicable portion of the Project, including but not limited to those permits required for City Infrastructure. Developer shall also obtain permits for the demolition and removal of any temporary structures or improvements, if any, on the Project. City staff will work cooperatively with Developer to assist in coordinating the expeditious processing and consideration of all necessary permits and approvals. However, the execution of this Agreement does not constitute the granting of, or a commitment to grant or obtain, any land use permits or approvals required by City or any other government agency. Developer makes no representation or warranty to City that Developer will be able to obtain all permits and approvals which may be required by City and any other governmental agency having jurisdiction over the applicable portion of the Project.

3.6 Limitations of this Agreement. By its execution of this Agreement, City is not committing itself to or agreeing to undertake: (a) disposition of the CCC Property or Depot Street to Developer; (b) approval of the proposed development Project described herein, or (c) any other acts or activities requiring the subsequent independent exercise of discretion by City or any agency or department thereof. In addition, nothing in this Agreement shall be construed to limit the application of CEQA to any change to the DDA or the proposed Project, or to changes to the foregoing, or to control the actions of City in meeting its CEQA obligations. In fulfilling its obligations under CEQA, City reserves full and complete discretion with respect to any such CEQA approvals without reference to this Agreement. City shall not be liable, in any respect, to Developer for its action or inaction in fulfilling its CEQA obligations. City will not consider the approval of any DDA or the proposed Project, or to changes to the foregoing, unless and until it has fully reviewed and considered the environmental impacts in accordance with CEQA. City is not, and

shall not be considered to be, obligated by this Agreement, or otherwise, to approve the proposed Project or any changes to this Agreement or any other agreement. After CEQA review, City is not obligated, by this Agreement or otherwise, to adopt findings of overriding considerations for approval of or to take any other action in support of the proposed Project or any changes to this Agreement or any changes to the foregoing. City is not precluded from rejecting any change to this Agreement DDA or the proposed Project or imposing mitigation measures as a condition of Project approval, which measures mitigate or avoid direct or indirect environmental effects of the proposed Project. If City rejects the proposed Project, this Agreement shall automatically terminate and, except as otherwise provided in Sections 4.1 and 4.8, neither Party shall have any further rights or obligations hereunder.

3.7 Financial Documentation. Developer shall provide the City with sufficient financial documentation prior to commencing construction of City Infrastructure that Developer has the financial capacity to complete construction of the City Infrastructure.

3.8 Insurance Requirements. Prior to Commencement of Construction until the completion of construction of the Project, as evidenced by issuance of a Final Certificate of Completion, Developer shall take out and maintain or shall cause its contractor to take out and maintain, a commercial general liability policy with a minimum limit of Two Million Dollars (\$2,000,000) per occurrence for bodily injury, personal injury, and property damage, or such other higher policy limits as may be required by Developer's lenders or other institutions providing financing to Developer for the Project. Coverage shall be at least as broad as Insurance Services Office Commercial General Liability coverage (occurrence Form CG 0001). If commercial general liability insurance or other form with a general aggregate is used, the general aggregate limit shall at least Five Million Dollars (\$5,000,000). Developer and each of its contractors shall also take out and maintain a comprehensive automobile liability policy in an amount not less than One Million Dollars (\$1,000,000).

Until such time as Developer has completed the Project, Developer shall also obtain and maintain builder's all-risk insurance in an amount not less than the full insurable cost of the building shell improvements applicable to that particular portion of the Project to be constructed, or caused to be constructed, on a replacement cost basis, or such other greater policy limits as may be required by Developer's lenders or other institutions providing financing for the Project, and shall furnish or cause to be furnished to City evidence reasonably satisfactory to City that Developer and any contractor with whom it has contracted for the performance of work on the Property or otherwise pursuant to this Agreement carries workers' compensation insurance as required by law.

Companies writing the insurance required hereunder shall be licensed to do business in the State of California. Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A:VII or otherwise reasonably acceptable to City. The commercial general liability and comprehensive automobile policies hereunder shall name City and City Parties as additional insureds with respect to liability arising out of work or operations performed by or on behalf of the Developer on or about the Property,

including materials, parts or equipment furnished in connection with such work or operations.

Developer shall furnish City with a certificate of insurance evidencing the required insurance coverage and a duly executed endorsement evidencing such additional insured status. To the extent provided by the insurance carrier, the insurance policies shall be endorsed to notify City of any material change, cancellation or termination of the coverage at least 30 days in advance of the effective date of any such material change, cancellation or termination. Coverage provided hereunder by Developer shall be primary insurance and shall not be contributing with any insurance, self-insurance or joint self-insurance maintained by City, and the policy shall so provide. Any insurance, self-insurance or joint self-insurance maintained by City shall be excess of and shall not contribute with the insurance required to be maintained by Developer. The insurance policies shall contain a waiver of subrogation for the benefit of City. The required certificate and endorsement for the Project shall be furnished by the Developer to City prior to the commencement of construction of the Project.

Any deductibles or self-insured retentions must be declared to and approved by City (which shall not be unreasonably withheld, conditioned or delayed), which may require Developer to provide proof of its ability to pay losses and costs of related investigation, claim administration, and defense expenses within the retention.

3.9 Rights of Access. During City Infrastructure construction City representatives and elected officials shall have the right of access to the City Infrastructure, at reasonable times and after prior arrangement with Developer, so long as such representatives and elected officials comply with all safety rules of Developer and its contractors and insurers and do not unreasonably interfere with the progress of construction of the applicable portion of the Project. Nothing herein shall be deemed to limit the ability of City to conduct code enforcement and other administrative inspections of any portion of the Project at any time in accordance with applicable law. City shall indemnify, defend, protect, and hold Developer harmless from any Claims to the extent caused by the active negligence or willful misconduct of City representatives, elective officials, or any other City Party all in the course of accessing the Property.

3.10 Compliance With Laws. Developer shall carry out, and shall ensure that its contractors and subcontractors carry out the Projectwork in conformity with all Applicable Laws, including all applicable state labor laws and standards; the City zoning and development standards; building, plumbing, mechanical and electrical codes; all other provisions of the City of Morgan Hill Municipal Code; and all applicable disabled and handicapped access requirements, including the Americans With Disabilities Act, 42 U.S.C. Section 12101, *et seq.*, Government Code Section 4450, *et seq.*, Government Code Section 11135, *et seq.*, and the Unruh Civil Rights Act, Civil Code Section 51, *et seq.* Developer's obligations under this Section 3.10 shall include the obligation to undertake all appropriate inquiries with state and federal governmental enforcement and regulatory agencies as necessary to fully comply with all Applicable Laws. The City hereby acknowledges and agrees that to its knowledge, prevailing wage

requirements shall not be applicable to the construction of improvements on the Residential Project, but are applicable to all construction related to the City Infrastructure.

3.11 Certificate of Completion. Following Final Completion of the entire Project, City shall furnish Developer with a “**Final Certificate of Completion**” substantially in the form of Exhibit D-1 attached hereto and incorporated herein by this reference. City shall not unreasonably withhold, condition, or delay such Final Certificate of Completion. Upon request by Developer, following Final Completion of this Project in accordance with this Agreement, City shall furnish Developer with a “**Partial Certificate of Completion**” as to such completed portion of the Project substantially in the form of Exhibit D-2 attached hereto and incorporated herein by reference. City shall not unreasonably withhold, condition, or delay such Partial Certificate of Completion.

