

**6/3/09 DRAFT – RECOMMENDED BY PLANNING COMMISSION FOR
CONSIDERATION BY CED COMMITTEE**

RECORDING REQUESTED BY
AND WHEN RECORDED, RETURN TO:

City of Oakland
Community and Economic Development Agency
250 Frank H. Ogawa Plaza, Suite 3315
Oakland, California 94612

Attention: Director of City Planning

(Space Above This Line Reserved for Recorder's Use)

DEVELOPMENT AGREEMENT

BY AND BETWEEN

CITY OF OAKLAND

AND

MACARTHUR TRANSIT COMMUNITY PARTNERS, LLC

REGARDING THE PROPERTY AND PROJECT KNOWN AS

"MACARTHUR TRANSIT VILLAGE"

Dated: , 2009

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CITY OF OAKLAND
DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT (the "Agreement") is made and entered into as of this [REDACTED] day of [REDACTED], 2009, by and between the CITY OF OAKLAND, a California charter city ("City"), and MACARTHUR TRANSIT COMMUNITY PARTNERS, LLC ("Developer"), a California limited liability company, pursuant to California Government Code Sections 65864, et seq., with respect to the development of the property and project known as "MacArthur Transit Village." City and Developer shall collectively be referred to herein as the "Parties," and may each individually be referred to as a "Party."

RECITALS

This Agreement is entered into on the basis of the following facts, understandings and intentions of the Parties:

A. These Recitals refer to and utilize terms which are defined in this Agreement; and the Parties refer to those definitions in conjunction with their use in these Recitals.

B. The Development Agreement Legislation authorizes City to enter into development agreements in connection with the development of real property within its jurisdiction. The Development Agreement Ordinance establishes the authority and procedure for review and approval of proposed development agreements by City.

C. Developer applied for approval of this Agreement to: (1) vest the land use policies established in the General Plan, the Broadway/MacArthur/San Pablo Redevelopment Plan, and other Existing City Regulations as of the Adoption Date; (2) vest its rights and City's obligations regarding current and future approvals necessary for the Project; and (3) memorialize certain other agreements made between City and Developer with respect to the Project. City and Developer acknowledge that development and construction of the Project is a large-scale

undertaking involving major investments by Developer, with development occurring in phases over a period of years. Certainty that the Project can be developed and used in accordance with the General Plan, the Broadway/MacArthur/San Pablo Redevelopment Plan, and other Existing City Regulations, will benefit City and Developer and will provide the Parties certainty with respect to implementation of the policies set forth in the General Plan, the Broadway/MacArthur/San Pablo Redevelopment Plan, and the other Existing City Regulations.

D. Development of the Project will meet the key objectives of City embodied in the General Plan, the Broadway/MacArthur/San Pablo Redevelopment Plan and other Existing City Regulations. Specifically, the development of the Project will provide many benefits to City and the public including, but not limited to: (1) mitigate or avoid potentially significant environmental impacts; (2) provide public improvements and infrastructure including, among others, renovation of the BART Plaza, improvements to the existing Frontage Road, construction of Village Drive with enhanced vehicular and pedestrian access to BART as shown in Exhibit C, Master Development Plan; and a new BART Garage; (3) strengthen City's economic base with a variety of residential opportunities and long term jobs, in addition to shorter term construction jobs; (4) provide for and generate substantial revenues for City in the form of one time and annual fees and Exactions, property tax and other fiscal benefits; (5) provide a variety of needed housing, including affordable housing; (6) enhance the MacArthur BART station and the surrounding neighborhood; and (7) otherwise achieve the goals and purposes for which the Development Agreement Ordinance was enacted. City is therefore willing to enter into this Agreement to, among other things: (1) provide certainty to encourage the required substantial private investment in the comprehensive development and planning of the Project; (2) secure orderly development and progressive fiscal benefits for public services, improvements and

facilities planning in City; and (3) fulfill and implement adopted City plans, goals, policies and objectives, including, among others, those embodied in City's General Plan.

E. City recognizes the pioneering nature of the Project and the Project Site, and City intends that implementation of the General Plan and Redevelopment Plan policies, objectives and goals, and the zoning ordinance, as amended, will create increased value, operation and function of the MacArthur BART station area and the surrounding neighborhoods.

F. City and Developer anticipate that the full build-out of the MacArthur Transit Village pursuant to this Agreement will generate economic and community benefits to the City of Oakland, the Oakland Redevelopment Agency ("Agency") and Oakland residents.

G. The Development Agreement Legislation authorizes City to enter into a development agreement with any Person having a legal or equitable interest in real property. Developer has an interest in the portion of the Project Site comprising the BART Property pursuant to an Exclusive Negotiating Agreement between Developer, Agency, and BART, dated as of November 1, 2004, as amended, pursuant to which BART has agreed to negotiate exclusively with Developer the terms upon which Developer may acquire a ground leasehold in the portion of the Project Site currently owned by BART to be developed as the affordable rental project and fee interest in the balance of the Project Site currently owned by BART. Developer has options to purchase the portion of the Project Site described as Assessor's Parcel Number ("APN") 012—0967-010-00 on Exhibit A pursuant to an Option Agreement for dated February 28, 2008 between Developer and the owner of said Property (Jagdishkumar B. Patel) and the portion of the Project Site described as APN 012-0967-009-00 on Exhibit A pursuant to an Option Agreement dated March 3, 2008 between Developer and the owners of said Property (Vimal Desai and Jignashaben Desai). The parcels will be conveyed by Developer to BART and

may be leased back to Developer in connection with the development of the BART parking garage. Developer also has an option to purchase the portion of the Project Site identified as APN's 012-0969-002-00, 012-0969-003-00 and 012-0969-053-02 on Exhibit A pursuant to an Option Agreement dated April 9, 2009 between Developer and the owners of the Property (Yeu Bin Wu and Tsui Ying Shen). Developer also anticipates acquiring the balance of the Project Site described on Exhibit A from the current owners thereof.

H. Developer proposes the development of the Project Site for a mix of residential use (market-rate and affordable), retail and commercial uses (including live/work units), community uses, a BART Garage, and other uses and improvements in accordance with the City Approvals and this Development Agreement.

I. City has taken several actions to review and plan for the future development of the Project. These include, without limitation, the following: (1) preparation and certification of an Environmental Impact Report, SCH No. 2006022075 ("EIR"); (2) approval of Ordinance No. 12883 C.M.S. amending Section 17.97.170 of the Oakland Planning Code related to the minimum usable open space requirements in the S-15 zone and rezoning the Project Site to S-15 Transit-Oriented Development Zone; (3) adoption and approval of a Preliminary Planned Unit Development ("Preliminary PUD") permit; (4) adoption and approval of a major conditional use permit; and (5) approval of preliminary design review for the Preliminary PUD. This Agreement also anticipates City will timely consider and grant additional future approvals, including, without limitation, Final PUD permits for each of the Project Phases, a vesting tentative map, final design review, a tree removal permit, conditional use permits and other necessary approvals and permits and that City will use the Environmental Impact Report prepared in support of this Agreement for those approvals and actions to the fullest extent allowed under applicable law.

J. On June 3, 2009, the City's Planning Commission held a duly noticed public hearing on this Agreement pursuant to the Development Agreement Ordinance, and other relevant provisions of the Planning Code. After due review of and report on Developer's application for this Agreement by City staff, consideration of all evidence heard and submitted at such public hearing and the matters to be considered pursuant to Section 17.138.060 of the Development Agreement Ordinance in enacting a development agreement, the Planning Commission, in relevant part: (1) considered and relied upon the certified the EIR for the Project, and determined that consideration of this Agreement complies with CEQA based on the EIR, and that this Agreement is consistent with the goals, objectives, policies, land uses and programs specified in the General Plan, the Broadway/MacArthur/San Pablo Redevelopment Plan, and the other Existing City Regulations pertaining thereto; and (2) recommended that the City Council approve this Agreement based on the foregoing findings. In taking the above actions, the Planning Commission reviewed and heard the report of City's staff on the Agreement and considered all other evidence heard and submitted at the public hearing, including the matters to be considered pursuant to Section 17.138.060 of the Development Agreement Ordinance in recommending to the City Council the approval of a development agreement.

K. On July 21, 2009, 2009, the City Council held a duly noticed public hearing on this Agreement pursuant to the requirements of the Development Agreement Ordinance, and other relevant provisions of the Planning Code. After due review of and report on Developer's application for this Agreement by City staff, consideration of the Planning Commission's recommendations thereon, all other evidence heard and submitted at such public hearing, all other matters considered by the Planning Commission, and the matters to be considered pursuant to Section 17.138.060 of the Development Agreement Ordinance in enacting a development

agreement and other relevant provisions of the Planning Code, the City Council: (1) considered and relied upon the certified EIR and determined that consideration of this Agreement complies with CEQA based on the EIR; and (2) introduced Enacting Ordinance No.

 C.M.S. approving this Agreement, finding and determining in connection therewith that this Agreement is consistent with the goals, objectives, policies, land uses and programs specified in the General Plan, the MacArthur/Broadway/San Pablo Redevelopment Plan and in the other Existing City Regulations pertaining thereto.

L. At a duly noticed public meeting on July 21, 2009, the City Council adopted Enacting Ordinance No. C.M.S. enacting this Agreement.

NOW, THEREFORE, pursuant to the authority contained in the Development Agreement Legislation and the Development Agreement Ordinance, and in consideration of the foregoing Recitals and the mutual covenants and promises of the Parties herein contained, the Parties agree as follows.

AGREEMENT

ARTICLE I

DEFINITIONS

1.1 Defined Terms. Each reference in this Agreement to any of the following terms shall have the meaning set forth below for each such term.

Adoption Date: The date the City Council adopted the Enacting Ordinance enacting this Agreement and the Agency has approved the Owner Participation Agreement. If such approvals do not occur on the same day, the Adoption Date shall be the later of the two Adoption Dates.

Affiliate: Any Person: (a) directly or indirectly Controlling, Controlled by or under Common Control with (i) Developer, (ii) either of Developer's principals: BUILD Equity Investments (MacArthur Transit Community), LLC ("BUILD") or MPI MacArthur, LLC ("MPI"); or (iii) BRIDGE Housing Corporation ("BRIDGE"); and (b) neither it nor its principals, members or partners has been convicted, found or admitted or assumed (including any plea of no contest) criminal or civil liability for any felony, fraud, misrepresentation or any act of moral turpitude (excluding only civil liability for construction defect claims of fraud or misrepresentation arising out of the sale, construction, warranty or repair of real property and improvements thereto).

Agency: The City of Oakland Redevelopment Agency.

Agent: Any member, shareholder, partner, official, officer, director, board, commission, employee, agent, or contractor or subcontractor of a Party, and its respective heirs, legal representatives, successors and assigns of an Agent in accordance with Laws, as each Agent is acting in his, her or its official capacity.

Affordable Parcel: The parcel containing the affordable housing units described as parcel D on Exhibit C.

Applicable City Regulations: The Existing City Regulations, as defined below, and such other City Regulations, as defined below, otherwise applicable to development of the Project pursuant to the provisions of Section 3.6.

Assumption Agreement: An executed and acknowledged agreement in recordable form specifying in detail: (i) the name, form of entity, and address of the proposed Transferee; (ii) the property and or interests that are the subject of the proposed Transfer; (iii) the rights and obligations of Developer under this Agreement that the proposed Transferee is assuming; (iv) the proposed Transferee's agreement that it expressly assumes such obligations; and (v) the assignor's express acknowledgement that it remains liable for all obligations not expressly assigned pursuant to the Assumption Agreement.

BART: The San Francisco Bay Area Rapid Transit District.

BART Garage: The new BART parking garage included as part of the Project and provided for in the City Approvals described in Recital I as shown on the Master Development Plan, Exhibit C.

BART Plaza: The improvements for the BART Plaza as shown on the Master Development Plan, Exhibit C.

BART Property: That certain real property designated as BART Property on Exhibit A.

CEQA: The California Environmental Quality Act (Public Resources Code Sections 21000, et seq.) and the Guidelines thereunder (14 California Code of Regulations, Sections 15000, et seq.) ("CEQA Guidelines").

City Application Fees: Fees City regularly charges for the filing and processing of applications as set forth on City's Master Fee Schedule. City Application Fees shall not include City Development Fees, as defined below, or any fee, the purpose of which, is to compensate for or cover any cost or expense other than the filing and processing of an application.

City Approvals: Permits or approvals required under Applicable City Regulations to develop, use and operate the Project and granted on or before the Adoption Date of this Agreement as identified in Recital I of this Agreement and described in Exhibit B. (See also "Subsequent Approval," defined below.)

City Council: The City Council of City or its designee.

City Development Fees: The fees or assessments legislatively imposed by City against development projects as a general matter for capital improvements.

City Master Fee Schedule: The Master Fee Schedule as adopted and amended by the Oakland City Council.

City Policies: The interpretations made by City of the manner in which Existing City Regulations will be applied to the development of the Project under Applicable City Regulations. The term "City Policy" shall refer to any or all City Policies as the context may require.

City Regulations: The General Plan of City, the Broadway/MacArthur/San Pablo Redevelopment Plan, and all other ordinances, resolutions, codes, rules, regulations and policies in effect as of the time in question.

Commence in Earnest: To Commence in Earnest a Phase of the Project shall mean to initiate activities based on a City-issued building permit and other necessary permit(s)

and diligently prosecute such permit(s) in substantial reliance thereon and make regular and consistent progress toward the completion of construction and the issuance of a final certificate of occupancy, including successful completion of building inspections to keep the building permit(s) and other permit(s) active without the benefit of an extension.

Community Redevelopment Law: The California Community Redevelopment Law (California Health and Safety Code Sections 33000, et seq.).

Conditions of Approval: Project conditions adopted by the City in connection with City Approvals or Subsequent Approvals.

Construction Codes and Standards: The City Regulations pertaining to or imposing life safety, fire protection, seismic, mechanical, electrical and/or building integrity requirements with respect to the design and construction of buildings and improvements, including the then-current Uniform Building Code as adopted and amended by City and other construction codes, Federal Emergency Management Agency standards, and City's then current design and construction standards for streets, drains, sidewalks and other similar improvements, which codes and standards are applied to comparable development on a City-wide basis.

Control: The ownership (direct or indirect) by one Person of an interest in the profits and capital and the right to manage and control, in fact, the day to day affairs of another Person. The term "Control" includes any grammatical variation thereof, including "Controlled" and "Controlling".

Common Control: Common control means that two Persons are both Controlled by the same other Person.

Dedication: An Exaction comprised of land and/or improvements required to be Dedicated to City.

Developer: The term "Developer" shall refer to Developer and, except as otherwise specified with respect to Master Developer Obligations, its respective Transferees, as the context may require, including for this purpose, Affiliates of Developer.

Development Agreement Legislation: California Government Code Sections 65864 through 65869.5, authorizing City to enter into development agreements as therein set forth.

Development Agreement Ordinance: Chapter 17.138 of City's Planning Code, in effect as of the Adoption Date, establishing City's authority and procedure for review and approval of proposed development agreements.

