ORDINANCE NO. 20-2195

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF CUPERTINO APPROVING A DEVELOPMENT AGREEMENT FOR THE DEVELOPMENT OF A NEW 7-STORY, 155 ROOM HOTEL WITH ASSOCIATED SITE AND LANDSCAPING IMPROVEMENTS LOCATED AT 10931 N. DE ANZA BLVD. (APN #326-10-061)

SECTION I: PROJECT DESCRIPTION

Application No.:	DA-2018-01
Applicant:	De Anza Properties (John Vidovich)
Property Owner:	Northwest Properties, LP
Location:	10931 N De Anza Blvd. (APN #326-10-061)

SECTION II: FINDINGS FOR DEVELOPMENT AGREEMENT

WHEREAS, the City of Cupertino received an application on March 20, 2018 for a General Plan Amendment, Development Permit, Development Agreement, Architectural and Site Approval, and Use Permit to allow the development of a new 7-story, 155 room hotel with associated site and landscaping improvements and associated environmental review ("Project"); and,

WHEREAS, De Anza Properties has a legal and equitable interest in certain real property consisting of approximately 1.29 acres located within the City and generally borderd by De Anza Blvd. to the east, APN #326-10-058 (Cupertino Inn) to the south, and APN #326-10-066 (Homestead Square) to the west ("Property"), and as more particularly described in Exhibit A of the Development Agreement for the De Anza Hotel Project By and Between City of Cupertino and Northwest Properties ("Development Agreement"); and

WHEREAS, Government Code Sections 65864 through 68569.5 provide the statutory authority for development agreements between municipalities and parties with a fee or equitable interest in real property; and

WHEREAS, Cupertino Municipal Code Sections 19.144.010 *et seq*. establish additional procedures for review and approval of proposed development agreements by the City of Cupertino; and

WHEREAS, in March 2018, De Anza Properties requested that the City consider entering into a Development Agreement for development of the Project; and

WHEREAS, the terms of the Development Agreement include the following community benefits funded by Northwest Properties, LP:

1. Community Amenity Funding of $500,000 for local transportation facilities, start-up costs for the Transportation Management Association, local public art, and landscaping for public parks, roadways, and medians;
2. Public access to a roof-top lounge;
3. Shuttle service to airports and major employment centers for City residents and employees;
4. Meeting rooms for City and public school functions;
5. Transient occupancy taxes; and
6. Minimum hotel standards.

WHEREAS, the Development Agreement will be consistent with the City's General Plan land use map, as amended and surrounding uses and consistent with the applicable zoning designation; and

WHEREAS, approval of the Development Agreement will provide Northwest Properties, LP with assurances that its development of the Property for the Project can proceed without disruption caused by a change in City planning and development policies and requirements, which assurance will thereby reduce the actual or perceived risk of planning, financing, construction, and use of the development and promote private and public objectives of the development; and

WHEREAS, the Project is described and analyzed in "The De Anza Hotel Project" Public Draft Initial Study ("Draft IS/MND") dated July 2, 2019; and

WHEREAS, the City of Cupertino's Environmental Review Committee at its August 1, 2019 meeting reviewed the Draft IS/MND, received public comments, and voted 5-0-0 to recommend adoption of a Mitigated Negative Declaration ("MND"); and

WHEREAS, based on substantial evidence in the record, on December 10, 2019, the Planning Commission recommended on a 4-0 vote (Saxena Absent) that the City Council adopt the MND for the Project and implement as conditions of approval all mitigation measures within the responsibility and jurisdiction of the City that are identified in the IS/MND, and adopt the Mitigation Monitoring and Reporting Program for the Project prior to taking final action on the Project; and

WHEREAS, on December 10, 2019 the Planning Commission recommended on a 4-0 vote (Saxena Absent) that the City Council approve the General Plan Amendment (GPA-2018-01) for the Project in a form substantially similar to the Resolution presented (Resolution No. 6890), approve the Development Permit (DP-2018-01) in a form substantially similar to the Resolution presented (Resolution No. 6892), approve the

Architectural and Site Approval Permit (ASA-2018-02) in a form substantially similar to the Resolution presented (Resolution No. 6893), approve the Use Permit (U-2018-02) in a form substantially similar to the Resolution presented (Resolution No. 6894), and approve and adopt an ordinance approving a Development Agreement (DA-2018-01) in a form substantially similar to the Ordinance presented; and