After issuance of such Partial Certification of Completion or Final Certificate of Completion, any party then owning or thereafter purchasing, leasing, or otherwise acquiring any interest in the Property covered by said Partial Certification of Completion or Final Certificate of Completion shall not (because of such ownership, purchase, lease or acquisition) incur any obligation or liability under this Agreement with respect to such remaining portions of the Project to which such Partial Certification of Completion or Final Certificate of Completion applies. The issuance of a Partial Certificate of Completion or Final Certificate of Completion shall not constitute a waiver or release of any Claims based upon a breach of any representation or warranty set forth in Section 1.2.1 or Section 1.2.2 to the extent a Claim for breach of such representation or warranty has been asserted in writing by the claiming Party against the breaching Party within the 12-month survival period of such representations and warranties. The Final Certificate of Completion and any Partial Certificates of Completion shall not be deemed a notice of completion as referred to in California Civil Code Section 9208.

3.12 Liens and Stop Notices. Developer shall not allow to be placed on the Project or any part thereof or any adjacent property (including without limitation any portion of the Property then owned by City) any lien or stop notice arising from any work or materials performed or provided or alleged to have been performed or provided by Developer’s contractors, subcontractors, agents, or representatives. If a claim of a lien or stop notice is given or recorded affecting the Project or any adjacent property, Developer shall within 30 days of Developer becoming aware of such recording or service: (a) pay and discharge the same; or (b) effect the release thereof by recording and delivering to City Manager a surety bond in sufficient form and amount.

3.13 Right of City to Satisfy Other Liens After Closing. After Closing, and provided the requirements set forth in Section 2.14 have not been met by Developer, City shall have the right, but not the obligation, upon not less than ten (10) days prior written notice to Developer, to satisfy any such liens or stop notices. In such event, Developer shall be liable for and City shall be entitled to reimbursement by Developer for the amount reasonably paid by the City to discharge such lien or satisfy such stop notice. This Section 3.13 shall survive termination or expiration of the Agreement.

3.14 Mortgage, Deed of Trust, Sale and Lease-Back Financing.

3.14.1 No Encumbrances Except Mortgages, Deeds of Trust, or Sale and Lease-Back for Development. Prior to issuance of a Final or Partial Certificate of Completion, as applicable, mortgages and deeds of trust will be permitted on the Residential Property (or portion thereof) only to the extent otherwise provided in this Agreement, and only for the purpose of financing the acquisition and/or construction and development of the Residential Project improvements or City Infrastructure (including but not limited to, design, planning, permitting, remediation, site preparation, and horizontal and vertical construction) on portions of the Project. The words "mortgage" and "deed of trust" as used herein shall include sale and lease-back financing.

3.14.2 Holder Not Obligated to Construct Improvements. Neither the holder of any mortgage or deed of trust on the Property or portion thereof nor any person or entity, including any deed of trust beneficiary or mortgagee, who acquires title or possession to the Residential Property, or any portion thereof, by foreclosure, trustee's sale, deed in lieu of foreclosure or otherwise, shall be obligated by the provisions of this Agreement to construct or complete the Project or City Infrastructure or to guarantee such construction or completion. Nothing in this Agreement shall be deemed to or be construed to permit or authorize any such holder, person or entity to devote the Property or portion thereof to any uses or to construct any improvements thereon other than those uses and Project improvements provided for or authorized by this Agreement and the Project Approvals or as otherwise agreed to by the City.

3.14.3 Notice of Default to Mortgagee or Deed of Trust Holders; Right to Cure. With respect to any mortgage or deed of trust granted by Developer on the Property or portion thereof, whenever City shall deliver any Notice or demand to Developer with respect to any breach or Default by Developer hereunder, City shall at the same time deliver to each holder of record of any mortgage or deed of trust on the Property or portion thereof a copy of such Notice or demand. No Notice of Default shall be effective as to the holder unless such Notice is given. Each such holder shall (insofar as the rights of City are concerned) have the right, at its option, within sixty (60) days following the expiration of the Developer's cure period set forth in Section 5.1 below, to cure or remedy or commence to cure or remedy any such Default and to add the cost thereof to the mortgage debt and the lien of its mortgage. If such breach or Default cannot reasonably be cured within such sixty (60) day period, then such holder shall have a reasonable period of time following the expiration of such sixty (60) day period to cure or remedy such breach or Default so long as such holder commences such cure or remedy within the initial sixty (60) day period and diligently prosecutes such cure or remedy to completion. In the event possession of the Property (or portion thereof) is required to effectuate such cure or remedy, the holder shall be deemed to have timely cured or remedied if it commences the proceedings necessary to obtain possession thereof within sixty (60) days, diligently pursues such proceedings to completion, and, after obtaining possession, diligently completes such cure or remedy (the foregoing time periods being subject to extension during the period that such holder is precluded from taking or pursuing any such action as a consequence of any bankruptcy stay or other court order). Nothing in this Agreement shall be preclude or prevent any holder of record of any mortgage or deed of trust on the Property or portion thereof from curing or remedying any

breach or Default by Developer hereunder, and City agrees to accept any such cure or remedy undertaken by any such holder of record of any mortgage or deed of trust on the Property or portion thereof.

3.14.4 Mortgagee or Deed of Trust Holder's Right to Transfer Property. If any mortgagee or deed of trust holder making a loan to Developer secured by the Property, or any portion thereof, forecloses upon the Property, or any applicable portion thereof, such foreclosure sale shall be a "**Permitted Transfer**" for purposes of this Agreement and such party acquiring title to the Property, or applicable portion thereof, at such foreclosure sale shall be entitled to transfer title to same to a third party without the consent of City.

3.15 Term. The term of this Agreement shall be five years from the Date of Agreement unless earlier terminated by the parties pursuant to this Agreement. Two, one-year extensions can be obtained by Developer making payments of \$100,000 for each year requested, as long as all public facilities have been constructed.

#### **4. COVENANTS, RESTRICTIONS AND AGREEMENTS.**

4.1 Covenants, Conditions and Restrictions. Upon request by Developer, City agrees to reasonably cooperate with Developer to allow Developer to record a Declaration of Covenants, Conditions & Restrictions against the Residential Project after Developer has constructed the City Infrastructure, but before completion of the Residential Project. Such Declaration shall be subject to City's approval, which shall not be unreasonably withheld, conditioned or delayed.

4.2 Taxes and Assessments. After the Closing, it shall be Developer's responsibility to pay prior to delinquency all ad valorem real estate taxes and assessments on the Residential Property, subject to Developer's right to contest in good faith any such taxes.

4.3 Effect and Duration of Covenants. The covenants established in this Agreement shall, without regard to technical classification and designation, be binding upon and inure for the benefit and in favor of City, and its successors and assigns. City is deemed the beneficiary of the terms and provisions of this Agreement and of the covenants running with the land for and in its own right and for the purposes of protecting the interests of the community and other parties, public or private, in whose favor and for whose benefit this Agreement and the covenants running with the land have been provided. This Agreement and the covenants shall run in favor of City without regard to whether City has been, remains or is an owner of any land or interest in the Project. Subject to the limitations on remedies set forth in Section 5, City shall have the right, if this Agreement or the covenants are breached, to exercise all rights and remedies and to maintain any actions or suits at law or in equity or other proper proceedings to enforce the curing of such breaches to which it may be entitled under the terms of this Agreement.