Development Parcels: The parcels of real property (including any improvements thereon) defined herein as the Project Site, as more particularly diagrammed and described in Exhibit A hereto, as such description shall be amended as may be necessary to conform to any approved final subdivision map.

Development Site: A portion of the Project Site containing the proposed physical improvements associated with the Project as shown on the Master Development Plan, Exhibit C.

Effective Date: The date this Agreement becomes effective, which shall be concurrent with the effective date of the Enacting Ordinance.

Enacting Ordinance: Ordinance No. [REDACTED] C.M.S., enacted by the City Council on July 21, 2009, enacting this Agreement.

Environmental Impact Report or EIR: The environmental impact report for the Project prepared pursuant to the requirements of CEQA for the City Approvals, and approved by City acting through its City Council, in accordance with the requirements of CEQA.

Exaction: An exaction (other than City Application Fees or City Development Fees), Dedication or reservation requirement, an obligation for on- or off-site improvements or construction of public improvements, or an obligation to provide services. For purposes hereof, Exactions include, but are not limited to, mitigation measures imposed or adopted pursuant to CEQA or as part of the City Approvals.

Exempt Transferee: Shall have the meaning given to it in Section 10.4 below.

Existing City Regulations: The City Regulations and City Policies in effect as of the Adoption Date and to the extent such are inconsistent therewith, the City Approvals as such are adopted from time to time.

Feasible: Capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors. The term "Feasible" includes any grammatical variant thereof, including "Feasibly" and "Infeasible."

FEIR: The Final Environmental Impact Report (and related materials) for the Project.

Final Development Plan: A Final Development Plan or FDP, as more particularly described in City's Planning Code.

Final PUD: A Final Planned Unit Development Permit, as more particularly described in City's Planning Code.

Finished Parcel: A Development Parcel or legally subdivided portion thereof, rough graded, with utilities stubbed to the lot line, and all adjacent curbs, gutters, utilities and streets for its use and enjoyment have been constructed or the construction thereof has been secured through the Developer's delivery of a subdivision improvement agreement executed by

Developer and City, together with the surety bonds or other security instruments acceptable to City required thereunder.

Finished Parcel Developer: A prospective Transferee who is: (a) acquiring one or more Finished Parcels and (b) assuming only those obligations under this Agreement and the City Approvals that relate specifically to the development or construction of any improvements located on such Finished Parcel and not any Master Developer Obligations.

Force Majeure: A delay in performance caused by war, terrorist acts, insurrection, strikes or other labor disturbances, walk-outs, riots, floods, earthquakes, fires, casualties, or acts of God; restrictions or delays imposed or mandated by Governmental Agencies; or any moratorium imposed or mandated by Governmental Agencies or City; failure by the applicable Governmental Agencies to disburse Prop 1C funds to Developer, or delay in the commencement of such disbursement beyond January 2011 or, thereafter, any suspension or interruption of such disbursement, unless such delay, failure suspension or interruption is due to the fault of Developer, in accordance with the OPA; any delay by Agency in the disbursement of the 2006 Broadway/MacArthur/San Pablo tax allocation bond proceeds pursuant to the OPA due to any delay in the execution of the BART Option Agreement or for any other reason other than the fault of Developer, in accordance with the OPA; enactment of Laws that prevent or preclude compliance by a Party with any material provision of this Agreement; litigation brought by Persons other than a Party, or Affiliate of a Party ("Litigation Force Majeure"); acts of one Party, or failure of such Party to act when action is required, which to the extent in and of itself prevents or precludes compliance by the other Party with any material provision of this Agreement; neglect of one Party which to the extent in and of itself prevents or precludes compliance by the other Party with any material provision of this Agreement; any delay in

Developer's ability to obtain reasonable access to the BART Property to commence construction of Phase I or any delay in Developer's ability to obtain title to any portion of the Project Site, due to circumstances beyond the reasonable control of the Developer, including, without limitation, the failure by the Agency to disburse funds for acquisition of such property when and as required by the OPA, in accordance with the OPA; or other similar basis for excused performance that is not within the reasonable control of the Party whose performance is to be excused. Force Majeure does not include delays that are within the reasonable Control of the Party whose performance is to be excused, delays associated with economic or market conditions, or delays related to financial inability (except as expressly provided above) or insolvency of a Party.

Governmental Agencies: All governmental or quasi-governmental agencies (such as public utilities) having jurisdiction over, or the authority to regulate development of, the Project. As used in this Agreement, the term "Governmental Agencies" does not include City or any of the departments of City.

Governmental Agency Approvals: All permits and approvals required by Governmental Agencies under Governmental Agency Regulations for construction, development, operation, use, provision of services to, or occupancy of, the Project.

Governmental Agency Regulations: The Laws, ordinances, resolutions, codes, rules, regulations and official policies of Governmental Agencies in effect as of the time in question.

Indemnify: An obligation of Developer to indemnify, defend, protect and hold the Indemnitees harmless from and against Losses. The term "Indemnify" includes any grammatical variation thereof, including "Indemnified", "Indemnifies" and "Indemnity".

Indemnitees: City and each of its Agents, officers, employees, departments, subdivisions, agencies, City Council, Mayor, boards and commissions (and each individual member of the City Council or any other City board or commission) and all of the heirs, legal representatives, successors and assigns of an Indemnatee in accordance with Laws, as each Indemnatee is acting in his, her or its official capacity. For purposes of this definition, the Port of Oakland shall not be considered an agency of City.

Laws: The Constitution and Laws of the State, the Constitution of the United States, and any codes, statutes, regulations, or executive mandates thereunder, and any court decision, State or federal, thereunder. The term "Laws" shall refer to any or all Laws as the context may require. "Law" or "Laws" excludes, for the purpose of this Agreement, any local ordinance, regulation, rule or requirement.

Losses: Any and all losses, damages (including foreseeable and unforeseeable consequential and punitive damages), liabilities, claims, liens, obligations, interest, penalties, fines, lawsuits and other proceedings, judgments and awards, challenges, demands, judgments, actions, causes of action, court costs, and legal or other expenses (including reasonable attorneys' fees, reasonable expert witness and consultant fees, reasonable City Attorney costs and fees, and other normal, reasonable City-staff and other related expenses incurred by City), all of whatever kind or nature, known or unknown, contingent or otherwise.

MacArthur/Broadway/San Pablo Redevelopment Plan: The MacArthur/Broadway/San Pablo Redevelopment Plan adopted by the City Council on July 25, 2000, pursuant to the Community Redevelopment Law, as amended or as subsequently may be amended from time to time.

Master Developer Obligation: Notwithstanding any Transfer, as defined below, other than a Transfer of the entire Project or of a Phase in which any of the items listed in (a) through (c) below are included to an Exempt Transferee and a complete assignment of all rights and obligations hereunder regarding the entire Project or Phase in which any of the items listed in (a) through (c) below are included to said Exempt Transferee, MacArthur Transit Community Partners LLC, shall not be released from any of the following obligations under this Agreement ("Master Developer Obligations") without City Council's prior written consent: (a) construction of public improvements as required by this Agreement including specifically: (i) construction of BART Garage; (ii) BART Plaza renovation; (iii) the reconfiguration and improvement of Frontage Road, as shown in Exhibit C, Master Development Plan; (iv) construction of new streets within the project: Village Drive and Internal Street, as shown in Exhibit C, Master Development Plan and (v) the installation of traffic signals at the intersections of Village Drive/Telegraph Avenue and West MacArthur Boulevard/Frontage Road; (b) compliance with the Community Benefit obligations as set forth in Section 4.2(i), (ii) and (iv) with respect to construction of any of (a)(i) through (v) above; and (c) adopted Conditions of Approval and MMRP mitigation measures which apply to the construction of items (a)(i) through (v) above. A Transferee that assumes any Master Developer Obligation similarly shall not be released from such Master Developer Obligation except as specified with respect to Developer. In the event of a transfer of a Phase containing any of the Master Developer Obligations to an Exempt Transferee, Master Developer shall be released only from those Master Developer Obligations that are contained in the Phase so transferred.

Master Development Plan: The Plan attached hereto as Exhibit C that generally shows the Project.

Mitigation Monitoring and Reporting Program or MMRP: The program prepared and adopted pursuant to CEQA Guidelines Section 15091(d).

Mortgage: (i) A mortgage or deed of trust, or other transaction, in which Developer conveys or pledges as security its interest in a Development Parcel, or a portion thereof, or interest therein, or any improvements thereon for the purpose of (A) financing the acquisition of the Project or any of the Development Parcels, or the development of the Project, or a Development Parcel or Development Parcels, (B) refinancing any of the foregoing, or (C) obtaining financing proceeds by encumbering a Development Parcel or Development Parcels; or (ii) a sale and leaseback arrangement, in which Developer sells and leases back concurrently therewith its interest in a Development Parcel, or a portion thereof, or interest therein, or improvements thereon for the purpose of (A) financing the acquisition of a Development Parcel or Development Parcels, or the development of the Project, or a Development Parcel or Development Parcels, (B) refinancing any of the foregoing, or (C) obtaining financing proceeds by encumbering a Development Parcel or Development Parcels for purposes of financing the construction, maintenance or ownership of the Project. The term "Mortgage" includes all other customary vehicles of real estate financing, financing for real estate acquisition, construction and land development, and refinancing any of the foregoing.

Mortgagee: The holder of the beneficial interest under a Mortgage, the landlord or lessor under a sale and leaseback Mortgage.

Non-Exempt Transferee: Any proposed Transferee which is not an Exempt Transferee or Mortgagee.

Owner Participation Agreement: The Owner Participation Agreement ("OPA") entered into by Agency and Developer with respect to the Project and any amendments thereto.

Party: City and/or Developer, and Transferees, as applicable, determined as of the time in question.

Person: An individual, partnership, limited liability company, firm, association, corporation, trust, governmental agency, administrative tribunal or other form of business or legal entity.

Phase: A development phase of the Project as identified in the Phasing Plan (as defined below). A Phase consists of the construction of all of the physical improvements on, and associated with, one Development Site, including, but not limited to, on-site building improvements and on- and off-site landscaping, infrastructure, and street improvements.

Phasing Plan: Phasing Plan shall have the meaning set forth in Section 3.3.3.

Planning Commission: The City's Planning Commission.

Preliminary PUD: A Preliminary Planned Unit Development Permit, as more particularly described in City's Planning Code.

Project: The development, use and occupancy of buildings and other improvements pursuant to the City Approvals, the Subsequent Approvals and this Agreement, as further described in Recital I.

Project Site: The real property described on Exhibit A hereto.

Prop 1C Funds. The term "Prop 1C Funds" is defined in Section 3.3.3(a).

PUD: A Planned Unit Development Permit, as more particularly described in City's Planning Code. (See also "Preliminary PUD" and "Final PUD," defined above.)

State: The State of California and any department or agency acting on behalf of the State.

Subsequent Approval: Permits or approvals required under Applicable City Regulations to develop, use and operate the Project and applied for, considered or granted after the Adoption Date of this Agreement. Subsequent Approvals may include, without limitation, the following: amendments of the City Approvals, design review approvals, improvement agreements, encroachment permits, use permits, variances, grading permits, public improvement permits, building permits, tree removal permits, lot line adjustments, sewer and water connection permits, certificates of occupancy, subdivision maps, Preliminary and Final PUD permits, rezonings, development agreements, permits, resubdivisions, condominium maps or approvals, and any amendments to, or repealing of, any of the foregoing.

Supported Transferee: Any Transferee in a Transfer whereby the Developer is not released from the obligations assumed by the Transferee.

Term: The term of this Agreement, as determined pursuant to Article II below, unless sooner Terminated as provided in this Agreement.

Terminate: The expiration of the Term of this Agreement, whether by the passage of time or by any earlier occurrence pursuant to any provision of this Agreement. "Terminate" includes any grammatical variant thereof, including "Termination" or "Terminated". Termination shall not relieve Developer of any other obligation, including obligations under this Agreement that survive Termination (such as Indemnity obligations), accrued obligations under this Agreement, and obligations to comply with City Approvals, Governmental Agency Approvals and other Laws.

Transfer: The sale, assignment, lease, sublease, or other transfer by Developer of this Agreement, or any right, duty or obligation of Developer under this Agreement, made pursuant to the terms, standards and conditions of Article X of this Agreement, including by

foreclosure, trustee sale, or deed in lieu of foreclosure, under a Mortgage, but excluding: (i) a Dedication, (ii) a Mortgage, including a Transfer or assignment of this Agreement to a Mortgagee as additional security under a Mortgage, (iii) leases or subleases entered into by Developer with tenants of the Project solely for occupancy of space or improvements (together with any appurtenant tenant rights and controls customarily included in such leases or subleases) in the Project, and any assignment or Transfer of any such lease or sublease by either Party thereto and (iv) the sale, assignment or other Transfer between Developer with buyers of completed condominium or townhome units or interests in completed tenant spaces or improvements in the Project and any further sale, assignment or other Transfer of any such completed condominium or townhome units, or interests in completed tenant spaces or improvements.

Transferee: The Person to whom a Transfer is effected.

1.2 Certain Other Terms. Certain other terms shall have the meaning set forth for each such term in this Agreement.

ARTICLE II

TERM

2.1 Effective Date; Term Commencement. This Agreement shall be dated as of the Adoption Date; the rights, duties and obligations of the Parties hereunder shall be effective, and the Term shall commence, as of the Effective Date. Not later than five (5) days after the Adoption Date, Developer shall execute and acknowledge this Agreement and return the Agreement to City; not later than ten (10) days after the Adoption Date, City, by and through its City Administrator or his/her designee, shall execute and acknowledge this Agreement, and upon receipt of such executed and acknowledged Agreement. The parties anticipate that Developer

may not own any of the Project Site as of the Effective Date. In order to make clear that the rights and obligations under this Development Agreement will apply to and run with the property comprising the Project Site (or Developer's ground leasehold interest therein, as to the Affordable Parcel and the BART Garage) after such property is acquired by Developer, upon acquisition of a fee or ground leasehold interest in such property by Developer, Developer shall cause this Agreement or a memorandum thereof to be recorded against Developer's interest in such property in the Official Records of the County of Alameda pursuant to Section 65868.5 of the Development Agreement Legislation and Section 17.138.070 of the Development Agreement Ordinance. City shall cooperate in such recording, and shall execute, acknowledge and deliver such additional instruments and documents as may be necessary to facilitate such recording.

2.2 Expiration of Term. Unless sooner Terminated pursuant to the applicable provisions of this Agreement, the Term shall expire on December 31 of the calendar year in which the 15th anniversary of the Effective Date falls, as such fifteen (15) year period may be extended in the event of Force Majeure or pursuant to Section 3.3.3(g). The Parties have established the Term as a reasonable estimate of the time required to carry out the Project, develop the Project, and obtain the public benefits of the Project. Notwithstanding the foregoing, the Term shall be extended, on a day-for-day basis, for any period of time during which a development moratorium (including, but not limited to, a water or sewer moratorium (or both)), prevents, prohibits or delays the construction of the Project or a lawsuit involving any such development approvals or permits is pending. Such extension shall be established pursuant to the procedure set forth in Section 7.1 below.