WHEREAS, on March 3, 2020, after consideration of substantial evidence contained in the entire administrative record and prior to consideration of the Development Agreement, the City Council on a 4-1 vote (Willey voting no) adopted Resolution No. 20-005 adopting the MND, Resolution No. 20-006 adopting the General Plan Amendment, Resolution 20-007 approving the Development Permit, Resolution No. 20-008 approving the Architectural and Site Approval Permit, and Resolution No. 20-009 approving the Use Permit;

WHEREAS, at the March 3, 2020 hearing, the City Council requested that Staff renegotiate the Community Benefits to be provided by the Project sponsor; and

WHEREAS, all necessary public notices having been given as required by the procedural ordinances of the City of Cupertino and the Government Code; and

WHEREAS, on April 7, 2020, upon due notice, the City Council held a public hearing to consider the Development Agreement; and

WHEREAS, the City Council is the decision-making body for this Ordinance;

WHEREAS, prior to taking action on this Ordinance, the City Council exercised its independent judgment in carefully considering the information in the IS/MND and finds that the scope of this Ordinance falls within the adopted Mitigated Negative Declaration because the proposed actions to be taken under the Development Agreement that have the potential for resulting in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment have been examined in the IS/MDN; therefore, no recirculation of the IS/MND is required; and

WHEREAS, Resolution 20-007 approving the Development Permit, Resolution No. 20-008 approving the Architectural and Site Approval Permit, and Resolution No. 20-009 approving the Use Permit are each conditioned on the Development Agreement taking effect; and

NOW, THEREFORE, BE IT ORDAINED AS FOLLOWS:

Section 1. The recitals set forth above are true and correct and are hereby incorporated herein by this reference as if fully set forth in their entirety.

Section 2. The City Council, having considered the notice of the public hearing to consider the Development Agreement, the staff report to the City Council for the meeting of April 7, 2020, evidence received at the public hearing, all exhibits, testimony, information, and other evidence submitted in the record of this proceeding, finds as follows:

A. The proposed Development Agreement is consistent with the objectives, policies, general land uses, and programs specified in the General Plan, as amended.

B. The proposed Development Agreement is compatible with the uses authorized in, and the regulations prescribed for, the land use district in which the Project is located.

C. The proposed Development Agreement conforms with and will promote public convenience, general welfare, and good land use practice.

D. The proposed Development Agreement will not be detrimental to the health, safety, or general welfare.

E. The proposed Development Agreement will not adversely affect the orderly development of property or the preservation of property values.

F. The proposed Development Agreement will promote and encourage the development of the Project by providing protections to the Project sponsor against changes in City regulations prior to completion of construction of the Project.

Section 3. The City Council hereby approves the Development Agreement in the form attached as Exhibit DA-1 subject to such minor technical conforming changes as may be approved by the City Attorney.

Section 4. This approval is based on the City Council's independent judgment in consideration of and reliance on the IS/MND and in accordance with the plans, details, and descriptions contained therein, and on the Resolution adopting the IS/MND.

Section 5. The City Council authorizes the City Manager to execute the Development Agreement on behalf of the City.

Section 6. The City Council directs the Director of Community Development to file a Notice of Determination with the Santa Clara County Recorder in accordance with the California Environmental Quality Act of 1970 (Public Resources Code Section 21000 *et seq.*) ("CEQA") and the State CEQA Guidelines (California Code of Regulations, Title 14, Section 15000 *et seq.*).

Section 7. This Ordinance shall be of no force and effect unless and until General Plan Amendment GPA-2018-01 becomes effective. The Development Agreement shall not take effect until this Ordinance takes effect and the Development Agreement is signed by all parties.

INTRODUCED at a Regular Meeting of the Cupertino City Council on the 7th day of April 2020, AND ENACTED at a regular meeting of the Cupertino City Council on the 21st day of April, 2020, by the following roll call vote:

Members of the City Council

AYES:
NOES:
ABSENT:
ABSTAIN:

SIGNED: _____ Steven Scharf, Mayor City of Cupertino	_____ Date
ATTEST: _____ Kirsten Squarcia, City Clerk	_____ Date
APPROVED AS TO FORM: _____ Heather Minner, City Attorney	_____ Date

RECORDING REQUESTED BY
AND WHEN RECORDED RETURN TO:

City of Cupertino
10300 Torre Avenue
Cupertino, CA 95014-3202
Attention: City Manager