4.4 No City Approval of Tenants Required. Developer shall not be required to obtain the City's consent or approval as to the tenants to whom Developer may lease

portions of the Residential Project and the City shall not impose any restrictions or limitations on the nature of the tenants to whom Developer may lease portions of the Residential Project; except that the use of the portion of the Residential Project by Developer shall be subject to the use restrictions and limitations created by the Project Approvals and applicable zoning affecting such portion of the Project.

4.5 Easements from City. If requested by Developer upon or following Developer's acquisition of City Properties the City shall grant to Developer, a utilities easement, utilities access easement, and/or emergency access vehicle easement, as the case may be, on, over, under, or across portions of the City Properties to the extent reasonably necessary to service the Residential Project and which, in the City's reasonable discretion, does not impair usage of the City's infrastructure or public projects.

4.6 Easements from Developer. If requested by City in the course of the development of the Project, Developer shall grant to City, a utilities easement, utilities access easement, access easement, and/or emergency access vehicle easement, as the case may be, on, over, under or across portions of the Residential Project to the extent reasonably necessary to service the public or the City or any utility. .

## **5. DEFAULTS AND REMEDIES.**

5.1 Default Remedies— General. Failure by either Party to perform any action or covenant required by this Agreement within 30 days following receipt by the failing Party of written Notice from the other Party specifying the failure shall constitute a **"Default"** under this Agreement; provided, however, that if the failure to perform cannot be reasonably cured within such 30 day period, a Party shall be allowed additional time as is reasonably necessary to cure the failure so long as such Party commences to cure the failure within the 30 day period and thereafter diligently prosecutes the cure to completion. Subject to the limitations of Section 6.2 below, any default by either Party under one or more of the other Project Agreements which is not cured following notice and expiration of any applicable cure periods thereunder shall also constitute a Default under this Agreement, and upon occurrence of such Default and without any right to further notice or additional cure period, the non-defaulting Party shall have all remedies available to it under this Agreement, including the right to terminate this Agreement as set forth in Section 5.3 below.

### **5.2 Legal Actions.**

5.2.1 Institution of Legal Actions. Upon the occurrence of a Default by Developer, City shall have the right, in addition to any other rights or remedies (but subject to the limitations set forth in Section 5.2.2 below), to institute any action at law or in equity to cure, correct, prevent, or remedy such Default, or to recover actual damages (subject to the limitations set forth below and in Section 5.2.2); provided, however, that in no event shall City's pre-Closing remedies include specific performance of Developer's obligation to close escrow on the Property. Developer's remedies in the event of a Default by City under this Agreement shall be limited to obtaining specific performance or injunctive relief, or terminating this Agreement. Neither Party shall have the right to

recover any punitive, consequential, or special damages. All legal actions must be instituted in the Superior Court of the County of Santa Clara, State of California.

5.2.2 Acceptance of Service of Process. In the event that any legal action is commenced by Developer against City, service of process on City shall be made by personal service upon the City Clerk of City or in such other manner as may be provided by law. In the event that any legal action is commenced by City against Developer, service of process on Developer shall be made in any manner as may be provided by law.

5.3 Termination. In addition to the automatic termination provided for under Section 2.6 above, this Agreement may be terminated: (a) if there is an uncured Default, after Notice from the Party not in default and expiration of all cure periods, or (b) if there is a failure of an express Developer Conditions Precedent (which is not waived by the Party whom the condition benefits) by timely Notice from the Party whom the condition benefits. If requested by City, upon termination of this Agreement, Developer shall promptly execute and deliver to City a Quitclaim Deed, in recordable form, as to all portions of the Property not yet purchased by Developer.

#### 5.4 City Option to Repurchase, Reenter, and Repossess.

5.4.1 As to City Properties. Subject to notice and opportunity to cure under Section 5.1 and applicable Force Majeure Delay under Section 6.2, City shall have the additional right, at its option, to reenter and take possession of the City Properties if after conveyance of title to the City Properties, Developer shall:

(a) Fail to Commence Construction of Residential Project within the time set forth on the Schedule of Performance, as extended by Force Majeure Delay(s); or

(b) Abandon or substantially suspend construction of City Infrastructure<sup>1</sup>, as extended by Force Majeure Delay(s).

5.4.2 Such rights to reenter and repossess, to the extent provided in this Agreement and (as applicable) Grant Deeds, shall be subordinate and subject to and be limited by and shall not defeat, render invalid or limit:

(a) Any mortgage, deed of trust or other security instrument permitted by this Agreement (including, without limitation, any assignment of rents and leases);

(b) Any rights or interests provided in this Agreement for the protection of the holder of such mortgages, deeds of trust or other security instruments; or

(c) City's rights under this Section 5.4 shall terminate upon the issuance of a Partial Certificate of Completion as to those portions of the Property covered by such Partial Certificate of Completion. If a Final Certificate of Completion is



issued by City, then City's rights under this Section 5.4 shall terminate as to the entire Property.

5.5 Rights and Remedies Are Cumulative. Except as specified otherwise in this Agreement, the rights and remedies of the parties are cumulative, and the exercise by either Party of one or more of such rights or remedies shall not preclude the exercise by it, at the same or different times, of any other rights or remedies for the same default or any other default by the other Party, except as otherwise expressly provided herein.

5.6 Inaction Not a Waiver of Default. Except as specified otherwise in the Agreement, any failures or delays by either Party in asserting any of its rights and remedies as to any Default shall not operate as a waiver of any Default or of any such rights or remedies, or deprive either such Party of its right to institute and maintain any actions or proceedings which it may deem necessary to protect, assert, or enforce any such rights or remedies.

## 6. GENERAL PROVISIONS.

6.1 Notices, Demands and Communications Between the Parties. Any approval, disapproval, demand, document or other notice ("**Notice**") which either Party may desire to give to the other Party under this Agreement must be in writing and shall be given by certified mail, return receipt requested and postage prepaid, personal delivery, or reputable overnight courier (but not by facsimile or email), to the Party to whom the Notice is directed at the address of the Party as set forth below, or at any other address as that Party may later designate by Notice.

To City: City of Morgan Hill  
Office of the City Manager  
17575 Peak Avenue  
Morgan Hill, CA 95037  
Attention: City Manager

With a copy to: City of Morgan Hill  
City Attorney's Office  
17575 Peak Avenue  
Morgan Hill, CA 95037  
Attention: City Attorney

To Developer: Brookfield Bay Area Holdings, LLC  
500 La Gonda Way Suite 100  
Danville, CA 94526  
Attention: Joe Guerra

Any Notice shall be deemed received on the date of delivery if delivered by personal service, on the date of delivery or refused delivery as shown by the return receipt if sent by certified mail, and on the date of delivery or refused delivery as shown by the records of the overnight courier if sent via nationally recognized overnight courier. Notices sent by a Party's attorney on behalf of such Party shall be deemed delivered by such Party.