2.3 Subsequent Amendments or Termination. If the Parties amend, modify or Terminate this Agreement as herein provided, or as otherwise provided by the Development

Agreement Ordinance, or this Agreement is modified or Terminated pursuant to any provision hereof, then the Developer shall, within ten (10) days after such action takes effect, cause an appropriate notice of such action to be recorded in the Official Records of the County of Alameda.

2.4 Effect of Termination of Agreement. Except for obligations a Party has accrued, upon Termination of this Agreement, all of the rights, duties and obligations of the Parties hereunder shall Terminate and be of no further force or effect. The Termination shall not permit City to modify, reduce or terminate any of the rights vested in Subsequent Approvals made pursuant to this Agreement prior to Termination for any Phase that Developer has Commenced in Earnest prior to the Termination or expiration of the Term, nor shall it relieve Developer from its obligations to complete any such Phase. Upon Termination, City shall retain any and all benefits, including money or land, received by City as of the date of Termination under or in connection with this Agreement. No Termination shall prevent Developer from completing and occupying buildings or other improvements authorized pursuant to valid building permits approved by City prior to the date of Termination, except that nothing herein shall preclude City, in its discretion, from taking any action authorized by Laws or City Regulations to prevent, stop or correct any violation of Laws or City Regulations occurring before, during or after construction.

2.5 Release of Development Agreement for Completed Buildings. Upon the issuance of a certificate of occupancy for the last residential unit in a building or for any building, with respect to non-residential uses (the "Completed Building"), if requested by Developer, the parties and Developer shall enter into a memorandum of agreement providing that (a) this Development Agreement has been terminated with respect to the Completed Building for which a certificate of

occupancy has been issued (subject to any obligations of Developer which survive termination pursuant to the express terms of this Agreement), and the City shall cause this Development Agreement to no longer be recorded against the Completed Building and the portion of the property upon which the Completed Building is located, provided that (a) Developer's right to rebuild pursuant to and in accordance with the provisions of Section 3.10 hereof shall survive such termination and shall terminate as set forth in Section 2.4 and (b) any obligations of Developer which survive termination pursuant to the express terms of this Agreement may, at City's sole discretion, be recorded against the Completed Building and the portion of the property upon which the Completed Building is located.

ARTICLE III

GENERAL REGULATION OF DEVELOPMENT OF PROJECT

3.1 Application of Agreement to Development Parcels. As between the Parties, this Agreement is effective as of the Effective Date and is enforceable by each Party in accordance with its terms. Upon the acquisition by Developer (or a Transferee of Developer) of a fee simple or ground lease interest (as applicable) in any portion of the Project Site, this Agreement shall automatically become effective as to, and govern, such property as of the later of: (i) the Effective Date, or (ii) the date Developer provides written evidence reasonably acceptable to City that it has acquired such interest.

3.2 Project Development; Permitted Uses; Control of Development. The Project shall consist of a mixed-use development comprised of market rate and affordable dwelling units, retail and commercial space, a BART Garage, and other infrastructure and uses as allowed by the City Approvals and Subsequent Approvals, as more particularly described in this Agreement and

the Master Development Plan, and as may from time to time be modified by the written agreement of the Parties.

This Agreement vests in Developer the right to develop the Project in accordance with the terms and conditions of this Agreement, the City Approvals and the Existing City Regulations; provided that City shall have the right to control development of the Project in accordance with the provisions of this Agreement. Except as expressly provided for in this Agreement, the permitted uses of the Project Site, the density and intensity of use of the Project Site, the siting, height, envelope, massing and size of proposed buildings in the Project, provisions for Exactions, and the provision of affordable housing shall be those set forth in the City Approvals, including this Agreement. The reservation or dedication of land for public purposes shall be as set forth on the appropriate tentative or final subdivision maps for the Project. This Agreement, the Master Development Plan and the City Approvals, and where this Agreement, the Master Development Plan and the City Approvals are silent, the Applicable City Regulations, shall control the overall design, development and construction of the Project, and all on- and off-site improvements and appurtenances in connection therewith, in the manner specified in this Agreement. In the event of any inconsistency between the Applicable City Regulations and this Agreement, this Agreement shall control, except that if the inconsistency cannot be reconciled by application of this rule of construction, the provision which, as determined by the City Council, best gives effect to the purposes of this Agreement shall control.

3.3 Project Phasing. The Parties acknowledge that uncertainties associated with market conditions, availability of financing, and other factors, may alter Developer's ability to construct the Project within the Term of this Agreement. Notwithstanding this possibility, to

assure City that the Project will be developed within a reasonable time period, Developer shall complete each Phase in accordance with the Phasing Plan set forth below.

3.3.1 City Right to Terminate Agreement. City shall have the right to Terminate this Agreement by written notice to Developer if City determines that, if for any reason other than due to Force Majeure, despite such Developer's reasonable efforts and other factors, including market and economic conditions as of the time in question for the uses contemplated for the Project, appropriate mix of uses and use categories, return on investment and similar criteria, Developer has not complied with the Phasing Plan.

3.3.2 Meet and Confer and Cure Period. In the event of any alleged failure to comply with the Phasing Plan, City and Developer shall follow the notice, meet and confer and cure processes set forth in Article VIII. City's sole and exclusive remedy in the event of Developer's breach of its obligations under this Article 3 shall be to Terminate this Agreement; however, any such Termination shall not relieve Developer of obligations under this Agreement that survive Termination (such as Indemnity obligations), accrued obligations under this Agreement, and obligations to comply with City Approvals, Subsequent Approvals, Governmental Agency Approvals and other Laws.

3.3.3 Phasing Plan. The Phasing Plan for the Project is as follows and illustrated on Illustrative Exhibit D. To the extent there is a conflict or inconsistency between this section 3.3.3 and Illustrative Exhibit D, this section 3.3.3 shall prevail:

(a) Developer shall submit a Final Development Plan (“FDP”) application for Phase 1, comprising the BART Garage, to be constructed on parcel E, site remediation, the BART Plaza improvements, Internal Drive, the Frontage Road improvements, and the portion of Village Drive that extends from the Frontage Road to the Internal Drive all as

shown on Exhibit C, Master Development Plan, no later than one year after the Adoption Date and shall make regular and consistent progress toward approval of the FDP within one year after the initial submittal date of the FDP application. Construction of Phase 1 shall Commence in Earnest within one year after approval of the FDP for Phase 1. The target outside approval date for the FDP shall be one year after the initial submittal date of the FDP application. In the event that approval of the FDP is not obtained by the target outside approval date, then the time for construction of Phase I to Commence in Earnest shall be extended one (1) day for each day after the target outside approval date until FDP approval is obtained. Developer's obligation with respect to Phase I shall be conditioned upon, and the above-referenced deadline for submittal of an FDP and Commencement in Earnest shall be extended until, satisfaction of the following conditions, all in accordance with the OPA: (i) execution of a ground lease by Developer and BART for the BART Garage, (ii) with respect to the obligations of Developer hereunder with respect to the BART Plaza only, execution of an agreement granting Developer the right to enter the BART Plaza and construct the Plaza improvements thereon; (iii) conveyance to Developer of a fee interest or right to enter and construct with respect to the property on which the roadway improvements described above are to be built, (iv) the award and disbursement of \$37,300,000 of the TOD Housing Program and the Infill Infrastructure Grant Program under California Proposition 1C, the Housing and Emergency Shelter Trust Fund Act of 2006 funds to the Project ("Prop 1C Funds") and, with respect to the obligations of Developer hereunder with respect to the BART Plaza, the award of funds sufficient to construct the BART Plaza improvements, and (v) the pass-through of the funds described in 3.3.3(a)(iv) to Developer in accordance with the OPA. Notwithstanding the foregoing, except in the event of Litigation Force Majeure, in no

event shall the above deadlines be extended for more than three (3) years for any reason, including, without limitation, Force Majeure other than Litigation Force Majeure

(b) Developer shall submit an FDP application for Phase 2, comprising the affordable rental development to be constructed on parcel D shown on Exhibit C, no later than three (3) years after the Adoption Date and shall make regular and consistent progress toward approval of the FDP within one year after the initial submittal date of the FDP application for Phase 2. Construction of Phase 2 shall Commence in Earnest within one year after approval of the FDP for Phase 2. The target outside approval date for the FDP shall be one year after the initial submittal of the Phase 2 FDP application. In the event that approval of the Phase 2 FDP is not obtained by the target outside approval date, then the time for construction of Phase 2 to Commence in Earnest shall be extended one (1) day for each day after the target outside approval date until Phase 2 FDP approval is obtained. Developer's obligation with respect to Phase 2, and the deadline for Commencement in Earnest of Phase 2 set forth above shall be extended until the earlier to occur of (i) execution by Developer and BART of a ground lease for parcel D and receipt by Developer of subsidy funds sufficient to construct Phase 2, in accordance with the OPA; or (ii) ten (10) years after the Adoption Date. In no event shall such ten (10) year deadline be extended for any reason including, without limitation, Force Majeure.

(c) Developer shall submit an FDP application for Phase 3, comprising the mixed-use market rate development to be constructed on parcel A shown on Exhibit C, including without limitation, the new hardscape public plaza along Frontage Drive in front of the building to be constructed on Parcel A as shown on Exhibit C, no later than three (3) years after the Adoption Date subject to a one-year extension at the reasonable request of Developer (if Developer reasonably believes that it is not Feasible to construct due to market

conditions), and shall make regular and consistent progress toward approval of the FDP for Phase 3 within one year after the initial submittal date of the FDP application for Phase 3. Construction of Phase 3 shall Commence in Earnest within one year after approval of the Phase 3 FDP. The target outside approval date for the FDP shall be one year after the initial submittal date of the Phase 3 FDP application. In the event that approval of the Phase 3 FDP is not obtained by the target outside approval date, then the time for construction of Phase 3 to Commence in Earnest shall be extended one (1) day for each day after the target outside approval date until FDP approval is obtained.

(d) Developer shall submit an FDP application for Phase 4, comprising the mixed-use market rate development to be constructed on parcel B shown on Exhibit C, no later than eight (8) years after the Adoption Date, and shall make regular and consistent progress toward approval of the FDP for Phase 4 within one year after the initial submittal date of the Phase 4 FDP application. Construction of Phase 4 shall Commence in Earnest within one year after approval of the Phase 4 FDP. The target outside approval date for the FDP shall be one year after the initial submittal of the Phase 4 FDP application. In the event that approval of the FDP is not obtained by the target outside approval date, then the time for construction of Phase 4 to Commence in Earnest shall be extended one (1) day for each day after the target outside approval date until FDP approval is obtained.

(e) Developer shall submit an FDP application for Phase 5, comprising the mixed-use market rate development to be constructed on parcel C shown on Exhibit C, no later than 10 (ten) years after the Adoption Date and shall make regular and consistent progress toward approval of the FDP for Phase 5 within one year after the initial submittal date of the Phase 5 FDP application. Construction of Phase 5 shall Commence in

Earnest within one year after approval of the Phase 5 FDP. The target outside approval date for the FDP shall be one year after the initial submittal of the Phase 5 FDP application. In the event that approval of the FDP is not obtained by the target outside approval date, then the time for construction of Phase 5 to Commence in Earnest shall be extended one (1) day for each day after the target outside approval date until FDP approval is obtained.

(f) Notwithstanding the timeframes set forth in subsections 3.3.3 (a) through (e) above, no target outside approval with respect to any Phase shall be extended unless Developer, with respect to such Phase, (i) uses reasonable good faith efforts to cause all FDP applications to comply with Section 17.140.040 of the City Planning Code; (ii) timely submits all FDP applications that contain all the requirements listed in of the City's Basic Application for Development Review, the City's Supplemental Submittal Requirements for a Planned Unit Development and Conditions of Approval related to the FDP (provided that in the event of Developer's failure to comply with this clause (ii), the extension of the target outside approval date will not be denied, but will be reduced by the number of days between the due date for the FDP application and the date upon which Developer submits an FDP application in compliance with this clause (ii)); and (iii) uses good faith efforts to make regular and consistent progress toward approval of the FDP, as evidenced by Developer's timely response to City's reasonable requests for information and meetings. If City does not believe Developer is eligible for any extensions of the target outside approval dates, or that any such extension should be shortened pursuant to (f)(ii), it shall immediately notify Developer in writing and initiate the dispute resolution procedures in Article VIII. Developer shall not be denied any such extension nor shall such extension be shortened absent such immediate written notice from City.

(g) If Agency does not issue the non-housing tax increment bonds and disburse the proceeds thereof to Developer in accordance with the OPA (by July 1, 2011), then all dates for submittal of complete FDP applications (other than the date for submittal of the FDP application for Phase I) and all dates for construction to Commencement in Earnest set forth in section 3.3.3 and the expiration of the Term of this Agreement shall be extended for a number of days equal to the number of days from July 1, 2011 until the Agency has issued such bonds and disbursed the proceeds thereof to Developer. If Agency fails to issue such bonds and disburse the proceeds thereof by July 1, 2014 and Developer exercises its right under the OPA to terminate the OPA, Developer shall also have the right to terminate this Agreement by written notice to City.

(h) Notwithstanding the timeframes set forth above, Developer shall, if feasible, make reasonable, good faith efforts to proceed with all phases as expeditiously as possible and to have full build-out of the Project be completed as early as possible.

(i) If, at the expiration of the Term, Developer has fully complied with the Phasing Schedule but construction of the Project is not complete, and notwithstanding the meet and confer process set forth above in Section 3.3.2, Developer shall be allowed to complete any Phase that Developer has Commenced in Earnest prior to the expiration of the Term pursuant to Section 2.4 of this Agreement.

3.4 Development Sequence. The foregoing five Phases may occur sequentially, however, they may also move forward concurrently, or, except for Phases 1 and 2, out of sequence, as conditions require in Developer's sole discretion. For example, Phase 4 could be the third Phase developed within the time prescribed above for development of Phase 3, and

accordingly, if commencement of construction for Phase 4 occurs within the time prescribed for commencement of construction of Phase 3, Phase 3 could be developed as the fourth or fifth Phase to be developed within the time prescribed for commencement of construction of Phase 4 or 5. In addition, if Phase 2 is delayed due to the failure of the conditions described above in section 3.3.3 (b), Developer may develop any of the other phases prior to development of Phase 2. Developer shall make good faith efforts to expedite the construction of the Project sooner than allowed by this Agreement, if such expedited schedule is feasible.

(i) Minimum Density. The minimum density for the Project is 106 units per net acre. The minimum density will be calculated as an average across the entire gross Project Site area (5.28 net acres), such that any single Phase of the Project may have a lower density than 106 units per net acre so long as, when the Project is fully built-out, the average density across the gross Project Site area is 106 units per net acre. For purposes hereof "net acre" shall mean the gross acreage of the Project Site excluding all private or public roadways or easement areas, the open space area on Block A as shown on Exhibit C hereto, sidewalks, curbs, gutters, and the BART Garage.