Record for the Benefit of
The City of Cupertino
Pursuant to Government Code
Section 27383

Space Above Reserved for Recorder's Use Only

DEVELOPMENT AGREEMENT

FOR THE DE ANZA HOTEL PROJECT

BY AND BETWEEN

CITY OF CUPERTINO

AND

NORTHWEST PROPERTIES
a California Limited Partnership

Effective Date: _____

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DEVELOPMENT AGREEMENT

This Development Agreement ("**Agreement**"), dated as of _____ ("**Effective Date**"), is entered into pursuant to the Development Agreement Law, by and between the CITY OF CUPERTINO, a California municipal corporation ("**City**") and NORTHWEST PROPERTIES LP, a California limited partnership ("**Developer**"). Developer and City are referred to individually in this Agreement as a "**Party**" and collectively as the "**Parties**."

RECITALS

This Agreement is entered based on the following facts, understandings and intentions of the Parties. The following recitals are a substantive part of this Agreement; capitalized terms used herein and not otherwise defined are defined in Article 1 of this Agreement.

A. In order to strengthen the public planning process, encourage private participation in comprehensive planning, and reduce the economic costs and risks of development, the Legislature of the State of California enacted sections 65864 *et seq.* of the Government Code ("**Development Agreement Statute**") which authorizes a city and a developer having a legal or equitable interest in real property to enter into a binding, long-term development agreement establishing certain development rights in the property.

B. In accordance with the Development Agreement Statute, the City Council of the City of Cupertino enacted Municipal Code sections 19.144.010 *et seq.* ("**Development Agreement Regulations**"), which authorize the execution of development agreements and set forth the required contents and form of those agreements. The provisions of the Development Agreement Statute and the City's Development Agreement Regulations are collectively referred to herein as the "**Development Agreement Law**."

C. Developer is the owner of that certain real property consisting of approximately 1.29 acres (approximately 56,000 square feet) in size located at 10931 N. De Anza Boulevard, Cupertino, CA 5014; Assessor's Parcel No. 326-10-061 ("**Property**") more particularly described in **Exhibit A** and depicted in **Exhibit B,** both attached hereto and incorporated herein. The Property is currently developed with an 8,323 square foot commercial building operating as a Goodyear Auto Service Center. This Agreement applies only to the Property and does not affect or burden any other real property owned by Developer and/or its Affiliated Parties

D. Developer submitted applications to the City for a General Plan text amendment (GPAAUTH-2018-01;) ("**General Plan Amendment**"), a Development Permit (DP-2018-01) ("**Development Permit**"), an Architectural and Site Approval Permit (ASA-2018-02) (the "**Architectural and Site Approval Permit**"), a Use Permit (U-2018-02) ("**Use Permit**"), and a Development Agreement (DA- 2018-01). These applications are in furtherance of the request by Developer to remove the existing structures and facilities and develop on the Project Site a new full-service boutique hotel comprising six stories above ground plus four levels of underground parking, containing 156 hotel rooms, meeting rooms, a restaurant, a rooftop bar, and associated

amenities, facilities and infrastructure (the "**Project**"). The Project is described in more detail in **Exhibit C**, attached hereto and incorporated herein.

E. The Project is the subject of a Mitigated Negative Declaration (EA-2018-03) ("**MND**") prepared pursuant to the California Environmental Quality Act ("**CEQA**") (Public Resources Code sections 21000 *et seq.*). The MND is tiered from the General Plan EIR in accordance with sections 15152 and 15168 of the CEQA Guidelines and CEQA section 21094.

F. After a duly noticed public hearing, the Planning Commission on _____ recommended to the City Council adoption of the MND, and approval of the General Plan Amendment, Development Permit, Architectural and Site Approval Permit, Use Permit, Tree Removal Permit, Exception Permit, and this Development Agreement.

G. Prior to or concurrently with approval of this Agreement, the City has taken the following actions to review and plan development and use of the Project (collectively, the "**Existing Approvals**"):

1. Adoption of the MND by Resolution No. _____ adopted by the City Council on _____.

2. Approval of the General Plan Amendment by Resolution No. _____ adopted by the City Council on _____.

3. Approval of the Development Permit by Resolution No. _____ adopted by the City Council on _____;

4. Approval of the Architectural and Site Approval Permit by Resolution No. _____ adopted by the City Council on _____; and

5. Approval of the Use Permit by Resolution No. _____ adopted by the City Council on _____.

H. It is the intent of City and Developer to establish certain conditions and requirements related to review, approval, development and operation of the Project, which are or will be the subject of this Agreement and possibly subsequent development applications and land use entitlements if found to be desired or required.