6.2 Enforced Delay; Extension of Times of Performance. Subject to the limitations set forth below, performance by either Party hereunder shall not be deemed to be in Default, and all performance and other dates specified in this Agreement shall be extended, where delays are due to: (a) war and insurrection; (b) strikes, lockouts and labor disputes; (c) riots, floods, earthquakes, fires, casualties, acts of God and acts of the public enemy; (d) epidemics, quarantine restrictions, freight embargoes, and governmental restrictions or priority; (e) delays in issuance of any Project Approvals, entitlements or permits necessary to develop any improvements contemplated to be developed on the Property, or applicable portion thereof; (f) litigation and arbitration, including court delays; legal challenges to this Agreement, the Project Agreements, the Project Approvals, or any other approval required for the Project or any initiatives or referenda regarding the same; (g) environmental conditions, pre-existing or discovered, delaying the construction or development of the Property or any portion thereof; (h) unusually severe weather or unseasonable inclement weather; (i) acts or omissions of the other Party or any of its members, managers, officers, agents, employees, affiliates or other representatives; or acts or failures to act or delay in acting of any public or governmental agency or entity (except that acts or failures to act of City shall not excuse performance by City); or (j) moratorium (each a "**Initial Delay**"). An extension of time for any such cause shall be for the period of the enforced delay and shall commence to run from the time of the commencement of the cause, if Notice by the Party claiming such extension is sent to the other Party within 60 days of the commencement of the cause or discovery of the cause. If Notice is sent after such 60 day period, then the extension shall commence to run no sooner than 60 days prior to the giving of such Notice. Times of performance under this Agreement may also be extended in writing by the mutual agreement of City and Developer. Developer's inability or failure to obtain financing or otherwise timely satisfy the Conditions Precedent to Closing (other than due to clauses (e) and (f) above or due to the acts, failure to act or fault of the City, and other than the Conditions to Closing set forth in Section 2.4.1, 2.4.6, 2.4.7 and 2.4.8) on or before any date in the Performance Schedule Date shall not be deemed to be a cause outside the reasonable control of the Developer and shall not be the basis for an excused delay unless approved in writing by the City.

6.3 Successors and Assigns. Subject to the restrictions on Developer transfers set forth in Section 1.2.1 above, all of the terms, covenants and conditions of this Agreement shall be binding upon Developer and City and their respective successors and assigns. Whenever the term "Developer" is used in this Agreement, such term shall include any permitted successors and assigns as herein provided.

6.4 Relationship Between City and Developer. It is hereby acknowledged that the relationship between City and Developer is not that of a partnership or joint venture and that City and Developer shall not be deemed or construed for any purpose to be the agent of the other. Accordingly, except as expressly provided herein or in the exhibits hereto, City shall have no rights, powers, duties or obligations with respect to the development, operation, maintenance, or management of the Project.

6.5 City Approvals and Actions. Whenever a reference is made herein to an action or approval to be undertaken by City, the City Manager or his or her designee is authorized to act on behalf of City, unless specifically provided otherwise or the context requires otherwise.

6.6 Counterparts. This Agreement may be signed in multiple counterparts each of which shall be deemed to be an original.

6.7 Integration. This Agreement, including the exhibits hereto, and the other Project Agreements contain the entire understanding between the parties relating to the transactions contemplated by this Agreement. All prior or contemporaneous agreements, understandings, representations and statements, oral or written, other than the other Project Agreements, are merged in this Agreement and shall be of no further force or effect. Each Party is entering this Agreement based solely upon the representations set forth herein and upon each Party's own independent investigation of any and all facts such Party deems material.

6.8 Brokerage Commissions. City and Developer each represents to the other that it has not engaged the services of any finder or broker and that it is not liable for any real estate commissions, broker's fees, or finder's fees which may accrue by means of the conveyance of the Property as described in this Agreement, or the negotiation and execution of this Agreement. Each Party shall indemnify, defend, protect and hold the other Party harmless from any and all Claims based upon any assertion that such commissions or fees are allegedly due from the Party making such representations.

6.9 Titles and Captions. Titles and captions are for convenience of reference only and do not define, describe or limit the scope or the intent of this Agreement or of any of its terms. References to section numbers are to sections in this Agreement, unless expressly stated otherwise. References to specific section numbers shall include all subsections which follow the referenced section.

6.10 Interpretation. As used in this Agreement, masculine, feminine or neuter gender and the singular or plural number shall each be deemed to include the others where and when the context so dictates. The words "include" and "including" shall be construed as if followed by the words "without limitation." The parties acknowledge that each Party and his, her or its counsel have reviewed and revised this Agreement and that the rule of construction to the effect that any ambiguities are to be resolved against the drafting Party shall not be employed in the interpretation of this Agreement or any document executed and delivered by either Party in connection with this Agreement.

6.11 Modifications. Any alteration, change or modification of or to this Agreement, in order to become effective, shall be made in writing and in each instance signed on behalf of each Party.

6.12 Severability. If any term, provision, condition or covenant of this Agreement or its application to any Party or circumstances shall be held, to any extent, invalid or unenforceable, the remainder of this Agreement, or the application of the term, provision, condition or covenant to persons or circumstances other than those as to whom or which it is held invalid or unenforceable, shall not be affected, and shall be valid and enforceable to the fullest extent permitted by law.

6.13 Computation of Time. The time in which any act is to be done under this Agreement is computed by excluding the first day, and including the last day, unless the last day is a holiday, Saturday, or Sunday, and then that day is also excluded. The term "holiday" shall mean all holidays as specified in Sections 6700 and 6701 of the California Government Code. If any act is to be done by a particular time during a day, that time shall be Pacific Time Zone time.

6.14 Legal Advice. Each Party represents and warrants to the other the following: they have carefully read this Agreement, and in signing this Agreement, they do so with full knowledge of any right which they may have; they have received independent legal advice from their respective legal counsel as to the matters set forth in this Agreement, or have knowingly chosen not to consult legal counsel as to the matters set forth in this Agreement; and, they have freely signed this Agreement without any reliance upon any agreement, promise, statement or representation by or on behalf of the other Party, or their respective agents, employees, or attorneys, except as specifically set forth in this Agreement, and without duress or coercion, whether economic or otherwise.

6.15 Time of Essence. Time is expressly made of the essence with respect to the performance by City and Developer of each and every obligation and condition of this Agreement.

6.16 Cooperation. Each Party agrees to cooperate with the other in this transaction and, in that regard, shall execute any and all documents which may be reasonably necessary, helpful, or appropriate to carry out the purposes and intent of this Agreement.

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

6.18 Time for Acceptance of Agreement by City. This Agreement, when executed by Developer and delivered to City, must be authorized, executed, and delivered by City on or before forty five (45) days after signing and delivery of this Agreement by Developer or this Agreement shall be void, except to the extent that

Developer shall consent in writing to a further extension of time for the authorization, execution and delivery of this Agreement.

6.19 Developer's Indemnity. Developer shall indemnify, defend (with counsel reasonably acceptable to City), protect, and hold City and its officers, employees, agents, and representatives, harmless from, all Claims to the extent arising out of the development of the Project or by anyone directly or indirectly employed or contracted with by Developer that arise out of the construction by or on behalf of Developer of improvements comprising the Project and whether such Claims shall accrue or be discovered before or after termination of this Agreement. Developer's indemnity obligations under this Section 6.19 shall not extend to Claims to the extent caused by the active negligence or willful misconduct of City or its officers, employees, agents or representatives. Insurance limits shall not operate to limit Developer's indemnity obligations under this Section 6.19. Notwithstanding anything to the contrary in this Section 6.19, any claims related to Initial Litigation Challenges shall be controlled exclusively by Section 6.19.