3.5 Easements; Abandonment; Subdivision Improvements. City shall reasonably cooperate with Developer in connection with any arrangements for abandoning existing utility or other easements and facilities and the relocation thereof or creation of any new easements within or adjacent to the Project Site in connection with the development of the Project; provided, however, that Developer shall be solely responsible for all costs associated therewith, including but not limited to, utility company charges, City Fees specified in Section 3.6.5 below, City staff time, City Attorney time and other costs or expenses incurred by City or an agency of City in performing its obligations under this Section 3.5. All improvements required as Exactions

pursuant to the City Approvals and/or this Agreement shall be constructed by Developer as set forth herein. Not in limitation of any other Developer obligation, Developer's obligations to Indemnify in accordance with Article V of this Agreement shall include any Losses of an Indemnitee that arise out of or are related to this Section 3.5.

3.6 Applicable City Regulations. Except as expressly provided in this Agreement and the City Approvals, the Existing City Regulations shall govern the development of the Project and all Subsequent Approvals with respect to the development of the Project on the Project Site. City shall have the right, in connection with any Subsequent Approvals, to apply City Regulations as Applicable City Regulations only in accordance with the following terms, conditions and standards:

3.6.1 Future City Regulations. Except as otherwise specifically provided in this Agreement, including, without limitation, the provisions relating to (a) regulations for health and safety reasons under Section 3.6.2 below; (b) regulations for Construction Codes and Standards under Section 3.6.4 below; and (c) provisions relating to the payment of City Application Fees pursuant to Section 3.6.5, below, City shall not impose or apply any City Regulations on the development of the Project Site that are adopted or modified by City after the Adoption Date (whether by action of the Planning Commission or the City Council, or by initiative, referendum, ordinance, resolution, rule, regulation, standard, directive, condition, moratorium) that would: (i) be inconsistent or in conflict with the intent, purposes, terms, standards or conditions of this Agreement; (ii) materially change, modify or reduce the permitted uses of the Project Site, the permitted density or intensity of use of the Project Site, the siting, height, envelope, massing, or size of proposed buildings in the Project, or provisions for City Fees specified in Section 3.6.5 below and Exactions as set forth in the City Approvals, including this Agreement; (iii)

materially increase the cost of development of the Project (subject to the acknowledgement as to the cost of Exactions specified in Section 3.6.6 below); (iv) materially change or modify, or interfere with, the timing, phasing, or rate of development of the Project; (v) materially interfere with or diminish the ability of a Party to perform its obligations under the City Approvals, including this Agreement, or the Subsequent Approvals, or to expand, enlarge or accelerate Developer's obligations under the City Approvals, including this Agreement, or the Subsequent Approvals; or (vi) materially modify, reduce or terminate any of the rights vested in City Approvals or the Subsequent Approvals made pursuant to this Agreement prior to expiration of the Term. Developer reserves the right to challenge in court any City Regulation that would conflict with this Agreement or reduce the development rights provided by this Agreement, provided that such City Regulation directly affects the Project; provided, however, Developer shall first follow the dispute resolution procedures in Article VIII.

3.6.2 Regulation for Health and Safety. Notwithstanding any other provision of this Agreement to the contrary, City shall have the right to apply City Regulations adopted by City after the Adoption Date, if such application (i) is otherwise permissible pursuant to Laws (other than the Development Agreement Legislation), and (ii) City determines based on substantial evidence and after a public hearing that a failure to do so would place existing or future occupants, or users of the Project, adjacent neighbors, or any portion thereof, or all of them, in a condition substantially dangerous to their health or safety. The Parties agree that the foregoing exception to Developer's vested rights under this Agreement is in no way intended to allow City to impose additional fees or exactions on the Project, beyond the City Fees described below in Section 3.6.5, that are for the purpose of general capital improvements or general services (except in the event of a City-wide emergency).

3.6.3 Existing City Regulations. The City shall, at Developer's sole cost and expense, compile two binders which include copies of all Existing City Regulations within ninety (90) calendar days after the Adoption Date, sign both copies, and deliver one copy to Developer. The City shall make every reasonable effort to include all Existing City Regulations.

3.6.4 Construction Codes and Standards. City shall have the right to apply to the Project at any time, as a ministerial act, the Construction Codes and Standards in effect at the time of the approval of any City Approval or Subsequent Approval thereunder.

3.6.5 City Fees. Except as otherwise specified in this Agreement, the City Development Fees and the City Application Fees shall be the only fees or assessments charged by City in connection with the development or construction of the Project. The City Development Fees applicable to the Project shall only be those fees in effect on the Effective Date, as set forth in the City's Master Fee Schedule. The Project shall be subject to any increases in City Development Fees in effect on the Effective Date but shall not be subject to any new City Development Fees adopted after the Effective Date. Notwithstanding any other provision of this Agreement, Developer shall pay City Application Fees chargeable in accordance with City Regulations (including any action by the City Council to increase or otherwise adjust City Application Fees listed in City's Master Fee Schedule) in effect and generally applicable at the time the relevant application is made.

3.6.6 Project Exactions. Developer and City acknowledge that the City Approvals and Subsequent Approvals authorize and require implementation of Exactions in connection with the development of the Project and that the specific costs of implementing such Exactions currently cannot be ascertained with certainty, but notwithstanding such uncertainty, except as otherwise provided in this Agreement, Developer shall be solely responsible for such

costs in connection with implementing such Exactions as and when they are required to be implemented. Subject to the terms and conditions of this Agreement, no new Exactions shall be imposed by City on the Developer or the development of the Project, or on any application made by Developer for any City Approval or Subsequent Approval concerning the development of the Project, or in enacting any City Approval or Subsequent Approval concerning the development of the Project, or in connection with the development, construction, use or occupancy of the Project; provided, however, that Exactions may be imposed if required by CEQA (e.g., further CEQA review is undertaken for Subsequent Approvals and such review identifies the need for additional or modified mitigation measures, or previously imposed mitigation measures are no longer Feasible).

3.6.7 Term of City Approvals and Subsequent Approvals. Notwithstanding anything to the contrary in Applicable City Regulations, the term of any City Approval and the Subsequent Approvals for the Project shall be for the longer of the Term of this Agreement (including any extensions) or the term otherwise applicable to such City Approval or Subsequent Approval if this Agreement is no longer in effect. Notwithstanding the foregoing, any discretionary approvals for use of the commercial space in the Project shall be subject to the term imposed pursuant to such approval. The rights vested in City Approvals and Subsequent Approvals granted pursuant to this Agreement and prior to expiration of the Term may not be modified, reduced, terminated or otherwise affected upon expiration of the Term, except as provided herein (including Section 2.4).

3.7 Review and Processing of Subsequent Approvals. City shall promptly accept for processing, review and action all applications for Subsequent Approvals with respect to the Project when and if the same are complete, as determined pursuant to City Policies and

Government Code Sections 65940, et seq. Additionally, as stipulated in the Conditions of Approval, all Final Development Plans shall be subject to review and recommendation by the Planning Commission's Design Review Committee and Planning Commission with final approval by the City Council. All applications for Subsequent Approvals shall be consistent and comply with the City Approvals, the Master Development Plan and this Agreement. Where design review is required in connection with any Subsequent Approval, such design review shall reference the Preliminary PUD for the Project, the adopted Design Review Guidelines for the Project imposed as Conditions of Approval and the Master Development Plan. City shall retain the right to use its discretion in reviewing and approving the architectural design of the Project, including, but not limited to, building style, surface articulation, materials, colors, detailing, finishes, fenestration, entryway location and design, and site landscape design. Unless otherwise provided by this Agreement, in no case shall City, in granting Subsequent Approvals, add conditions to the Project unrelated to design review, alter the Project as described in the Master Development Plan and City Approvals, or decrease the amount of development allowed under any Phase on the basis of a design review action or consideration, provided that such modifications may be made with the express written agreement of Developer. Upon acceptance by City of an application for a Subsequent Approval, City shall reasonably cooperate with Developer to facilitate prompt review and processing of such application as necessary to facilitate the Phasing Plan, including the prompt provision of notice and scheduling of all required public hearings, and prompt processing and checking of all maps, plans, permits, building plans and specifications and other plans relating to the Subsequent Approval filed by Developer. Likewise, Developer shall reasonably cooperate with City to facilitate its prompt review and processing. In connection with any Subsequent Approval, City shall exercise its

discretion or take action only in that manner which complies and is consistent with this Agreement. Any failure by Developer to comply with the Phasing Plan set forth in Section 3.3.3, that is directly caused by City's unreasonable failure, to promptly process any Subsequent Approval shall not be a basis for City to pursue remedies for breach or default of this Agreement or any other punitive measure against Developer. Where an application requires Planning Commission action, such application shall be noticed on a Planning Commission agenda within sixty (60) days of the application being deemed complete. Absent an appeal to the City Council, City shall make all good faith best efforts to take final action within ninety (90) days of deeming an application complete. Where an application requires City Council action, such application shall be noticed on a City Council agenda within sixty (60) days of the Planning Commission issuing a decision/recommendation, where such a decision/recommendation is appropriate or required, or within sixty (60) days of the application being deemed complete, where no Planning Commission action is required. City shall make all good faith best efforts to take final City Council action within one hundred and twenty (120) days of the application being deemed complete. All time periods in this Section 3.7 shall be extended as determined necessary by City to complete further CEQA review if such is required or determined necessary by City.

3.8 Effect of Agreement. This Agreement shall constitute a City Approval pursuant to the Applicable City Regulations.

3.9 Other Governmental Approvals. Developer shall promptly and timely apply for and diligently pursue all required Governmental Agency Approvals from Governmental Agencies, as and when each such Governmental Approval is required during the course of design, development, construction, use or occupancy of, and delivery of services to, the Project. Developer shall diligently take all reasonable steps necessary to obtain all such Governmental

Approvals and shall bear all costs and expenses for obtaining such Governmental Approvals. When and if obtained, copies of all such Governmental Approvals shall be submitted to City promptly after Developer's receipt of a written request therefor from City. Developer shall comply with, and shall cause the Project to comply with, all Governmental Agency Regulations and Laws related to the development, use and operation of, or provision of services to, the Project. Developer shall take all reasonable, diligent efforts to fulfill its obligations under this Section 3.9. City shall reasonably cooperate with Developer in such endeavors upon Developer's written request for such cooperation. Developer shall be solely responsible for undertaking any investigation and acquiring necessary knowledge of Governmental Agency Regulations and Laws applicable to or affecting the Project Site, including existing or proposed restrictions, environmental and land use Laws and regulations (other than City Regulations) to which the Project Site may be subject. Developer shall reimburse City for all costs and expenses (including without limitation City staff or City Attorney time) incurred in connection with obtaining Governmental Agency Approvals.

3.10 Developer's Right to Rebuild. City agrees that Developer may rebuild the Project within the Term of this Agreement should it become necessary due to natural disaster, changes in seismic requirements, or should the buildings located within the Project become functionally outdated, within Developer's sole discretion, due to changes in technology, the economy or otherwise. Any such rebuilding shall be subject to the square footage and height limitations vested by this Agreement, and shall comply with the City Approvals, Subsequent Approvals, Master Development Plan, this Agreement, the building codes existing at the time of such rebuilding or reconstruction, and the requirements of CEQA.

3.11 Exempting Fees Imposed by Outside Agencies. City agrees to exclude Developer from any and all collection agreements regarding fees, including, but not limited to, development impact fees, which other public agencies request City to impose at City's discretion on the Project during the Term of this Agreement, provided, however, that if such exclusion would result in City having to pay such fees in-lieu of Developer paying them, Developer shall be required to pay such fees in full. Developer shall Indemnify and reimburse City for all costs and expenses (including without limitation consultants, City staff and/or City attorney or outside counsel time) incurred under this Section 3.11.

3.12 Fee Reductions or Credits. City and Developer intend that the fees and other commitments described in Article IV, below, will be in lieu of any Exactions, taxes or assessments generally intended to address similar uses or purposes, and that Developer shall not be required to pay two times for any such Exaction, fee or assessment. Accordingly, the fees and other commitments described in Article IV, below, shall be subject to reductions/credits in an amount equal to Developer's actual cost of complying with any such lawfully imposed Exaction, tax, or assessment generally intended to address similar uses or purposes, whether imposed on the Project, the City Approvals or the Subsequent Approvals. Notwithstanding the foregoing, no such reduction/credit shall be provided as a result of any assessment that arises from an assessment district requested or agreed to by Developer under this Agreement.

ARTICLE IV

CERTAIN ADDITIONAL CRITERIA AND OBLIGATIONS APPLICABLE TO DEVELOPMENT OF PROJECT

4.1 Requirements for Approval of Project. City and Developer acknowledge that City has approved a Preliminary PUD (as included within the City Approvals set forth in Recital I)

and that further development, construction, occupation and implementation of the Project is subject to review and approval in accordance with the City Approvals (as included within the City Approvals set forth in Recital I) and this Agreement. To develop the Project, Developer will need to obtain: (i) the Subsequent Approvals under Applicable City Regulations, including, but not limited to, a Final PUD and design review for each Phase and any off-site improvements, and (ii) Subsequent Approvals under Construction Codes and Standards, and that, subject to the attainment of the City Approvals and such Subsequent Approvals, as applicable, Developer may proceed with the development, construction, use and occupancy of the Project as a matter of right under this Agreement. Subject to the terms of this Agreement, Developer shall, at its sole cost and expense, fund, comply with, and implement (or ensure implementation of) all mitigation measures or Conditions of Approval that are: (1) required by the EIR and incorporated as part of the City Approvals, (2) otherwise incorporated as part of the Subsequent Approvals, consistent with the limitations set forth in this Agreement, or (3) incorporated as part of Governmental Agency Approvals, all in accordance with the standards, timing, terms and conditions specified for such mitigation measures in the City Approvals, Subsequent Approvals or Governmental Agency Approvals.

4.2 Project Community Benefits. The Project shall include, the following community benefits (the "Community Benefits"):

(i) West MacArthur Boulevard Underpass and Greenscape Improvements. Developer to fund improvements to include lighting, street furniture and improved sidewalks to increase safety and improve connection to Martin Luther King Jr. Way and west side of station and greenscape improvements along West MacArthur to the corner of Telegraph Avenue. Developer shall submit a plan showing said public improvements to City

and Agency for review and approval prior to commencing construction. Developer shall fund \$1.45 million dollars toward design and implementation of said approved improvements.

(ii) Public Open Space Improvements. Developer to provide \$25,000 for improvements to Mosswood Park or Grove Shafter Park or for improvements to the “path of travel” between the Project and either park prior to issuance of building permits for Phase 3. Use of the funds for these improvements shall be subject to the discretion of the Redevelopment Agency.

(iii) LEED certification. Developer shall obtain certification under the LEED-ND pilot program to at least a gold level and building certification under Buildit Green’s Green Point Checklist to a minimum of 70 points. Should the LEED-ND pilot program not become a certified LEED program, the Project shall still be required to incorporate the relevant energy and environmental design measures from the LEED-ND pilot program.