I. City specifically finds, as required by Municipal Code section 19.144.110 and as reflected in the Enacting Ordinance, that approving this Agreement for the Project will promote orderly growth and quality development in accordance with the goals and policies set forth in the General Plan; is compatible with the uses authorized in, and the regulations prescribed for, the district in which the Property is located; will promote the public convenience, general welfare, and good land use practice; will promote development which is not detrimental to the health, safety and general welfare; will not adversely affect the orderly development of property or the preservation of property value; and will promote and encourage development of the Project by providing a greater degree of requisite certainty. City also finds that the Project will provide substantial public benefits as described in this Agreement.

J. City and Developer have reached mutual agreement and desire to voluntarily enter into this Agreement to facilitate development and operation of the Project subject to the conditions and requirements set forth herein.

K. City has given the required notice of its intention to adopt this Agreement and has conducted public hearings thereon under Government Code section 65867 and Municipal Code section 19.144.090. City has reviewed and evaluated this Agreement in accordance with the Development Agreement Law and found that the provisions of this Agreement and its purposes are consistent with the Development Agreement Law and the goals, policies, standards, and land use designations specified in the General Plan.

L. Following a duly noticed public hearing, on _____ the City Council introduced Ordinance No. _____ approving this Agreement and authorizing its execution, and adopted that Ordinance on _____ ("**Enacting Ordinance**").

AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein and other valuable consideration, the Parties hereby agree as follows:

ARTICLE 1
DEFINITIONS

1.1 Definitions.

"***Administrative Agreement Amendment***" is defined in Section 8.3.3.

"***Administrative Project Amendment***" is defined in Section 8.2.1.

"***Accepted Conditions of Title***" is defined in Section 5.8 and shall be listed in Exhibit E.

"***Affiliated Party***" is defined in Section 10.1.2.

"***Agreement***" or "***Development Agreement***" shall mean this Development Agreement between City and Developer, including all Exhibits hereto.

"Annual Review Form" is defined in Section 6.1.2.

"***Applicable City Regulations***" is defined in Section 3.4.

"***Applicable Law***" means the Applicable City Regulations and all State and Federal laws and regulations applicable to the Property and the Project as such State and Federal laws and regulations may be enacted, adopted and amended from time to time, as more particularly described in Section 3.8 (Changes in the Law).

"***Architectural and Site Approval Permit***" is defined in Recital D.

"***Assignee***" is defined in Section 10.1.1.

"***Assignment***" is defined in Section 10.1.3.

"***Building Permit***" means a building permit issued by the City for the vertical construction of any building (or buildings) within the Project, and shall not include any demolition permit, grading permit, or building permit issued for a foundation or subterranean parking garage.

"***Business License Requirement***" is defined in Section 5.4.

"***CEQA***" means the California Environmental Quality Act, California Public Resources Code sections 21000, *et seq.*, as amended from time to time.

"***CEQA Guidelines***" means the State CEQA Guidelines (California Code of Regulations, Title 14, sections 15000, *et seq.*), as amended from time to time.

"***Certificate***" is defined in Section 6.1.4.

"***Changes in the Law***" is defined in Section 3.8.

"***City***" means the City of Cupertino.

"***City Council***" means to the City Council of the City of Cupertino.

"***City Manager***" means the City's City Manager or his or her designee.

"***City Parties***" means and includes City and its elected and appointed officials, officers, employees, contractors, and representatives.

"***Claims***" means liabilities, obligations, orders, claims, damages, fines, penalties, and expenses, including attorneys' fees and costs.

"***Community Amenity Payment***" is defined in Section 5.1.1.

"***Connection Fees***" means those fees charged by City on a citywide basis or by a utility provider to utility users as a cost for connecting water, sanitary sewer, and other applicable utilities, except for any such fee or portion thereof that constitutes an Impact Fee.

"***Construction Tax***" is defined in Section 4.4.