6.20 Cooperation in the Event of Legal Challenge to Project Approvals. City and Developer shall cooperate in the defense of any court action or proceeding instituted by a third party or other governmental entity or official challenging the validity of any provision of this Agreement or the City's initial approval of this Agreement or any of the Project Approvals ("**Initial Litigation Challenge**"), and the Parties shall keep each other informed of all developments relating to such defense, subject only to confidentiality requirements that may prevent the communication of such information.

6.20.1 Meet and Confer. If an Initial Litigation Challenge is filed, upon receipt of the petition, the Parties will have 20 days to meet and confer regarding the merits of such Initial Litigation Challenge and to determine whether to defend against the Initial Litigation Challenge, which period may be extended by the Parties' mutual agreement so long as it does not impact any litigation deadlines. The City and Developer mutually commit to meet all required litigation timelines and deadlines. The Parties shall expeditiously enter a joint defense agreement, which will include among other things, provisions regarding confidentiality. The City Manager is authorized to negotiate and enter such joint defense agreement in a form acceptable to the City Attorney. Such joint defense agreement shall also provide that any proposed settlement of an Initial Litigation Challenge shall be subject to City's and Developer's approval, each in its reasonable discretion. If the terms of the proposed settlement would constitute an amendment or modification of this Agreement, the settlement shall not become effective unless such amendment or modification is approved by Developer, and by City in accordance with Applicable Laws, and City reserves its full legislative discretion with respect thereto.

6.20.2 Defense Election. If, after meeting and conferring, the Parties mutually agree (each in its sole discretion) to defend against the Initial Litigation Challenge, then the following shall apply:

(a) Developer shall take the lead role defending such Initial Litigation Challenge and may, in its sole discretion, elect to be represented by the legal counsel of its choice;

(b) City may, in its sole discretion, elect to be separately represented by the outside legal counsel of its choice in any such action or proceeding with the reasonable costs of such representation to be paid by Developer;

(c) Developer shall reimburse City, within ten business days following City's written demand therefor, which may be made from time to time during the course of such litigation, all necessary and reasonable costs incurred by City in connection with the Initial Litigation Challenge, including City's administrative, outside legal fees and costs, and court costs.

(d) The Parties intend that the City's role under subsection shall be primarily oversight although the City reserves its right to protect the City's interests, and the City shall make good faith efforts to maximize coordination and minimize its outside legal costs (for example, minimizing filing separate briefs, and duplication of effort to the extent feasible).

(e) For any Initial Litigation Challenge which the Developer has elected to defend under this Section, Developer shall indemnify, and hold harmless the City and City Parties from any liability, damages, claim, action, cause of action, judgment (including City costs to effectuate such judgment, including any attorneys' fees or cost awards, including attorneys' fees awarded under Code of Civil Procedure Section 1021.5, assessed or awarded against City by way of judgment, settlement, or stipulation), loss (direct or indirect), or proceeding (including legal costs, attorneys' fees, expert witness or consultant fees, staff time, expenses or costs) related to such Initial Litigation Challenge; provided, however, such indemnification, defense and hold harmless obligation shall not apply to Claims to the extent caused by the active negligence or willful misconduct of City or any of its agents, employees, officers, contractors or representatives. Notwithstanding the foregoing, the Developer shall not be responsible for any reimbursement to the City for the time of the City Attorney related to the Initial Litigation Challenge if the City is represented by outside legal counsel.

6.20.3 Developer Election Not To Defend. If Developer elects, in its sole and absolute discretion, not to defend against the Initial Litigation Challenge, it shall deliver written notice to the City regarding such decision. If Developer elects not to defend, the City has the right, but not the obligation, to proceed to defend against the Initial Litigation Challenge and shall take the lead role defending such Initial Litigation Challenge and may, in its sole discretion, elect to be represented by the legal counsel of its choice, at its sole cost and expense. If Developer elects not to defend, the City has the right, but not the obligation, to terminate this Agreement and consider the Developer's pending application for any related Project Approvals withdrawn. In the event the City does not terminate this Agreement, then if the terms of a proposed settlement would constitute an amendment or modification of this Agreement, the settlement shall not become effective unless such amendment or modification is approved by

Developer(which approval shall not be unreasonably withheld), and by City in accordance with Applicable Laws, and City reserves its full legislative discretion with respect thereto. In the event the Developer unreasonably withholds its approval of such amendment or modification, the City retains the right, but not the obligation, to terminate this Agreement and consider the Developer's application for any related Project Approvals withdrawn.

6.21 Non-liability of Officials and Employees of City. No member, official or employee of City shall be personally liable to Developer, or any successor in interest, in the event of any Default or breach by City or for any amount which may become due to Developer or its successors, or on any obligations under the terms of this Agreement. Developer hereby waives and releases any claim it may have against the members, officials, or employees of City with respect to any Default or breach by City or for any amount which may become due to Developer or its successors under the terms of this Agreement.

6.22 Limitation of Remedies. In the event of an uncured default by either Party under this Agreement, the non-defaulting Party's exclusive remedy is to terminate this Agreement. In no event shall either Party have the right, and each Party expressly waives the right, to seek monetary damages of any kind (including, but not limited to, actual damages, economic damages, consequential damages, or lost profits) in the event of a default by the other Party under this Agreement.

6.23 Applicable Law; Venue. The laws of the State of California, without regard to conflict of laws principles, shall govern the interpretation and enforcement of this Agreement. The exclusive venue for any disputes or legal actions shall be the Superior Court of California in and for the County of Santa Clara.

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6.24 Survival. The parties' indemnification obligations under Sections 3.7, 6.19 and 6.21 shall survive termination of this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.

**CITY:**

CITY OF MORGAN HILL, a California municipal corporation

By:

\_\_\_\_\_  
Steve Rymer, City Manager

APPROVED AS TO FORM:

By:

\_\_\_\_\_  
Donald A. Larkin, City Attorney

ATTEST:

By:

\_\_\_\_\_  
Irma Torrez, City Clerk



**DEVELOPER:**

**Brookfield Bay Area Holdings, LLC**  
a California Limited Liability Company

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

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

**Approved as to Form:**

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

EXHIBIT A-1  
EXISTING SITE MAP



EXHIBIT A-2

LEGAL DESCRIPTION OF ALL PARCELS IN THE PROJECT

EXHIBIT B

**RECORDING REQUESTED BY AND  
AFTER RECORDATION MAIL TO:**

City of Morgan Hill  
17575 Peak Avenue  
Morgan Hill, CA95037  
Attention: \_\_\_\_\_

*This document is exempt from the payment  
of a recording fee pursuant to Government  
Code §§ 6103, 27383*

*(Space Above This Line for Recorder's Use Only)*

**GRANT DEED  
(With Covenants)**

For valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the City of Morgan Hill, a California municipal corporation ("**Grantor**"), hereby grants to Brookfield Bay Area Holdings, LLC, a California Limited Liability Company ("Brookfield"), a California limited liability company ("**Grantee**"), the real property (the "**Property**") located in the City of Morgan Hill, County of Santa Clara, California, known as Santa Clara County Assessor's Parcel Nos. \_\_\_\_\_ and more particularly described in Attachment No. 1 attached hereto and incorporated in this grant deed ("**Grant Deed**") by reference.