(iv) Remnant Residential Permit Parking ("RPP") Funds. Should any of the \$150,000 required to fund an RPP program for the neighborhood not be utilized, all remaining fees shall be used to supplement the Community Benefits listed above.

4.3 Environmental Impact Mitigation. CEQA requires that a Project include Feasible measures to mitigate or avoid potentially significant environmental impacts. Such impacts and mitigation measures are identified and analyzed in the EIR for the Project, and in approving the Project, City Council has made findings regarding such measures, has made Feasible measures conditions of Project approval, and has adopted the MMRP, as required by CEQA, to track the responsibility for and implementation of the required mitigation measures. By implementing the mitigation measures, the Project will avoid or reduce potentially significant environmental

impacts and, in doing so, these measures contribute to the Project's benefits. In addition to being required as Project Conditions of Approval, Developer is required by this Agreement to implement these measures as set forth in the MMRP, and implementing these measures as set forth below contributes to the consideration given by Developer in support of this agreement.

4.4 Labor Code. Developer shall comply with all applicable requirements of the California Labor Code, including prevailing wage requirements. Developer shall use all diligent efforts to ensure that its contractors and subcontractors comply with all provisions of the California Labor Code applicable to the Project.

4.5 Equal Benefits. Developer shall comply with the requirements of City's Equal Benefits Ordinance in effect as of the Adoption Date with respect to any contract or property contract as specified in Oakland Municipal Code Sections 2.32.020 and 2.32.030.

4.6 Potential Reimbursement To Developer. The Parties acknowledge that: (a) the City Approvals require Developer to design and construct certain public improvements that the FEIR identifies Developer as having less than a one-hundred percent (100%) fair share responsibility for such improvements; and (b) other properties and developers, and City, may also directly benefit from such improvements. As such, at Developer's sole and exclusive option, City shall consider in good faith entering into a reimbursement agreement or forming a benefit district, the purpose of which is to reimburse Developer for all costs in excess of Developer's fair share responsibility using funds obtained from the benefited properties/developers, and not from the City. Any such reimbursement mechanism shall be based on the following: (a) City shall use commercially reasonable efforts to identify benefited properties and developers; (b) the reimbursement shall be based upon a benefit formula established by the City Council (such benefit formula shall be based on ascertainable criteria, taking into account, to the extent

ascertainable, the benefit actually conferred on the Project Site and the benefit conferred on other developers and properties, and the owners thereof). Developer shall bear the sole cost and expense for developing and implementing such reimbursement mechanism, including any required studies, (*e.g.*, AB 1600 nexus study), however, such costs and expenses may be reimbursed through funds collected thereunder.

4.7 General Provisions With Respect to Financing Improvements. Developer shall have the right to request City to utilize, in connection with any exactions or other on- or off-site improvement with respect to the Project, any public financing method then available under Applicable City Regulations or Laws applicable to such improvement. In connection with any such request, City shall consider, among other things, the utilization of the requested financing method, taking into account the requirements of the Applicable City Regulations and/or Laws, and the benefit to be derived with respect to the development of the Project of such public financing methods as they relate to the reduction in cost of development of the Project and the enhancement thereof to achieve the intent of the Parties hereunder. If, after such good faith consideration, City agrees to utilize such financing method, City shall take such actions as may be necessary or appropriate in order so to do, and Developer shall cooperate therewith. The financing methods contemplated hereunder shall include, without limitation, formation of assessment benefit, maintenance or other districts, issuance of revenue bonds, and other similar methods which may be available from time to time, or at any time, during the term of this Agreement. Developer shall reimburse City for all costs and expenses (including without limitation consultants, City staff and/or City attorney or outside counsel time) incurred under this Section 4.7.

ARTICLE V

INDEMNITY

5.1 Developer Indemnity. Except as hereinafter specifically otherwise provided, Developer shall Indemnify the Indemnitees from any third-party Losses arising out of, related to, or in any way connected with any of the following: (i) any City Approval or Subsequent Approval (including any litigation or other proceeding initiated by a third Person challenging any City Approval or Subsequent Approval); (ii) development and construction of the Project (including any Losses associated with any alleged violations of the California Labor Code); (iii) any Governmental Agency Approval (including any litigation or other proceeding initiated by a third Person challenging any Governmental Agency Approval); (iv) any accident, injury, bodily injury, or death, or loss of or damage occurring to Property on any Development Parcel owned/controlled by Developer, either in fee or through a ground lease, or any part thereof; (v) any use, possession, occupation, operation, maintenance, or management of the Project or the Project Site or any part thereof by Developer or any of its tenants, subtenants, agents, or invitees; (vi) any act or omission of Developer or any of its agents, architects, engineers, contractors, subcontractors or suppliers with respect to the development or use of the Project, or the Project Site; (vii) any latent design construction or structural defect relating to the improvements on the Development Parcels or otherwise within the control of Developer or its agents; (viii) the physical, geotechnical or environmental condition of any portion of the Project Site owned/controlled by Developer, either in fee or through a ground lease, or any part thereof, including any hazardous materials or other contamination in, on, under or above the Project Site (including soils and groundwater conditions); (ix) obligations specified in this Agreement (other than any breach of this Agreement by City); and/or (x) any civil rights actions or other legal actions or suits initiated by any user or occupant of the Project or the Project Site in

connection with the construction, use, operation or management of the Project or the Project Site by Developer. Notwithstanding the provisions of the immediately preceding sentence to the contrary: (a) to the extent that a Loss is caused by the active, gross negligence or willful misconduct of an Indemnitee, Developer's Indemnity obligation shall not extend to such Indemnitee's contributory share of the Losses arising from such joint active, gross negligence or willful misconduct; and (b) Developer's Indemnity obligation under this Section 5.1 shall not apply to an Indemnitee to the extent Losses are caused by a claim filed by City to recover any decrease in or a loss of tax revenue by City or its Agents as a result of the invalidation of any City Approval or Subsequent Approval applicable to the Project or the failure of the Project to generate projected real property taxes or sales tax revenues. If Developer is required to Indemnify one or more Indemnitees hereunder, Developer shall pay within thirty (30) days after receipt from City (together with appropriate backup) any amount owing by Developer to an Indemnitee under this Section 5.1. Developer's Indemnity obligation under this Section 5.1 includes the duty to defend Indemnitees in any court action, administrative action or other proceeding brought by any third Person included within the Indemnitee obligations under this Section 5.1. In the event Developer is defending an Indemnitee with counsel designated by Developer, then such counsel shall be reasonably acceptable to City, except that, to the extent Losses subject to Developer's Indemnity hereunder are covered by insurance carried by Developer, then counsel designated by the insurance company providing such insurance coverage shall defend City. Upon the advice of the City Attorney, City shall retain the right to reject such insurance company designated counsel (on the basis of a conflict, incompetence or similar grounds) and to require Developer to retain counsel reasonably acceptable to City for Indemnitee's defense.

5.2 Insurance. Developer shall, at all times during the Term of this Agreement, maintain and keep in full force and effect at Developer's own cost and expense, the following policies of insurance in accordance with the terms and conditions of this Section 5.2. The insurance requirements and other provisions of this Agreement shall not limit Developer's indemnification obligations under this Article V nor any other obligation Developer may have to any Indemnitee.

5.2.1 Commercial General Liability Insurance. Developer shall maintain Commercial General Liability Insurance applicable to the Project and improvements thereon with limits of liability of not less than \$3,000,000.00 combined single limit per occurrence and general aggregate. The Commercial General Liability Insurance hereunder shall include coverage for Bodily Injury, Broad Form Property Damage, Contractual Liability, Operations, Products and Completed Operations, Owners and Contractors Protective Liability, and/or XCU coverage, when applicable. Each Commercial General Liability Insurance policy shall provide that it is primary and any other insurance or self-insurance available to City under any other policies shall be excess insurance over the insurance required by this Section 5.2.1. Each Commercial General Liability Insurance policy shall provide for severability of interests for all insureds and additional insureds under such policy. Each Commercial General Liability Insurance policy shall name City, its elected and appointed officials, officers, directors, agents, employees, and members of its boards and commissions as additional insureds.

5.2.2 Railroad Protective Liability Insurance. Developer shall maintain railroad protective liability insurance on behalf of the City of Oakland as named insured, with a limit of the greater of (a) three million (\$3,000,000), or (b) an amount required by BART.

5.2.3 Automobile Liability Insurance. Developer shall maintain Automobile Liability Insurance with a limit of liability of not less than \$1,000,000.00 combined single limit per occurrence and general aggregate. Each Automobile Liability Insurance policy shall include coverage for owned, leased, hired, or borrowed vehicles by or on behalf of Developer, or its Agents. Each Automobile Liability Insurance policy shall provide for severability of interests for all insureds and additional insureds under such policy. Each Automobile Liability Insurance policy shall name City, its elected and appointed officials, officers, directors, agents, employees, and members of its boards and commissions as additional insureds.

5.2.4 Workers' Compensation Insurance. Developer shall maintain Workers' Compensation Insurance as required by the Laws of the State. Statutory coverage may include Employers Liability coverage with limits not less than \$1,000,000.00. Developer certifies that it is aware of the provisions of Section 3700 of the California Labor Code, which requires every employer to provide workers' compensation coverage, or to undertake self-insurance in accordance with the provisions of that Code. Developer shall comply with the provisions of Section 3700 of the California Labor Code.

5.2.5 General Requirements of Insurance. Each policy of insurance carried by Developer hereunder shall provide that it may not be cancelled without at least thirty (30) days' prior written notice to City. Developer shall furnish to City a certificate of each such policy of insurance, stating that such insurance is in full force and effect and, in the case of the Commercial General Liability Insurance and Automobile Liability Insurance, showing additional insureds as required by Sections 5.2.1 and 5.2.3 above. Developer shall submit the ACORD Insurance Certificate, together with the additional insured endorsement set forth on a CG 20 10 10 93 Form Designated Insured Form and/or an or equivalent form as approved by City's Risk

Manager. Each insurance company issuing a policy of insurance hereunder shall have a Best's-Rating of at least A-. Any insurance required to be maintained by Developer hereunder may be maintained under a so-called "blanket policy", insuring other parties and other locations, so long as the amount of insurance required to be provided hereunder is not thereby diminished. The insurance required by this Agreement shall be the primary insurance and any insurance maintained by City shall be excess to and non-contributory with the insurance required hereunder.

5.2.6 City Right to Take Out Insurance. If for any reason Developer fails to maintain any policy of insurance required under Section 5.2, City may at City's option, after notice of such Event of Default given in accordance with Article VIII below, take out and maintain, at Developer's expense, such insurance in the name of Developer as required pursuant to Section 5.2; however, any failure of City to take out or maintain insurance in accordance with this Section 5.2.6 shall not limit or waive any of City's rights or remedies under this Agreement. Developer shall reimburse City for all costs and expenses incurred by City in so doing, promptly after demand by City for such costs and expenses.

5.2.7 Subcontractors. Should the Developer subcontract out the work required under this Agreement, Developer shall include all subcontractors as insured under its policies or shall maintain separate certificates and endorsements for each subcontractor. As an alternative, the Developer may require all subcontractors to provide at their own expense evidence of all the required coverage listed in this Schedule. If this option is exercised, both City and Developer shall be named as additional insureds under the subcontractor's General Liability policy. All coverages for subcontractors shall be subject to all the requirements stated herein. The City

reserves the right to perform an insurance audit during the term of this Agreement to verify compliance with requirements.

5.2.8 Waiver of Subrogation. The Parties waive all rights against the other parties and their respective Council members, officers, directors and employees for recovery of Losses to the extent those Losses are covered by forms of insurance maintained by the parties.

5.2.9 Evaluation of Adequacy of Coverage. City maintains the right to modify, delete, alter or change these requirements, with reasonable notice, upon not less than ninety (90) days prior written notice; provided, however, that such modifications are commercially reasonable and are then generally applicable to or then being maintained by similarly situated prudent parties. Notwithstanding the foregoing to the contrary, in no event shall City be able to modify the insurance requirements prior to the date that is five (5) years after the Effective Date and not more than once every five (5) years thereafter, except that all the foregoing insurance coverage amounts shall be automatically escalated every five (5) years to account for inflation based upon the Consumer Price Index for the San Francisco-Oakland-San Jose SMSA, provided such coverage amounts are not in conflict with statutory requirements and are commercially available at a reasonable price.

5.3 Cooperation of City. If Developer is obligated to Indemnify an Indemnitee under this Article V, Developer shall coordinate and cooperate fully with the City Attorney in fulfilling such Indemnity obligation, shall use diligent efforts to fully protect City's rights, and shall keep the City Attorney fully informed of all developments relevant to such Indemnity (subject only to any privileges which prevent the communication of any such information to the City Attorney). City shall fully cooperate with Developer as necessary to facilitate Developer's fulfillment of such Indemnity obligation.

5.4 Survival; Other Obligations. Developer's obligations under this Article V and any other Developer indemnity under City Approvals, Subsequent Approvals or otherwise may have shall survive any Termination. Developer's Indemnity obligations in this Article V are in addition to, and in no way shall be construed to limit or replace, any other obligations or liabilities that Developer may have to any Indemnitee in the City Approvals, Subsequent Approvals, Laws or otherwise.

5.5 Release of Claims Against City. Developer hereby waives and releases any and all claims against the Indemnitees from any Losses arising at any time, including all claims arising from the joint or concurrent negligence of Indemnitees. Notwithstanding the foregoing to the contrary, Developer retains any claims against an Indemnitee that arise out of the following which occur after the Adoption Date: (a) a breach of this Agreement, (b) an Indemnitee's gross negligence or willful misconduct or (c) an Indemnitee's fraud.

ARTICLE VI

ANNUAL REVIEW OF COMPLIANCE

6.1 Annual Review. City and Developer shall annually review this Agreement, and all actions taken pursuant to the terms of this Agreement with respect to the Project, in accordance with the provisions of Section 17.138.090 of the Development Agreement Ordinance and this Article VI. Nothing herein is intended to, nor does, (a) preclude earlier review by City at its reasonable request with thirty (30) days notice to Developer, or (b) either Party providing notice of noncompliance, breach or default of this Agreement to the other Party in accordance with the applicable dispute resolution provisions of this Agreement detailed in Article VIII.