"***Consumer Price Index***" shall mean the cumulative Consumer Price Index for All Urban Consumers (CPI-U), as defined in Cupertino's CMC Section 5.04.460 (and as reflected in the most recent report of consumer prices for the San Francisco/Bay Area Standard Metropolitan Statistical Area as published by the U.S. Department of Labor, Bureau of Labor Statistics) or if such index is no longer available by a comparable index as reasonably selected by City.

"***Default***" is defined in Section 12.1.

"***Developer***" means Northwest Properties LP, a California limited partnership and its permitted successors, assigns, and Affiliated Parties (as defined in Section 10.1.2).

"***Development Agreement***" or "***Agreement***" means this Development Agreement between City and Developer, including all Exhibits hereto.

"***Development Agreement Law***" is defined in Recital B.

"***Development Agreement Regulations***" is defined in Recital B.

"***Development Agreement Statute***" is defined in Recital A.

"***Development Permit***" is defined in Recital D.

"***Development Project***" means a development project as defined by section 65928 of the California Government Code. Notwithstanding section 65928 of the California Government Code, Development Project shall also include all ministerial approvals required to carry out, construct, reconstruct, and occupy such a development project.

"***Effective Date***" means the date that this Agreement becomes effective as determined under Section 2.1.

"***Enacting Ordinance***" refers to the Ordinance identified in Recital L.

"***Exactions***" means exactions that may be imposed by the City as a condition of developing the Project, including requirements for acquisition, dedication, or reservation of land; and obligations to construct on-site or off-site public and private infrastructure improvements such as roadways, utilities, or other improvements necessary to support the Project, whether such exactions constitute subdivision improvements, mitigation measures in connection with environmental review of the Project, or impositions made under Applicable City Regulations. For purposes of this Agreement, Exactions do not include Impact Fees.

"***Existing Approvals***" means and includes those permits and approvals for the Project granted by City to Developer as of the Effective Date as set forth in Recital G.

"***Existing Impact Fees***" is defined in Section 4.1.

"***General Plan***" means City's Cupertino General Plan: Community Vision 2015-2040, as amended through the Effective Date.

"General Plan Amendment" is defined in Recital D.

"***General Plan EIR***" means the General Plan Amendment, Housing Element Update, and Associated Rezoning Environmental Impact Report (EIR) that was certified by the City Council in December 2014 and the addendum to that EIR that was approved by the City Council in October 2015.

"***Impact Fees***" means the monetary amount charged by City in connection with a Development Project for the purpose of defraying all or a portion of the cost of mitigating the impacts of the Development Project or development of the public facilities related to the Development Project, including, any "fee" as that term is defined by Government Code section

66000(b). For purposes of this Agreement, a fee that meets both the definitions of an Impact Fee and an Exaction will be considered to be an Impact Fee. Impact Fees do not include Other Agency Fees.

"***Laws***" means the Constitution and laws of the State, the Constitution of the United States, and any codes, statutes, regulations, and executive mandates thereunder, and any court decision, State or federal, thereunder.

"***Litigation Challenge***" is defined in Section 9.3.

"***Major Agreement Amendment***" is defined in Section 8.3.2.

"***Major Project Amendment***" is defined in Section 8.2.2.

"***Material Condemnation***" is defined in Section 13.1.

"***Meeting Room Benefit***" is defined in Section 5.1.3.

"***Minimum Hotel Standard***" is defined in Section 5.3.

"***MND***" or Mitigated Negative Declaration is defined in Recital E.

"***Mortgage***" is defined in Section 11.1 and means any mortgage, deed of trust, security agreement, and other like security instrument encumbering all or any portion of the Property or any of Developer's rights under this Agreement.

"***Mortgagee***" means the holder of any Mortgage, and any successor, assignee, or transferee of any such Mortgage holder.

"***Municipal Code***" means and refers to the City of Cupertino's Municipal Code, as amended from time to time.

"***New City Laws***" means and includes any ordinances, resolutions, orders, rules, official policies, standards, specifications, guidelines, or other regulations, which are promulgated or adopted by the City (including but not limited to any City agency, body, department, officer, or employee) or its electorate (through their power of initiative or otherwise) after the Effective Date.

"***Notice of Breach***" is defined in Section 12.1.

"***Other Agency Fees***" is defined in Section 4.3.

"***Other Agency Subsequent Approvals***" means approvals, entitlements, and permits required for development or use of the Project to be obtained from entities other than the City.

"***Parties***" shall mean City and Developer.

"***Permitted Delay***" is defined in Section 13.4.

"***Planning Commission***" means the City of Cupertino Planning Commission.