1. Covenants. Grantee expressly covenants and agrees for itself, its successors and assigns and all persons claiming under or through it, that as to the Property and any improvements constructed or to be constructed thereon, or any part thereof, or alterations or changes thereto, Grantee and all such successors and assigns and all persons claiming under or through it, shall use, devote, operate and maintain the Property and the improvements thereon, and every part thereof, to the uses specified and in accordance with that certain Disposition and Development Agreement between Grantor and Grantee dated as of \_\_\_\_\_, 2017 ("**DDA**") for the period of time specified therein, only in strict accordance with the agreements and covenants set forth in this Grant Deed. Capitalized terms used but not otherwise defined herein shall have the meanings provided in the DDA.

2. City Option to Repurchase, Reenter and Repossess. Until such time as a Partial or Final Certificate of Completion is issued with respect to the Property, Grantor shall have the right, in the event of certain specified uncured defaults under the DDA, to

repurchase, reenter and take possession of, the Property referred to above, as further provided in, and subject to the limitations and conditions in, Section 5.4 of the DDA. Such right to repurchase, reenter and repossess shall be subject and subordinate to and be limited by and shall not defeat, render invalid or limit: (a) any mortgage, deed of trust or other security instrument permitted by the DDA; or (b) any rights or interests provided in the DDA for the protection of the holder of such mortgages, deeds of trust or other security instruments. Such right to repurchase, reenter and repossess also shall be subject and subordinate to all leases and licenses that may be entered into by Grantee or its successors or assigns, as lessor or licensor, as the case may be, affecting the Property, or applicable portion thereof. In the event Grantor exercises its right to repurchase, reenter or repossess the Property, or applicable portion thereof, Grantor shall accept title to the Property, or applicable portion thereof, so repurchased or repossessed subject to such mortgages, deeds of trust, other security instruments, leases and/or license agreements previously entered into by Grantee or its successors or assigns to the extent permitted by the DDA.

3. Effect, Duration and Enforcement of Covenants.

(a) It is intended and agreed that the covenants and agreements set forth in this Grant Deed shall be covenants running with the land and that they shall be, in any event and without regard to technical classification or designation, legal or otherwise, to the fullest extent permitted by law and equity, (i) binding for the benefit and in favor of Grantor, as beneficiary; and (ii) binding against Grantee, its successors and assigns to or of the Property and any improvements thereon or any part thereof or any interest therein, and any Party in possession or occupancy of the Property or the improvements thereon or any part thereof. The agreements and covenants herein shall be binding on Grantee itself, each successor in interest or assign, and each Party in possession or occupancy, respectively, only for such period as it shall have title to or an interest in or possession or occupancy of the Property or part thereof. Anything herein to the contrary notwithstanding, the Grantor's rights and interests under Section 2 in this Grant Deed and under Section 5.4 of the DDA, including, without limitation, its right to repurchase, reenter and take possession of the Property, or applicable portion thereof as described in Section 2 above, and the Grantee's obligations under Section 2 of this Grant Deed and under Section 5.4 of the DDA, and all other obligations of Grantee under the DDA, except for the obligations therein that expressly survive the termination of the DDA, shall terminate as to the Property upon the issuance and recordation of a Partial Certificate of Completion or Final Certificate of Completion with respect to the Property. Upon the issuance and recordation of a Partial Certificate of Completion or Final Certificate of Completion with respect to the Property, the Grantor hereby quitclaims all rights and interests in the Property and the Grantor has no further right to enforce any of Grantor's rights under the DDA (including, without limitation, under Section 5.4 of the DDA) with respect to the Property; provided, however, such obligations under the DDA that expressly survive the termination of the DDA shall survive the recordation of a Partial Certificate of Completion or Final Certificate of Completion with respect to the Property. If reasonably requested by Developer or its successors or assigns, City shall execute, acknowledge and cause to be recorded an instrument evidencing the foregoing termination and quitclaim.

(b) Grantor shall have the right, in the event of any and all of such covenants of which it is stated to be the beneficiary, to institute an action for injunction and/or specific enforcement to cure an alleged breach or violation of such covenants, subject to Section 4(c) below. Grantee shall not be liable to Grantor or any beneficiaries for any damages caused by any breach or violation of a covenant by Grantee under any circumstances, including but not limited to expenditure of money to cure a breach or violation by Grantee, nor shall Grantor have the right to void or rescind the conveyance of the Property to Grantee pursuant to this Grant Deed as a result of any breach or violation of a covenant by Grantee under any circumstances.

(c) Grantee shall be entitled to written notice from Grantor and have the right to cure any alleged breach or violation of all or any of the covenants set forth in this Grant Deed; provided that Grantee shall cure such breach or violation within 30 days following the date of written notice from Grantor, or in the case of a breach or violation not reasonably susceptible of cure within 30 days, Grantee shall commence to cure such breach or violation within such 30 day period and thereafter diligently to prosecute such cure to completion within a reasonable time.

4. Mortgagee Protection. No violation or breach of the covenants, conditions, restrictions, provisions or limitations contained in this Grant Deed shall defeat or render invalid or in any way impair the lien or charge of any mortgage, deed of trust or other financing or security instrument encumbering the Property; provided, however, that any successor of Grantee to the Property (other than the Grantor in the event Grantor acquires title to the Property, or any part thereof, pursuant to a foreclosure, deed in lieu of foreclosure, or trustee's sale under the deed of trust recorded for the benefit of Grantor) shall be bound by such covenants, conditions, restrictions, limitations and provisions, whether such successor's title was acquired by foreclosure, deed in lieu of foreclosure, trustee's sale or otherwise.

5. Amendments. Only the Grantor, its successors and assigns, and the Grantee and the successors and assigns of the Grantee in and to all or any part of the fee title to the Property shall have the right to consent and agree to changes or to eliminate in whole or in part any of the covenants contained in this Grant Deed. For purposes of this Section, successors and assigns of the Grantee shall be defined to include only those parties who hold all or any part of the Property in fee title, and shall not include a tenant, lessee, easement holder, licensee, mortgagee, trustee, beneficiary under deed of trust, or any other person or entity having an interest less than a fee in the Property and the Project.

6. Grantee's Acknowledgment. By its execution of this Grant Deed, Grantee has acknowledged and accepted the provisions hereof.

7. Counterparts. This Grant Deed may be executed in counterparts, each of which shall be deemed an original and all of which taken together shall constitute one and the same instrument.

**GRANTOR:**

City of Morgan Hill, a California municipal corporation

Date: \_\_\_\_\_, By: *[form document – do not execute]*  
201\_\_

\_\_\_\_\_, City Manager

***[SIGNATURE MUST BE  
NOTARIZED]***

ATTEST:

\_\_\_\_\_, City  
Clerk

APPROVED AS TO FORM:

\_\_\_\_\_, City Attorney

**GRANTEE:**

Brookfield Bay Area Holdings, LLC, a  
California Limited Liability Company  
("Brookfield"),a California limited liability  
company

Date: \_\_\_\_\_, By: *[form document – do not execute]*  
201\_\_

Name: \_\_\_\_\_

***[SIGNATURE MUST BE  
NOTARIZED]***

Title: \_\_\_\_\_

Date: \_\_\_\_\_, By: *[form document – do not execute]*  
201\_\_

Name: \_\_\_\_\_

***[SIGNATURE MUST BE  
NOTARIZED]***

Title: \_\_\_\_\_



## ACKNOWLEDGMENTS

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA     )

COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_, 201\_\_ before me, \_\_\_\_\_, Notary Public, personally appeared \_\_\_\_\_, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

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

WITNESS my hand and official seal.