6.2 Developer's Submittal. Not later than the first anniversary date of the Effective Date, and not later than each anniversary date of the Effective Date thereafter during the Term,

Developer shall apply for annual review of this Agreement, as specified in Section 17.138.090.A of the Development Agreement Ordinance. Developer shall pay with such application the City Application Fee for annual review of Development Agreements under Existing City Regulations in effect at the time the application is submitted. Developer shall submit with such application a written report to the Director of City Planning, with a copy to the District Council Member, City Attorney and Community and Economic Development Agency Director, describing Developer's good faith substantial compliance with the terms of this Agreement during the preceding year. Such report shall include a statement that the report is submitted to City pursuant to the requirements of Government Code Section 65865.1, and Section 17.138.090 of the Development Agreement Ordinance, on the top of the first page of the report, in clearly marked bold, twelve point typeface, substantially as follows:

**"THIS REPORT IS SUBMITTED UNDER GOVERNMENT
CODE SECTION 65865.1 AND SECTION 17.138.090 OF
THE DEVELOPMENT AGREEMENT ORDINANCE. CITY
HAS 45 DAYS TO RESPOND."**

6.3 Finding of Compliance. Within forty-five (45) days after Developer submits its report hereunder, the Director of City Planning shall review Developer's submission to ascertain whether Developer has demonstrated good faith substantial compliance with the material terms of this Agreement. If the Director of City Planning finds and determines that Developer has in good faith substantially complied with the material terms of this Agreement, the Director of City Planning shall prepare and issue a certificate of compliance pursuant to section 8.12 below. If the Director of City Planning does not make a determination and issue a certificate of compliance within forty-five (45) days of receipt of Developer's report under Section 6.2 above

(unless extended by Developer in writing), the Developer shall submit a second letter notifying the Director of City Planning, Community Economic Development Agency Director, City Administrator and the District Council Member that the 45-day determination period has expired. If the Director of City Planning does not make a determination and issue a certificate of compliance within 30 days after receipt of the Developer's second letter (as required in this section), the Developer shall submit a final notification letter. The final notification letter shall be addressed to the Mayor, Council President, Director of City Planning, Community Economic Development Agency Director, City Administrator and the District Council Member. The final notification letter shall inform the City representatives that if the Director of City Planning does not make a determination and issue a certificate of compliance, within 15 days after receipt of the final notification letter, the annual review shall be deemed concluded.

If the Director of City Planning initially determines that such report is inadequate in any respect, he or she shall provide written notice to that effect to Developer, and Developer may supply such additional information or evidence as may be necessary to demonstrate good faith substantial compliance with the material terms of this Agreement. Developer's written response of additional information/evidence must be submitted within fifteen (15) days of City notification. If the Director of City Planning again concludes that Developer has not demonstrated good faith substantial compliance with the material terms of this Agreement, he or she shall so notify Developer prior to the expiration of the 30-day period after receipt of Developer's additional information or evidence. If the Director of City Planning does not agree with Developer's response, then he/she shall provide written notice of the commencement of the Meet and Confer/Mediation Process within thirty (30) days of the receipt of the response, and the

dispute resolution procedures and process detailed in Article VIII will apply, commencing with Section 8.4 (Meet and Confer/Mediation Process).

ARTICLE VII

PERMITTED DELAYS; SUPERSEDURE BY SUBSEQUENT LAWS

7.1 Permitted Delays. Performance by a Party of its obligations under this Agreement shall be excused during, and extended for a period of time equal to, any period of delay caused at any time by reason of Force Majeure. Promptly after learning of the occurrence of a Force Majeure event, the affected Party shall notify the other Party of the occurrence of such Force Majeure event. Upon the other Party's receipt of such notice, the Term of this Agreement shall be extended by the period of the delay associated with the Force Majeure event specified in such therein.

7.2 Supersedure By Subsequent Laws

7.2.1 Effect of Conflicting Law. As provided in Government Code Section 65869.5 , this Agreement shall not preclude application to the Project or the Project Site of changes in Laws, nor shall anything in this Agreement preclude City from imposing on Developer any fee required by Laws. As specified in Government Code Section 65869.5, if any Law enacted after the date of this Agreement prevents or precludes compliance with one or more provisions of this Agreement, then the provisions of this Agreement shall, to the extent Feasible, be modified or suspended by City as may be necessary to comply with such new Law. Immediately after becoming aware of any such new Law, the Parties shall meet and confer in good faith to determine the Feasibility of any such modification or suspension based on the

effect such modification or suspension would have on the purposes and intent of this Agreement. At the conclusion of such meet and confer process, and to the extent Feasible in any event no later than ninety (90) days after such new Law takes effect, City shall initiate proceedings for the modification or suspension of this Agreement as may be necessary to comply with such new Law. Such proceedings shall be initiated by public notice given in accordance with the Applicable City Regulations, and the City Council shall make the determination of whether modifications to or suspension of this Agreement is necessary to comply with such new Law. The City Council's determination shall take into account the results of the meet and confer process between the Parties, including all data and information exchanged in connection therewith. To the extent Feasible, the City Council shall make its determination hereunder within sixty (60) days after the date the proceedings hereunder are initiated.

7.2.2 Contest of New Law. Either Party shall have the right to contest the new Law preventing compliance with the terms of this Agreement, and, in the event such challenge is successful, this Agreement shall remain unmodified and in full force and effect. The City Council, in making its determination under Section 7.2.1, shall take into account the likelihood of success of any contest pending hereunder, and if the contesting Party has obtained interim relief preventing enforcement of such new Law, then the City Council shall delay consideration of action on modifications to or suspension of this Agreement pursuant to Section 7.2.1 above until such contest is concluded or such interim relief expires.

ARTICLE VIII

EVENTS OF DEFAULT; REMEDIES; ESTOPPEL CERTIFICATES

8.1 Events of Default. Subject to the provisions of this Agreement, any failure by a Party to perform any material term or provision of this Agreement shall constitute an "Event of

Default," if, following the notice, meet and confer and cure processes specified below, the Party in default has not timely cured said default.

8.2 Notice of Noncompliance. If either Party determines there is noncompliance with this Agreement, said Party must provide the other Party written notice of such noncompliance, which shall specify in reasonable detail the grounds therefor and all facts demonstrating such noncompliance or failure, so the other Party may address the issues raised in the notice of noncompliance or failure on a point-by-point basis.

8.3 Response to Notice of Noncompliance. Within thirty (30) days of receipt of the notice of noncompliance, the Party receiving such notice shall respond in writing to the issues raised in the notice of noncompliance on a point-by-point basis. If the noticing Party agrees with and accepts the other Party's response, no further action shall be required. If the noticing Party does not agree with the response, then it shall provide to the other Party written notice of the commencement of the Meet and Confer/Mediation Process within thirty (30) days of the receipt of the response.

8.4 Meet and Confer/Mediation Process. Within fifteen (15) days of receipt of a meet and confer notice, the Parties shall initiate a Meet and Confer/Mediation Process pursuant to which the Parties shall meet and confer in good faith in order to determine a resolution acceptable to both Parties of the bases upon which either Party has determined that the other Party has not demonstrated good faith substantial compliance with the material terms of this Agreement.

8.5 Hearing Before City Council to Determine Compliance.

(a) Pursuant to the Annual Review Process of Article VI, or if City determines, after the Meet and Confer/Mediation Process, that there still

remain outstanding noncompliance issues, the City Council shall conduct a noticed public hearing pursuant to Section 17.138.090 of the Development Agreement Ordinance to determine the good faith substantial compliance by Developer with the material terms of this Agreement. At least ten (10) days prior to such hearing, the Director of City Planning shall provide to the City Council, Developer, and to all other interested Persons requesting the same, copies of the City Council agenda report, agenda related materials and other information concerning the Annual Review and/or Developer's good faith substantial compliance with the material terms of this Agreement and the conclusions and recommendations of the Director of City Planning. The results and recommendations of the Meet and Confer/Mediation Process shall be presented to the City Council for review and consideration. At such hearing, Developer and any other interested Person shall be entitled to submit evidence, orally or in writing, and address all the issues raised in the staff report on, or with respect or germane to, the issue of Developer's good faith substantial compliance with the material terms of this Agreement.

(b) The City Council may, in its sole discretion, require an additional Meet and Confer/Mediation Process with a designated third party or mediator. The results and recommendations of said process shall be presented to the City Council for review and consideration at a duly noticed meeting.

(c) If, after receipt of any written or oral response of Developer, and/or results and recommendations from the Meet and Confer/Mediation Process that may have occurred, and after considering all of the

evidence at such public hearing, or a further public hearing, the City Council finds and determines, on the basis of substantial evidence, that Developer has not substantially complied in good faith with the material terms of this Agreement, the City Council shall specify to Developer the respects in which Developer has failed to comply, and shall also specify a reasonable time for Developer to meet the terms of compliance and shall be reasonably related to the time necessary to adequately bring Developer's performance into good faith substantial compliance with the material terms of this Agreement. If the areas of noncompliance specified by the City Council are not corrected within the time limits prescribed by the City Council hereunder, subject to Force Majeure pursuant to Section 7.1, above, the City Council may by subsequent noticed hearing extend the time for compliance for such period as the City Council may determine (with conditions, if the City Council deems appropriate), Terminate or modify this Agreement, or take such other actions as may be specified in the Development Agreement Legislation and the Development Agreement Ordinance.

8.6 Effect of City Council Finding of Noncompliance; Rights of Developer. If the City Council determines that Developer has not substantially complied in good faith with the material terms of this Agreement pursuant to this Article VIII, and takes any of the actions specified in this Article VIII with respect to such determination of noncompliance, Developer shall have the right to contest any such determination of noncompliance by City Council pursuant to Section 8.7, below.

8.7 Remedies. Upon the occurrence of an Event of Default, each Party shall have the right, in addition to all other rights and remedies available under this Agreement, to (i) bring any

proceeding in the nature of specific performance, injunctive relief or mandamus, and/or (ii) bring any action at law or in equity as may be permitted by Laws or this Agreement. Notwithstanding the foregoing, however, neither Party shall ever be liable to the other Party for any consequential or punitive damages on account of the occurrence of an Event of Default (including claims for lost profits, loss of opportunity, lost revenues, or similar consequential damage claims), and the Parties hereby waive and relinquish any claims for punitive damages on account of an Event of Default, which waiver and relinquishment the Parties acknowledge has been made after full and complete disclosure and advice regarding the consequences of such waiver and relinquishment by counsel to each Party. The provisions of this Section 8.7 are subject to the limitation on remedies set forth in Section 3.3.2 for failure to comply with the Phasing Plan.

8.8 Time limits; Waiver; Remedies Cumulative. Failure by a Party to insist upon the strict or timely performance of any of the provisions of this Agreement by the other Party, irrespective of the length of time for which such failure continues, shall not constitute a waiver of such Party's right to demand strict compliance by such other Party in the future. In the event a Party determines that the other Party has not complied with any applicable time limit governing performance under this Agreement by such other Party or governing the time within which such other Party must approve a matter or take an action, then the Party affected by such circumstance shall, prior to taking any other action under this Agreement or exercising any other right or remedy under this Agreement, notify such other Party of such failure of timely performance or such failure to render an approval or take an action within the required time period.

In the case of City, Developer shall send such notice to City's Agent, including the head of any board or commission, the President of the City Council, or the Mayor, having

responsibility for performance, approval or action, as applicable, and to the City Administrator, City Attorney and Director of City Planning.

Any such notice shall include a provision in at least twelve point **bold** face type as follows:

"YOU HAVE FAILED TIMELY TO PERFORM OR RENDER AN APPROVAL OR TAKE AN ACTION REQUIRED UNDER THE AGREEMENT: [SPECIFY IN DETAIL]. YOUR FAILURE TO COMMENCE TIMELY PERFORMANCE AND COMPLETE SUCH PERFORMANCE AS REQUIRED UNDER THE AGREEMENT OR RENDER SUCH APPROVAL TO TAKE SUCH ACTION WITHIN THIRTY (30) DAYS AFTER THE DATE OF THIS NOTICE SHALL ENTITLE THE UNDERSIGNED TO TAKE ANY ACTION OR EXERCISE ANY RIGHT OR REMEDY TO WHICH IT IS ENTITLED UNDER THE AGREEMENT AS A RESULT OF THE FOREGOING CIRCUMSTANCES."

The failure of the Party receiving such notice to proceed to commence timely performance and complete the same as required, or render such approval or take such action, within such thirty (30) day period shall entitle the Party giving such notice to take any action or exercise any right or remedy available under this Agreement, subject to any additional notice, cure or other procedural provisions applicable thereto under this Agreement.

Any deadline in this Agreement that calls for action by the City Council or other body that is subject to the requirements of the Ralph M. Brown Act (Government Code Sections 54950 et seq.), City Sunshine Ordinance (Oakland Municipal Code Chapter 2.20), or other noticing and procedural requirements, shall be automatically extended as may be reasonably necessary to comply with such requirements and with City's ordinary scheduling practices and other procedures for setting regular public meeting agendas.

No waiver by a Party of any failure of performance, including an event of default, shall be effective or binding upon such Party unless made in writing by such Party, and no such waiver shall be implied from any omission by a Party to take any action with respect to such failure. No express written waiver shall affect any other action or inaction, or cover any other period of time, other than any action or inaction and/or period of time specified in such express waiver. One or more written waivers under any provision of this Agreement shall not be deemed to be a waiver of any subsequent action or inaction, and the performance of the same or any other term or provision contained in this Agreement.

Nothing in this Agreement shall limit or waive any other right or remedy available to a Party to seek injunctive relief or other expedited judicial and/or administrative relief to prevent irreparable harm.

8.9 Limitations on Actions. Unless otherwise provided by Laws, any action by any third Person to attack, review, set aside, void or annul any action or decision taken by a Party under this Agreement shall not be maintained by such Person unless such action or proceeding is commenced within ninety (90) days after the date such decision or action is made or taken hereunder.

8.10 Effect of Court Action. If any court action or proceeding is brought within the applicable statute of limitations by any third Person to challenge the City Council's approval of (a) this Agreement or any portion thereof, or (b) any Project approval concurrently adopted with this Agreement, then (i) Developer shall have the right to Terminate this Agreement upon thirty (30) days notice in writing to City, given at any time during the pendency of such action or proceeding, or within ninety (90) days after the final determination therein (including any appeals), irrespective of the nature of such final determination, and (ii) any such action shall constitute a permitted delay under Article VII.

8.11 Estoppel Certificate. Either Party may, at any time, and from time to time, deliver written notice to the other Party requesting such other Party to certify in writing that: (i) this Agreement is in full force and effect and a binding obligation of the Parties, (ii) this Agreement has not been amended or modified either orally or in writing, and if so amended, identifying the amendments, and identifying any administrative implementation memoranda entered into by the Parties, and (iii) to the knowledge of such other Party, neither Party has committed an event of default under this Agreement, or if an event of default has to such other Party's knowledge occurred, to describe the nature of any such event of default. A Party receiving a request hereunder shall execute and return such certificate within twenty (20) days following the receipt thereof, and if a Party fails so to do within such 20-day period, the information in the requesting Party's notice shall conclusively be deemed true and correct in all respects. The Director of City Planning, as to City, shall execute certificates requested by Developer hereunder. Each Party acknowledges that a certificate hereunder may be relied upon by Transferees and Mortgagees. No Party shall, however, be liable to the requesting Party, or third Person requesting or receiving a certificate hereunder, on account of any information therein contained, notwithstanding the

omission for any reason to disclose correct and/or relevant information, but such Party shall be estopped with respect to the requesting Party, or such third Person, from asserting any right or obligation, or utilizing any defense, which contravenes or is contrary to any such information.