"***Prevailing Wage Laws***" is defined in Section 9.2.

"***Processing Fees***" means all fees for processing Development Project applications, including any required supplemental or other further environmental review, plan checking and inspection and monitoring for land use approvals, design review, grading and building permits, General Plan maintenance fees, and other permits and entitlements required to implement the Project, which are in effect at the time those permits, approvals or entitlements are applied for, and which are intended to cover the actual costs of processing the foregoing.

"***Project Approvals***" means the Existing Approvals and all Subsequent Approvals.

"***Project***" is defined in Recital D.

"***Property***" is defined in Recital C.

"***Public Benefit Covenants***" is defined in Section 5.7.

"***Rooftop Amenity***" is defined in Section 5.1.8.

"***Shuttle Service***" is defined in Section 5.1.2.

"***STR***" or Smith Travel Research is defined in Section 5.3.

"***Subsequent Approvals***" is defined in Section 7.1.

"***Surviving Provisions***" is defined in Section 12.9.

"***Term***" is defined in Section 2.2.

"***Termination***" is defined in Section 12.3.

"***TOT***" or Transient Occupancy Tax is defined in Section 5.2.

"***TOT In-lieu Payment***" is defined in Section 5.2.

"***TOT Law***" is defined in Section 5.2.

"***TOT Requirement***" is defined in Section 5.2.

"***Tree Removal Permit***" is defined in Recital D.

"***Use Permit***" is defined in Recital D.

ARTICLE 2
EFFECTIVE DATE AND TERM

2.1 Effective Date. The Effective Date of this Agreement shall be the later of (a) the date that is thirty (30) days after the date the Enacting Ordinance is adopted, or (b) the date this Agreement is fully executed by the Parties. The Effective Date is inserted at the beginning of this Agreement. The Parties acknowledge that section 65868.5 of the Development Agreement Statute requires that this Agreement be recorded with the County Recorder no later than ten (10) days after the City enters into this Agreement, and that the burdens of this Agreement shall be binding upon, and the benefits of this Agreement shall inure to, all permitted successors in interest to the Parties to this Agreement. The City Clerk shall cause such recordation.

2.2 Term of Agreement. The "**Term**" of this Agreement shall commence on the Effective Date and shall expire on the fifth (5^{th}) anniversary of the Effective Date, unless earlier terminated or extended by mutual written consent of the Parties hereto in accordance with the requirements of Section 8.1, below.

2.3 City Representations and Warranties. City represents and warrants to Developer that, as of the Effective Date:

2.3.1 City is a municipal corporation and has all necessary powers under the laws of the State of California to enter into and perform the undertakings and obligations of City under this Agreement.

2.3.2 The execution and delivery of this Agreement and the performance of the obligations of the City hereunder have been duly authorized by all necessary City Council action and all necessary City approvals have been obtained.

2.3.3 This Agreement is a valid obligation of City and is enforceable in accordance with its terms.

During the Term of this Agreement, City shall, upon learning of any fact or condition which would cause of any of the warranties and representations in this Section 2.3 not to be true, immediately give written notice of such fact or condition to Developer.

2.4 Developer Representations and Warranties. Developer represents and warrants to City that, as of the Effective Date:

2.4.1 Developer is duly organized and validly existing under the laws of the State of California, and is in good standing and has all necessary powers under the laws of the State of California to own property interests and in all other respects enter into and perform the undertakings and obligations of Developer under this Agreement.

2.4.2 The execution and delivery of this Agreement and the performance of the obligations of Developer hereunder have been duly authorized by all necessary partnership action and all necessary partner approvals have been obtained.

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

2.4.4 Developer has not (a) made a general assignment for the benefit of creditors; (b) filed any voluntary petition in bankruptcy or suffered the filing of any involuntary petition by Developer's creditors; (c) suffered the appointment of a receiver to take possession of all, or substantially all, of Developer's assets; (d) suffered the attachment or other judicial seizure of all, or substantially all, of Developer's assets; or (e) admitted in writing its inability to pay its debts as they come due.

2.4.5 Developer and/or its Affiliated Parties are in the business of developing and owning real estate. Developer and its Affiliated Parties have sufficient financial resources to undertake development of the Project and thereafter operate or cause the hotel to be operated as described in Section 5.3 and as otherwise intended by this Agreement. The entity that operates the hotel, whether Developer, one of its Affiliated Parties, or any third-party entity that Developer arranges for such purpose, shall satisfy the qualifications for an Assignee as described in Section 10.1.1 to the extent applicable.