Signature: \_\_\_\_\_ (seal)

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA     )

COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_, 201\_\_ before me, \_\_\_\_\_, Notary Public, personally appeared \_\_\_\_\_, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

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

WITNESS my hand and official seal.

Signature: \_\_\_\_\_ (seal)

## ACKNOWLEDGMENT

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STATE OF CALIFORNIA     )

COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_, 201\_\_ before me,  
\_\_\_\_\_, Notary Public, personally appeared \_\_\_\_\_, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

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

WITNESS my hand and official seal.

Signature: \_\_\_\_\_ (seal)

ATTACHMENT NO. 1

**LEGAL DESCRIPTION**

That certain real property located in the City of Morgan Hill, County of Santa Clara described as follows:

## EXHIBIT C

### SCHEDULE OF PERFORMANCE[conform to final DDA]

NOTE: Capitalized terms used below shall have the meaning ascribed to such terms in the Disposition and Development Agreement (“**Agreement**”) to which this Exhibit C is attached. All of the dates and deadlines described below shall be subject to extension by the City Manager pursuant to Section 3.3 of the Agreement or due to “Force Majeure Delays” in accordance with Section 6.2 of the Agreement. The provisions of the Schedule of Performance are intended as a convenient guideline for the Parties and are not intended to supersede or amend the referenced operative sections listed below. In the event of any conflict between this Schedule of Performance and the Agreement, the Agreement shall control.

#	MILESTONE	TIMING REQUIREMENT
1	City shall consider approval of the Agreement, and if approved, shall deliver one executed original to Developer.	Upon Developer’s delivery to the City of three executed originals and City Council action approving this Agreement.
2	Planning Commission Approval of Conformance to General Plan [Recital J]	Completed 1/24/17
3	City Council Approval of DDA	Currently scheduled for 2/15/17
4	Developer shall file for a Precise Development Plan Application (including zoning, subdivision map, general plan designation modification and Site Review).	Immediately following City Council approval of the DDA and these applications must be submitted no later than August 15, 2017.
5	Developer shall apply for Site Review for the Housing Project, street realignment and parking facilities (garage, surface parking etc.).	No later than May 30, 2017 and complete and obtain final Site Review approval by June 2018.
6	Developer to provide and file with City documents including tentative and final subdivision maps to subdivide the property.	By January 15, 2018.
7	Developer shall file for Final Map and obtain Final Map and record Final Map.	Filing shall occur by January 15, 2017 and Final Map shall be recorded no

#	MILESTONE	TIMING REQUIREMENT
		later than June 15, 2018.
6	Developer to Execute Subdivision Agreement	By June 15, 2018.
7	Intentionally Omitted	Intentionally Omitted
8	Developer submits Organizational Documents to City and to Escrow.	By April 1, 2017
9	Developer shall have submitted complete applications for all demolition and grading permit necessary for the Developer to perform the work for the City Infrastructure and such permits shall be ready to be issued by the City subject only to payment of applicable fees.	June30, 2018
10	Developer shall have submitted complete applications for all construction permits necessary for Developer to construct the Residential Project, to be ready to be issued by the City subject only to payment of applicable fees.	March 1, 2021
11	Temporary Parking of not less than 200 stalls shall be provided for the public during CCC replacement parking and Depot Street realignment construction.	Temporary Parking shall be provided concurrently with any activity by Developer which limits access to existing parking on Depot Street or at the CCC.
12	Parties to open escrow for the conveyance of the City Properties to Developer and Developer Property to City.	By April 1, 2017
13	Developer secures all required permits and approvals for development of applicable portion of the Project.	Prior to the commencement of construction for each applicable portion of the Project.
14	Developer submits evidence of insurance to the City.	Prior to Commencement of Construction of the City Infrastructure including demolition or grading

#	MILESTONE	TIMING REQUIREMENT
15	Developer shall commence construction of the multistory parking lot on the CCC.	By June 30, 2018
16	Developer shall substantially complete construction of the multistory parking lot on the CCC.	Within one year of commencing construction.
17	Developer shall commence construction of a parking lot on Developer Property.	By March 1, 2019
18	Developer Substantially Completes construction of a parking lot on Developer Property.	Within 180 days of commencing construction.
19	Developer shall convey the Developer Property after City has accepted the parking improvements thereon.	Within 15 days of the acceptance by the City of the improvements on the Developer Property.
20	Developer shall complete construction of the Residential Project.	Within 5 years of the Date of Agreement. Two, one-year extensions can be obtained by Developer making payments of \$100,000 for each year requested.
18	Developer shall commence construction of the realigned Depot Street	By June 30, 2018
19	Developer shall Substantially complete construction of the realigned Depot Street	Within one year from the Commencement of Construction.
24	City shall provide the Certificate of Completion to Developer.	Within 30 days following completion of the Project (or in the case of a Partial Certificate of Completion, the applicable portion of the Project) and Developer's written request therefor.

EXHIBIT D-1

FORM OF FINAL CERTIFICATE OF COMPLETION

RECORDING REQUESTED BY  
AND WHEN RECORDED MAIL TO:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attention: \_\_\_\_\_

Space above this line for recorder's use

FINAL CERTIFICATE OF COMPLETION

THIS FINAL CERTIFICATE OF COMPLETION ("**Final Certificate of Completion**") is made by the CITY OF MORGAN HILL, a municipal corporation ("**City**"), in favor of \_\_\_\_\_ ("**Developer**"), as of the date set forth below.

RECITALS

A. City and Developer are parties to that certain Disposition and Development Agreement dated as of \_\_\_\_\_, 2015 ("**Agreement**") concerning in part an approximately 0 –acre site located in the City of Morgan Hill, County of Santa Clara, California. This Final Certificate of Completion affects the entire site as more particularly described in Attachment A attached hereto and incorporated herein (the "**Property**"). Capitalized terms used herein without definition shall have the meaning ascribed to such terms in the Agreement.

B. Pursuant to Section 5.4 of the Agreement, and Grant Deeds dated \_\_\_\_\_20\_\_ and \_\_\_\_\_20\_\_, respectively, and recorded in the Official Records of Santa Clara County on \_\_\_\_\_20\_\_ and \_\_\_\_\_20\_\_ at Document Nos. \_\_\_\_\_ and \_\_\_\_\_, respectively ("**Grant Deeds**"), following certain specified Developer defaults and satisfaction of certain other conditions, City had the right to repurchase, reenter and repossess the Property.

C. Pursuant to Section 3.9 of the Agreement, City is required to furnish Developer or its successors, in form suitable for recordation, a Final Certificate of Completion upon (i) issuance of certificates of occupancy for each of the Phase I and



Phase 2 portions of the Project and (ii) at least 50% of the gross rentable space for each of the Phase 1 and Phase 2 portions of the Project, being occupied by a commercial tenant under a customary commercial lease, and therefore terminate the City right to repurchase, reenter and repossess the Property.

D. The City has determined that the conditions in Recital C have occurred as required by the Agreement.

NOW, THEREFORE, the City hereby certifies as follows:

1. Certificates of occupancy for the portions of the Project have been issued., Therefore, the City's right to reenter and repossess the Property pursuant to Section 5.4 of the Agreement and the Grant Deed is terminated.

2. All indemnity covenants contained in the Agreement that are applicable to the Property shall remain in effect and enforceable in accordance with the Agreement.