8.12 Certificate of Compliance. Upon Developer's written request, or as part of the annual review process described in this Article VIII, if the Director of City Planning (or the City Council, if applicable) finds good faith substantial compliance by Developer with the material terms of this agreement, the Director of City Planning shall issue a certificate of compliance within twenty (20) days thereafter, certifying Developer's good faith compliance with the material terms of this Agreement through the period of the applicable annual review. Such certificate of compliance shall be in recordable form and shall contain such information as may be necessary to impart constructive record notice of the finding of good faith compliance hereunder. Developer shall have the right to record the Certificate of Compliance in the Official Records of the County of Alameda.

ARTICLE IX

MORTGAGEE PROTECTION; DEVELOPER RIGHTS OF CURE

9.1 Mortgagee Protection. This Agreement shall be superior and senior to the lien of any Mortgage encumbering any interest in the Project. Notwithstanding the foregoing, no Event of Default shall defeat, render invalid, diminish or impair the lien of any Mortgage made for value, but, subject to the provisions of Section 9.2 below, all of the terms and conditions contained in this Agreement shall be binding upon, inure to the benefit of and effective against any Person (including any Mortgagee) who acquires title to the Project, or any portion thereof or interest therein or improvement thereon, by foreclosure, sheriff's sale, trustee's sale, or deed in lieu thereof.

Notwithstanding anything to the contrary set forth herein, any rights given hereunder to Mortgagees (other than notice rights, which shall apply to all Mortgagees that have given City the notice required under Section 9.3), shall only apply to the most senior Mortgagee, unless such Mortgagee elects not to exercise its rights thereunder, in which event such rights will apply to the next most senior Mortgagee.

9.2 Mortgagee Not Obligated; Mortgagee as Transferee. No Mortgagee shall have any obligation or duty under this Agreement, unless and until such Mortgagee has acquired Developer's interest in the Project or any portion thereof by foreclosure or by transfer in lieu of foreclosure and has executed an Assumption Agreement (as defined in Section 10.2). Nothing contained in this Agreement shall be deemed to permit or authorize any Mortgagee to undertake any new construction or improvement Project, or to otherwise have the benefit of any rights of Developer, or to enforce any obligation of City to Developer, under this Agreement, unless and until such Mortgagee (or its Transferee) has executed the Assumption Agreement.

9.3 Notice of Default to Mortgagee; Right of Mortgagee to Cure. If City receives notice from a Mortgagee requesting a copy of any notice of an Event of Default given Developer hereunder and specifying the address for service thereof, then City shall deliver to such Mortgagee, concurrently with service thereon to Developer, any notice given to Developer with respect to any claim by City that Developer has committed an Event of Default. If City makes a determination of noncompliance under this Article IX, City shall likewise serve notice of such noncompliance on such Mortgagee concurrently with service thereof on Developer. City's failure to give such notice to a Mortgagee shall not be deemed to constitute a default by City under this Agreement, but no such notice by City shall be deemed to have been given to Developer unless and until a copy thereof shall have been so given to Mortgagee. Any such

notices required to be given under this Article IX shall be given in the same manner as provided in Article XII.

If an Event of Default on the part of the Developer remains uncured after the expiration of the period provided herein for Developer to remedy or cure such default, the Mortgagee shall have the right to remedy, or cause to be remedied, such default within thirty (30) calendar days in the event of a monetary default and sixty (60) calendar days in the event of a non-monetary default after the later to occur of (i) the expiration of the period provided herein for the Developer to remedy or cure such default or (ii) the date that City delivered notice of the default to Mortgagee, or such longer period as reasonably necessary so long as Mortgagee commences cure within such 60-day period and diligently proceeds to completion, and the City shall accept such performance by or at the insistence of the Mortgagee as if the same had been timely made by the Developer. The undertaking of cure on the part of Mortgagee shall not constitute an assumption of Developer's obligations hereunder on the part of Mortgagee. The Mortgagee shall have the right to add the cost of any such cure to the obligations secured by its security, provided, however, that this Agreement shall remain superior and senior to the Mortgage including, without limitation, any such additional cure costs included in the obligations secured by the Mortgage. If, however, the Event of Default or such noncompliance is of a nature which can only be remedied or cured by such Mortgagee upon obtaining possession of the Project, or portion thereof, such Mortgagee shall seek to obtain possession with diligence and continuity (but in no event later than one-hundred eighty (180) days after the notice of the Event of Default is given) through a receiver or otherwise, and shall thereafter remedy or cure such event of default or noncompliance promptly and with diligence and dispatch after obtaining possession. If a Mortgagee is prohibited by any process or injunction issued by any court having jurisdiction

of any bankruptcy or insolvency proceedings involving Developer from commencing or prosecuting foreclosure or other proceedings in the nature thereof, the times specified above for commencing or prosecuting proceedings to obtain possession of the property shall be extended for the period of such prohibition, provided that the Mortgagee shall (i) have fully cured any Event of Default due to a default in the payment of money (ii) continue to pay currently such monetary obligations as and when the same become due, and (iii) perform all other obligations of Developer under this Agreement to the extent that they are susceptible of being performed by Mortgagee. Other than an Event of Default or noncompliance (i) for failure to pay money; or (ii) that is reasonably susceptible of remedy or cure prior to a Mortgagee obtaining possession, so long as such Mortgagee is pursuing cure of the Event of Default or noncompliance in conformance with the requirements of this Section 9.3, City shall not exercise any right or remedy under this Agreement on account of such Event of Default or noncompliance. When and if a Mortgagee acquires the interest of Developer encumbered by such Mortgagee's Mortgage and such Mortgagee becomes a Transferee pursuant to Section 10.5 below, then such Mortgagee shall promptly cure all monetary or other Events of Default or noncompliance then reasonably susceptible of being cured by such Mortgagee to the extent such that such Events of Default or noncompliance are not cured prior to such Mortgagee's becoming a Transferee pursuant to Section 10.5. If an Event of Default is not so reasonably susceptible of cure, then such Event of Default shall be deemed cured when such Mortgagee acquires such interest and becomes a Transferee pursuant to Section 10.5. Subject to the Mortgagee protection provisions specified in this Section 9.3, nothing in this Agreement shall preclude City from exercising any right or remedy under this Agreement with respect to any Event of Default by Developer during the pendency of a Mortgagee's proceedings to obtain possession or title.

9.4 Priority of Mortgages. For purposes of exercising any remedy of a Mortgagee pursuant to this Article IX, or for becoming a Transferee in the manner specified in Article X below, the applicable Laws of the State of California shall govern the rights, remedies and priorities of each Mortgagee, absent a written agreement between Mortgagees otherwise providing.

ARTICLE X

TRANSFERS AND ASSIGNMENTS; DEVELOPER CURE RIGHTS, ALLOCATION OF DEVELOPER RIGHTS, DUTIES AND OBLIGATIONS

10.1 Limitations on Developer's Right to Transfer. Developer acknowledges that the qualifications of Developer are of particular importance to City for, among others, the following reasons: (i) the importance of development of the Project Site to the surrounding area and the Broadway/MacArthur/San Pablo Redevelopment Area, and to the general welfare of City, with particular reference to City's objectives as reflected in the General Plan and the Broadway/MacArthur/San Pablo Area Redevelopment Plan (as applicable); (ii) City's reliance upon the qualifications and ability of Developer to serve as the catalyst for development of the Project and to assure the quality of the use, operation and maintenance in the development of the Project; and that such qualifications and identity are material considerations inducing City to enter into this Agreement with Developer. In recognition of these factors, other than as expressly provided for in this Agreement, Developer may not sell, convey, assign, Transfer, alienate or otherwise dispose of all or any of its interest or rights in this Agreement without in each instance obtaining the prior written approval of City in accordance with this Article X. Approval of any one Transfer will not waive City's right to require such approval for each and every Transfer. No Transfer shall be valid unless it is done for a legitimate business purpose and

not to deprive City of any of the benefits under this Agreement. Developer shall reimburse City for its reasonable costs of reviewing a proposed Transfer. Developer's rights to Transfer any right or interest under this Agreement shall be governed strictly in accordance with the provisions of this Article X, and no voluntary or involuntary successor-in-interest of Developer shall acquire any rights or powers under this Agreement except as expressly set forth in this Article X. City shall not unreasonably withhold or delay consideration or approval of a proposed Transfer, and may only deny a proposed Transfer for the proposed Transferee's failure to satisfy the criteria and elements set forth in this Article X.

10.2 Conditions Precedent to All Transfers. The following conditions precedent must be satisfied prior to the effectiveness of Developer's Transfer of any right or interest under this Agreement:

10.2.1 No Event of Default. No Event of Default by Developer shall be outstanding and uncured as of the effective date of the proposed Transfer, or in the event of a Transfer by Developer of its rights, duties and obligations with respect to a portion of the Project Site, no Event of Default by Developer shall be outstanding and uncured as to any development parcel included within the proposed Transfer as of the effective date of the proposed Transfer, unless City Council has received adequate assurances satisfactory to it in its sole discretion that such Event of Default shall be cured in a timely manner either by Developer or the Transferee under the Transfer. Notwithstanding the foregoing to the contrary, the condition precedent set forth in this Section 10.2.1 shall not apply to Mortgagee Transferees.

10.2.2 Assumption Agreement. Developer or Transferee shall have delivered to City an Assumption Agreement, the form of which shall be subject to the City staff's prior approval. In the case of a Non-Exempt Transferee, such Assumption Agreement shall be

delivered in accordance with the procedure for approval of Transferees pursuant to the Owner Participation Agreement. With respect to an Exempt Transferee, such Assumption Agreement shall be delivered no later than five (5) days prior to the effective date of the proposed Transfer. The Assumption Agreement shall be recorded in the Official Records of the County of Alameda concurrently with the consummation of the Transfer, and a copy thereof, certified by the County Recorder as a duplicate copy of the approved Assumption Agreement with recording information, shall be delivered to City within three (3) days after consummation of the Transfer; provided, however, City's failure to receive such certified copy shall not affect Developer's release from the assumed obligations.

10.3 Non-Exempt Transferee. Unless the proposed Transferee is an Exempt Transferee, Developer shall comply with the provisions for approval of Transferees set forth in the Owner Participation Agreement and the standards for approval of Transferees by Agency set forth in the Owner Participation Agreement, including, without limitation, Section 2.1.4 thereof (including Agency Board approval), are incorporated herein by reference as the standards of approval of Transferees by City.

10.4 Transfers to Exempt Transferees. Transfers to the following Transferees shall not require City's prior consent (collectively "Exempt Transferees"):

(a) Affiliates (provided that, for purposes of (i) Phase I (the BART Garage), Affiliates shall be limited to Affiliates of MPI or BUILD or any entity comprised of MPI and BUILD or comprised of Affiliates of MPI and BUILD; (ii) Phase 2 (the affordable rental project), Affiliates shall be limited to BRIDGE Housing Corporation or Affiliates of BRIDGE Housing Corporation;

(iii) Phases 3, 4 or 5 Affiliates shall be limited to BUILD or any Affiliate of BUILD, or any entity comprised of BUILD Affiliates of MPI and/or BUILD);

(b) Any transferee pursuant to a transfer which is a Permitted Transfer under Article 12 of the Owner Participation Agreement;

(c) Mortgagees; and

(d) Supported Transferees.

Transfers to Exempt Transferees are subject only to the conditions precedent set forth in Section 10.2.1 and, where applicable, 10.2.2 and Transfers to Mortgagees shall not be subject to Section 10.2.1 or Section 10.2.2 above.

10.5 Mortgagee as Transferee. No Mortgage (including the execution and delivery thereof to the Mortgagee) shall constitute a Transfer. A Mortgagee shall be a Transferee only upon the acquisition by such Mortgagee of the affected interest of Developer encumbered by such Mortgagee's Mortgage. Mortgagee's rights and obligations under this Agreement after acquiring such interest shall be subject to Section 9.2 above.

10.6 Effect of Transfer; Release; No Cross Default. A Transferee shall become a Party to this Agreement only with respect to the interest Transferred to it under the Transfer and then only to the extent set forth in the Assumption Agreement delivered under Section 10.2.2 above. Except in the event of a Transfer to a Supported Transferee, Developer shall be released from all obligations assumed by the Transferee pursuant to the Assumption Agreement first accruing from and after the effective date of the Transfer; provided, however, that in no event shall Developer be released from any Master Developer Obligation in the event of a transfer to a Non-Exempt Transferee without City approval as specified in Section 10.3 for Non-Exempt Transfers.

From and after the effective date of the Transfer, (a) an Event of Default by the Developer under this Agreement shall have no effect on the Transferee's rights and obligations under this Agreement; (b) an Event of Default with respect to any Transferee shall have no affect on the Developer's rights and obligations under this Agreement; and (c) an Event of Default by a Transferee under this Agreement shall have no effect on the rights and obligations of any other Transferee under this Agreement.

10.7 Right of Developer to Cure Supported Transferee Default. Concurrently with service thereon to any Supported Transferee, City shall deliver to Developer any notice given with respect to such Supported Transferee's alleged Event of Default. If City makes a determination of noncompliance under Articles VI or VIII above, City shall likewise serve on Developer notice of such Supported Transferee's noncompliance. Developer shall have the right, to cure or remedy, or to commence to cure or remedy, the Event of Default claimed or the areas of noncompliance set forth in City's notice within the applicable time periods for cure specified in this Agreement. If, the Event of Default or such noncompliance is of a nature which can only be remedied or cured by Developer upon obtaining possession of the affected Development Parcel, Developer shall seek to obtain possession with diligence and continuity, and shall thereafter remedy or cure the Event of Default or noncompliance as soon as reasonably possible after obtaining possession. So long as Developer or the Supported Transferee demonstrates to the satisfaction of City that it is diligently pursuing cure of the Event of Default or noncompliance in conformance with the requirements of this Section 10.7, City shall not exercise any right or remedy under this Agreement on account of such Event of Default or noncompliance; however, nothing herein shall prevent City from seeking any right or remedy

under this Agreement if it determines in its sole discretion that the Developer has failed to make such a showing.

ARTICLE XI

AMENDMENT AND TERMINATION

11.1 Amendment or Cancellation. Except as expressly provided in this Agreement, this Agreement may be Terminated, modified or amended only by the consent of the Parties made in writing, and then only in the manner provided for in Section 17.138.080 of the Development Agreement Ordinance. Neither this Agreement nor any term, covenant, condition or provision herein contained shall be subject to initiative or referendum after the Effective Date.

11.2 Certain Actions Not an Amendment. Notwithstanding the provisions of Section 11.1 above, a minor modification to this Agreement may be approved by mutual agreement of City and Developer and shall not require a noticed public hearing or any action by the Planning Commission or City Council before the Parties execute such modification, but shall require the giving of notice pursuant to Section 65867 of the Development Agreement Legislation as specified by Section 65868 thereof. For purposes hereof, "minor modification" shall mean a modification to this Agreement which does not relate to the Term, the Project (as defined herein), the location, siting, height, envelope, massing, or size of improvements within the Project, Master Development Plan contained in Exhibit C, provisions for dedications, or any conditions, terms, restrictions and requirements relating to obligations of City or Developer under Article IV.

Upon the expiration of such notice period, any such matter shall automatically be deemed incorporated into the Project and vested under this Agreement. The granting or amendment of a Project Approval, Subsequent Approval or the Master Development Plan shall not require notice

under Section 65867 and shall not be considered an amendment to this Agreement. Instead, any such matter automatically shall be deemed to be incorporated into the Project and vested under this Agreement.

ARTICLE XII

NOTICES

12.1 Procedure. All formal notices to a Party shall be in writing and given by delivering the same to such Party in person or by sending the same by registered or certified mail, or Express Mail, return receipt requested, with postage prepaid, or by overnight courier delivery, to such Party's mailing address. The respective mailing addresses of the Parties are, until changed as hereinafter provided, the following:

City: City of Oakland
Community and Economic Development Agency
250 Frank H. Ogawa Plaza, Suite 3315
Oakland, California 94612
Attention: Director of City Planning

Oakland City Attorney's Office
One Frank H. Ogawa Plaza, 6th Floor
Oakland, California 94162
Attention: Mark Wald

Developer: MacArthur Transit Community Partners, LLC
c/o BRIDGE Urban Infill Land Development, LLC
345 Spear Street, Suite 700
San Francisco, CA 94105
Attention: President and
Attention: General Counsel

With a
copy to: McGrath Properties, Inc.
130 Webster Street
Oakland, CA 94607

Attention: Terrence M. McGrath

Notices and communications with respect to technical matters in the routine performance and administration of this Agreement shall be given by or to the appropriate representative of a Party by such means as may be appropriate to ensure adequate communication of the information, including written confirmation of such communication where necessary or appropriate. All formal notices under this Agreement shall be deemed given, received, made or communicated on the date personal delivery is effected or, if mailed or sent by courier, on the delivery date or attempted delivery date shown on the return receipt or courier records. Any notice which a Party desires to be a formal notice hereunder and binding as such on the other Party must be given in writing and served in accordance with this Section 12.1.

12.2 Change of Notice Address. A Party may change its mailing address at any time by giving formal written notice of such change to the other Party in the manner provided in Section 12.1 at least ten (10) days prior to the date such change is effected.

ARTICLE XIII

COVENANTS RUNNING WITH THE LAND

13.1 Covenants Running With The Land. All of the provisions, agreements, rights, powers, standards, terms, covenants and obligations contained in this Agreement shall be binding upon the Parties and their respective heirs, successors (by merger, consolidation, or otherwise) and assigns, devisees, administrators, representatives, lessees, and all other Persons that acquire a legal or equitable interest of Developer in the Development Parcels, or any portion thereof, or any interest therein, or any improvement thereon, whether by operation of Laws or in any manner whatsoever, and shall inure to the benefit of the Parties and their respective heirs, successors (by merger, consolidation or otherwise) and permitted assigns as Transferees, as

covenants running with the land pursuant to Section 65868.5 of the Development Agreement Legislation. This Agreement and the covenants as set forth herein 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 Development Parcels.

13.2 Successors to City. For purposes of this Article XIII, "City" includes any successor public agency to which land use authority over the Project may be transferred, which public agency shall, as part of such Transfer, by written instrument satisfactory to City and Developer, expressly (i) assume all of City's rights, duties and obligations under this Agreement; and (ii) release and Indemnify City from all obligations, claims, liability or other Losses under this Agreement.

ARTICLE XIV

MISCELLANEOUS

14.1 Negation of Partnership. The Parties specifically acknowledge that the Project is a private development, that neither Party is acting as the Agent of the others in any respect hereunder, and that each Party is an independent contracting entity with respect to the terms, covenants and conditions contained in this Agreement. None of the terms or provisions of this Agreement shall be deemed to create a partnership between or among the Parties in the businesses of Developer, the affairs of City, or otherwise, or cause them to be considered joint venturers or members of any joint enterprise. This Agreement is not intended and shall not be construed to create any third party beneficiary rights in any Person who is not a Party or a Transferee; and nothing in this Agreement shall limit or waive any rights Developer may have or acquire against any third Person with respect to the terms, covenants or conditions of this Agreement.

14.2 Approvals. Unless otherwise provided in this Agreement, whenever approval, consent, satisfaction, or decision (herein collectively referred to as an "Approval"), is required of a Party pursuant to this Agreement, it shall not be unreasonably withheld or delayed. If a Party shall disapprove, the reasons therefor shall be stated in reasonable detail in writing. Approval by a Party to or of any act or request by the other Party shall not be deemed to waive or render unnecessary approval to or of any similar or subsequent acts or requests. Whenever, under this Agreement, the term "Approve" (or any grammatical variant thereof, such as "Approved" or "Approval") is used in connection with the right, power or duty of City, or any representative board, commission, committee or official of City, to act in connection with any City approval, such term shall only include the right to approve, conditionally approve, or disapprove in accordance with the applicable terms, standards and conditions of this Agreement.

14.3 Not a Public Dedication. Except for Exactions made in accordance with this Agreement, and then only when made to the extent so required, nothing herein contained shall be deemed to be a gift or dedication of the Project, or portion thereof, to the general public, for the general public, or for any public use or purpose whatsoever, it being the intention and understanding of the Parties that this Agreement be strictly limited to and for the purposes herein expressed for the development of the Project as private property.

14.4 Severability. If any phrase, clause, section, subsection, paragraph, subdivision, sentence, term or provision of this Agreement, or its application to a particular situation, shall be finally found to be void, invalid, illegal or unenforceable by a court of competent jurisdiction, then notwithstanding such determination, such term or provision shall remain in force and effect to the extent allowed by such ruling and all other terms and provisions of this Agreement or the application of this Agreement to other situations shall remain in full force and effect.

Notwithstanding the foregoing, if any material term or provision of this Agreement or the application of such material term or condition to a particular situation is finally found to be void, invalid, illegal or unenforceable by a court of competent jurisdiction, then the Parties hereto agree to work in good faith and fully cooperate with each other to amend this Agreement to carry out its intent.

14.5 Exhibits. The exhibits listed below, to which reference is made herein, are deemed incorporated into this Agreement in their entirety by reference thereto:

Exhibit A: Project Site
Exhibit B: City Approvals
Exhibit C: Master Development Plan
Exhibit D: Illustrative Phasing Plan

14.6 Entire Agreement. This written Agreement and the exhibits hereto contain all the representations and the entire agreement between the Parties with respect to the subject matter hereof. Except as otherwise specified in this Agreement, any prior correspondence, memoranda, agreements, warranties or representations are superseded in total by this Agreement and exhibits hereto, and such administrative implementation memoranda. Neither the conduct or actions of the Parties, nor the course of dealing or other custom or practice between the Parties, shall constitute a waiver or modification of any Term or provision of this Agreement; and this Agreement may be modified or amended only in the manner specified in this Agreement.

14.7 Construction of Agreement. All of the provisions of this Agreement have been negotiated at arms-length between the Parties and after advice by counsel, who have reviewed this Agreement, and other representatives chosen by each Party, and the Parties are fully informed with respect thereto. Therefore, this Agreement shall not be construed for or against either Party by reason of the authorship or alleged authorship of any provisions hereof, or by reason of the status of either Party. The provisions of this Agreement and the exhibits hereto

shall be construed as a whole according to their common meaning and not strictly for or against any Party and consistent with the provisions hereof, in order to achieve the objectives and purpose of the Parties hereunder. The captions preceding the text of each article, section and the table of contents hereof are included only for convenience of reference and shall be disregarded in the construction and interpretation of this Agreement.

14.8 Mitigation of Damages. In all situations arising out of this Agreement, each Party shall attempt to avoid and minimize the damages resulting from the conduct of the other Party. Each Party shall take all necessary measures to effectuate the provisions of this Agreement. Such actions shall include, but not be limited to, good faith and active participation in any meet and confer and cure process.

14.9 Further Assurances; Covenant to Sign Documents. Each Party shall take all actions and do all things, and execute, with acknowledgment or affidavit if required, any and all documents and writings, which may be necessary or proper to achieve the purposes and objectives of this Agreement.

14.10 Covenant of Good Faith and Fair Dealing. Neither Party shall do anything which shall have the effect of harming or injuring the right of the other Party to receive the benefits of this Agreement; each Party shall refrain from doing anything which would render its performance under this Agreement impossible; and each Party shall do everything which this Agreement contemplates that such Party shall do in order to accomplish the objectives and purposes of this Agreement. The Parties intend by this Agreement to set forth their entire understanding with respect to the terms, covenants, conditions and standards for the development, use and occupancy of the Project and by which the performance of the rights, duties and obligations of the Parties hereunder shall be measured or judged.

14.11 Governing Law. This Agreement, and the rights and obligations of the Parties, shall be governed by and interpreted in accordance with the Laws of the State of California.

14.12 References; Terminology. Unless otherwise specified, whenever in this Agreement, reference is made to the table of contents, any article or section, or any defined term, such reference shall be deemed to refer to the table of contents, article or section or defined term of this Agreement. The use in this Agreement of the words "including," "such as" or words of similar import, when following any general term, statement or matter, shall not be construed to limit such statement, term or matter to specific items or matters, whether or not language of nonlimitation, such as "without limitation" or "but not limited to," or words of similar import, are used with reference thereto, but rather shall be deemed to refer to all other items or matters that could reasonably fall within the broadest possible scope of such statement, term or matter.

14.13 Irregularity in Proceeding. No action, inaction or recommendation by a Party pursuant to this Agreement, or of City in connection with a City approval, shall be held void or invalid, or be set aside by a court on the grounds of improper admission or rejection of evidence, or by reason of any error, irregularity, informality, neglect or omission (collectively, an "Error") as to any matter pertaining to petition, application, notice, finding, record, hearing, report, recommendation or any matters of procedure whatsoever, unless after an examination of the entire record with respect to such error, including the evidence, the court finds that the Error complained of was prejudicial, and that by reason of the Error, the complaining Party, or third Person, sustained and suffered substantial injury, and that a different result would have been probable if the Error had not occurred or existed. No presumption shall arise that an Error is prejudicial, or that injury resulted from an Error, solely as a result of a showing that Error occurred.

14.14 Judicial Proceeding to Challenge Termination. Any challenge made by Developer to City's termination, modification, or amendment of this Agreement pursuant to a right so to do granted by this Agreement, shall be subject to review in the Superior Court of the County of Alameda and solely pursuant to California Code of Civil Procedure Section 1094.5(c).

14.15 Conflicts of Interest. Developer shall use all diligent efforts to ensure that no member, officer, employee, or consultant of City who participates in any way in the Project or in the making of this Agreement, or a member of such Person's immediate family, shall have any personal financial interest in the Project or this Agreement or receive any personal financial benefit from the Project. Developer warrants that it has not paid or given, and will not pay or give, to any third Person any money or other consideration in exchange for obtaining this Agreement. Not in limitation of any other indemnity obligation of Developer, Developer shall Indemnify City from any claims for real estate commissions or brokerage fees, finders or any other fees in connection with this Agreement.

14.16 Nonliability. No member, official, employee, agent, or member of any board or commission of City shall be personally liable to Developer, or any Transferee, in the event of any Event of Default committed by City or for any amount that may become due to Developer or a Transferee under the terms of this Agreement.

14.17 Developer's Warranties. Developer represents and warrants that it: (i) has access to professional advice and support to the extent necessary to enable Developer to fully comply with the terms of this Agreement and otherwise carry out the Project, (ii) is duly organized and validly existing under the Laws of the State of California, and (iii) has the full power and authority to undertake the Project; and (iv) that the Persons executing and delivering this Agreement are authorized to execute and deliver this Agreement on behalf of Developer.

14.18 Execution of Other Documentation. City and Developer shall execute any further documentation that may be necessary to carry out the intent and obligations under this Agreement, so long as such documentation does not conflict with this Agreement.

14.19 Exercise of Police Power. The Parties acknowledge that City has exercised its police power in the interest of the Parties, the citizens of City and the general public, by enacting this Agreement as its legislative act, and that full implementation of this Agreement will confer substantial benefits to the citizens of City and the general public.

14.20 City of Oakland Campaign Contribution Limits. Developer has dated and executed and delivered to City an acknowledgement of campaign contributions limits form as required by Chapter 3.12 of the Oakland Municipal Code.

14.21 Employment Nondiscrimination. Neither Developer, nor its successors, assigns, contractors and subcontractors shall not discriminate against any employee or applicant for employment in connection with construction of the Project on the basis of race, color, ancestry, national origin, religion, sex, sexual preference, marital status, AIDS or AIDS-related complex, or physical or mental disability. In addition, each of the following activities shall be conducted in a nondiscriminatory manner: hiring; upgrading; demotion and transfers; recruitment and recruitment advertising; layoff and termination; rates of pay and other forms of compensation; and selection for training, including apprenticeship.

14.22 Disabled Access. Developer shall construct the Project in compliance with all applicable federal, state, and local requirements for access for disabled Persons.

14.23 City Subject to Brown Act and Sunshine Ordinance Requirements. Developer acknowledges that all City Council and Planning Commission actions are subject to the requirements of the provisions of the Sunshine Ordinance (Oakland Municipal Code Chapter

2.20) and the Ralph M. Brown Act (Government Code Sections 54950, et seq.), and the published agenda of the City Council and Planning Commission and regular procedures applicable thereto. City shall cause all City Council and Planning Commission actions to conform to the foregoing requirements and Developer shall take no action which would violate the foregoing requirements.

14.24 Signature Pages. This Agreement may be executed in counterparts, and in facsimile and/or electronic form, and all so executed, shall constitute one Agreement that shall be binding upon all Parties hereto, notwithstanding that the signatures of all Parties' designated representatives do not appear on the same page.

14.25 No Third Party Beneficiary. Nothing in this Agreement shall confer any rights in favor of any third party or third parties.

14.26 Time. Time is of the essence of this Agreement and of each and every term and condition hereof.

14.27 Recitals True and Correct. The Parties acknowledge and agree that the Recitals are true and correct and are an integral part of this Agreement.

14.28 Subdivision Maps. Approval of any subdivision, as defined in Government Code Section 66473.7, that may be required for the Project shall comply with the provisions of said Section 66473.7. This provision is included in this Agreement to comply with Section 65867.5 of the Development Agreement Statutes.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the day and year first above written.

AUTHORIZED SIGNATURE OF CITY TO AGREEMENT

CITY OF OAKLAND, a California charter city

By:

Its:

APPROVED AS TO FORM AND LEGALITY:

By:

Its City Attorney

AUTHORIZED SIGNATURE OF DEVELOPER:

MACARTHUR TRANSIT COMMUNITY PARTNERS, LLC, a California limited liability company

By: MPI MacArthur, LLC,
a California limited liability company,
Member

By:

Terrence M. McGrath, Managing Member

By: BRIDGE Urban Infill Land
Development, LLC, a Delaware limited liability
company, Member

By: BRIDGE Infill Development,
Inc., a California Corporation, Manager

By:

Lydia Tan, President