3. Any Party now owning or hereafter purchasing, leasing or otherwise acquiring any interest in the Property, or applicable part thereof, shall not (because of such ownership, purchase, lease or acquisition) incur any obligation or liability under the Agreement with respect to the Property. Except for those obligations under the Agreement that expressly survive the expiration or earlier termination of the Agreement, neither the City nor any of its successors or assigns shall have any rights, remedies or controls with respect to the Property (or any portion thereof) that it would otherwise have or be entitled to exercise under the Agreement as a result of a default in or breach of any provision of the Agreement pertaining to the Property, or applicable portion thereof, and the respective rights and obligations of the City and its successors and assigns with reference to the Property, or applicable portion thereof, shall be, as applicable, as set forth in any other documents to be recorded against the Property, or applicable portion thereof, pursuant to the Agreement. The preceding notwithstanding, the issuance of this Final Certificate of Completion shall not constitute a waiver or release of any Claims based upon a breach of any representation or warranty set forth in Section 1.2.1 or Section 1.2.2 of the Agreement to the extent a Claim for breach of such representation or warranty has been asserted in writing by the claiming Party against the breaching Party within the 12-month survival period of such representations and warranties as provided in the Agreement.

4. This FinalCertificate of Completion shall not be deemed or construed to constitute evidence of compliance with, or satisfaction of, any obligation of Developer to any holder of a mortgage, or any insurer of a mortgage, securing money loaned to Developer in connection with the Project or any portion thereof. This Final Certificate of Completion is not a notice of completion as referred to in California Civil Code Section 3093.

5. Nothing contained in this instrument shall be deemed or construed to modify any provisions of the Agreement or any other document executed in connection therewith.

6. This Final Certificate of Completion may be executed in counterparts, each of which shall be deemed an original and together shall constitute one instrument.

IN WITNESS WHEREOF, City has executed and issued this FinalCertificate of Completion as of the date set forth below.

**CITY:**

CITY OF MORGAN HILL, a municipal corporation

Dated \_\_\_\_\_,  
: 20\_\_

By: FORM – DO NOT SIGN

Name \_\_\_\_\_  
:

Title: \_\_\_\_\_  
\_\_\_\_\_

## ACKNOWLEDGEMENT

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA     )

COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_, 20\_\_\_\_, before me,  
\_\_\_\_\_, Notary Public, personally appeared \_\_\_\_\_, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

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

WITNESS my hand and official seal.

Signature \_\_\_\_\_ (Seal)

ATTACHMENT A TO CERTIFICATE OF COMPLETION

**PROPERTY**

*[to be inserted]*

Exhibit D-2

**FORM OF PARTIAL CERTIFICATE OF COMPLETION**

RECORDING REQUESTED BY  
AND WHEN RECORDED MAIL TO:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Attention: \_\_\_\_\_

*Space above this line for recorder's use*

**PARTIAL CERTIFICATE OF COMPLETION**

THIS PARTIAL CERTIFICATE OF COMPLETION ("**Partial Certificate of Completion**") is made by the CITY OF MORGAN HILL, a municipal corporation ("**City**"), in favor of \_\_\_\_\_ ("**Developer**"), as of the date set forth below.

RECITALS

A. City and Developer are parties to that certain Disposition and Development Agreement dated as of \_\_\_\_\_, 2017 ("**Agreement**") concerning in part an approximately 0.42 –acre site located in the City of Morgan Hill, County of Santa Clara, California. This Partial Certificate of Completion affects a portion of the approximately in Attachment A attached hereto and incorporated herein (the "**Property**"). The portion of the Project which was performed on the Property is referred to as Capitalized terms used herein without definition shall have the meaning ascribed to such terms in the Agreement.

B. Pursuant to Section 5.4 of the Agreement, and a Grant Deed, dated \_\_\_\_\_, 20\_\_ and recorded in the Official Records of Santa Clara County on \_\_\_\_\_ 20\_\_ at Document No. \_\_\_\_\_ ("**Grant Deed**"), following certain specified Developer defaults and satisfaction of certain other conditions, City had the right to repurchase, reenter and repossess the Property.

C. Pursuant to Section 3.9 of the Agreement, City is required to furnish Developer or its successors, in form suitable for recordation, a Partial Certificate of Completion, and therefore terminate the City right to repurchase, reenter and repossess the Property.

D. The City has determined that the conditions in Recital C have occurred as required by the Agreement.

NOW, THEREFORE, the City hereby certifies as follows:

1. All City Infrastructure has been completed.
2. All indemnity covenants contained in the Agreement that are applicable to the Property shall remain in effect and enforceable in accordance with the Agreement.
3. Any Party now owning or hereafter purchasing, leasing or otherwise acquiring any interest in the Property covered by this Partial Certification of Completion shall not (because of such ownership, purchase, lease or acquisition) incur any obligation or liability under the Agreement with respect to such applicable portion of the Project to which this Partial Certification of Completion applies. Except for those obligations under the Agreement that expressly survive the expiration or earlier termination of the Agreement, neither the City nor any of its successors or assigns shall have any rights, remedies or controls with respect to the portion of the Project to which this Partial Certificate of Completion applies that it would otherwise have or be entitled to exercise under the Agreement as a result of a default in or breach of any provision of the Agreement pertaining to such portion of the Project to which this Partial Certification of Completion applies, and the respective rights and obligations of the City and its successors and assigns with reference to the portion of the Project to which this Partial Certificate of Completion (or portion thereof) shall be, as applicable, as set forth in the other documents recorded against the Property, or applicable portion thereof, pursuant to the Agreement. The preceding notwithstanding, the issuance of this Partial Certificate of Completion shall not constitute a waiver or release of any Claims based upon a breach of any representation or warranty set forth in Section 1.1 to the extent a Claim for breach of such representation or warranty has been asserted in writing by the claiming Party against the breaching Party within the 12-month survival period of such representations and warranties set forth in the Agreement.
4. This Partial Certificate of Completion shall not be deemed or construed to constitute evidence of compliance with, or satisfaction of, any obligation of Developer to any holder of a mortgage, or any insurer of a mortgage, securing money loaned to Developer in connection with the Project or any portion thereof. This Partial Certificate of Completion is not a notice of completion as referred to in California Civil Code Section 3093.
5. Nothing contained in this instrument shall be deemed or construed to modify any provisions of the Agreement or any other document executed in connection therewith.
6. This Partial Certificate of Completion may be executed in counterparts, each of which shall be deemed an original and together shall constitute one instrument.

IN WITNESS WHEREOF, City has executed and issued this [Partial] [Final]  
Certificate of Completion as of the date set forth below.

**CITY:**

CITY OF MORGAN HILL, a municipal  
corporation

Dated \_\_\_\_\_,  
: 20\_\_

By: FORM – DO NOT SIGN

Name \_\_\_\_\_  
:

Title: \_\_\_\_\_  
\_\_\_\_\_

## ACKNOWLEDGEMENT

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STATE OF CALIFORNIA     )

COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_, 20\_\_\_\_, before me,  
\_\_\_\_\_, Notary Public, personally appeared \_\_\_\_\_, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

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

WITNESS my hand and official seal.

Signature \_\_\_\_\_ (Seal)



ATTACHMENT A TO PARTIAL CERTIFICATE OF COMPLETION

**PROPERTY**

*[to be inserted]*

EXHIBIT E  
FORM OF EASEMENT AGREEMENT

EXHIBIT F

SALE OF CITY PROPERTY