During the Term of this Agreement, Developer shall, upon learning of any fact or condition that/ would cause any of the warranties and representations in this Section 2.4 not to be true, immediately give written notice of such fact or condition to City.

ARTICLE 3
DEVELOPMENT OF THE PROPERTY

3.1 Vested Rights. The Property is hereby made subject to the provisions of this Agreement. Developer shall have the vested right to develop the Property and the Project in conformance with the Existing Approvals, the Subsequent Approvals, Applicable Law and this Agreement, as may be amended from time to time pursuant to this Agreement, which shall control the permitted uses, density, and intensity of use of the Property and the maximum height and size of buildings on the Property.

3.2 Life of Approvals. Pursuant to Government Code section 66452.6(a) and this Agreement, the life of the Project Approvals shall automatically be extended to and until the later of the following: (1) the end of the Term of this Agreement; or (2) the end of the term or life of any such Project Approval. Notwithstanding the foregoing, the vested elements secured by Developer under this Agreement shall have a life no greater than the Term of this Agreement.

3.3 Permitted Uses. The permitted uses for the Property and the Project are those set forth in the Project Approvals, and include the following:

3.3.1 Up to 156 hotel rooms in one building of six above-grade stories with a fitness facility and amenities customary for a hotel meeting the Minimum Hotel Standard;

3.3.2 four levels of below-grade parking;

3.3.3 a restaurant/bar with an outdoor patio, to be open to the general public;

3.3.4 a rooftop lounge and/or bar; and

3.3.5 rooms suitable for meetings, conferences, banquets and similar uses.

The details for each component are subject to the Project and Agreement amendment processes as set forth in Sections 8.2 and 8.3 herein. In the event of a conflict between the Existing Approvals and the terms of this Section 3.3, the Existing Approvals shall govern.

3.4 Applicable City Regulations. The laws, rules, regulations, official policies, standards and specifications of City applicable to the development, use and operation of the Property and the Project shall be (collectively, "**Applicable City Regulations**"):

3.4.1 Those rules, regulations, official policies, standards, and specifications of the City set forth in the Project Approvals and this Agreement;

3.4.2 With respect to matters not addressed by and not otherwise inconsistent with the Project Approvals and this Agreement, those laws, rules, regulations, official policies, standards and specifications (including City ordinances and resolutions) governing permitted uses, building locations, timing and manner of construction, densities, intensities of uses, maximum heights and sizes, design, set-backs, lot coverage and open space, parking, landscaping, requirements for on- and off-site infrastructure and public improvements and Exactions, in each case only to the extent in full force and effect on the Effective Date;

3.4.3 Except as may be addressed in the Project Approvals, New City Laws that relate to hearing bodies, petitions, applications, notices, findings, records, hearings, reports, recommendations, appeals and any other matter of procedure imposed at any time, provided that such New City Laws are uniformly applied on a City-wide basis to all substantially similar types of Development Projects and properties, and such procedures are not inconsistent with procedures set forth in this Agreement;

3.4.4 New City Laws that revise City's uniform construction codes, including City's building code, plumbing code, mechanical code, electrical code, fire code, grading code and other uniform construction codes, as of the date of permit issuance, provided that such New City Laws are uniformly applied on a City-wide basis to all substantially similar types of Development Projects and properties;

3.4.5 New City Laws that are necessary to protect the physical health and safety of the public, provided that such New City Laws are uniformly applied on a City-wide basis to all substantially similar types of Development Projects and properties;

3.4.6 New City Laws that do not conflict with this Agreement or the Project Approvals, provided that such New City Laws are uniformly applied on a City-wide basis to all substantially similar types of Development Projects and properties; and

3.4.7 New City Laws that do not apply to the Property and/or the Project due to the limitations set forth above, but only to the extent that such New City Laws are accepted in writing by Developer in its sole discretion.

3.5 Timing of Development. Developer shall have no obligation to develop the Project or any component of the Project. Without any limitation of the foregoing, it is the desire of the Parties hereto to avoid the result in *Pardee Construction Co. v. City of Camarillo* (1984) 37 Cal.3d 465, in which the California Supreme Court held that the failure of the parties therein to consider, and expressly provide for, the timing of development resulted in a later-adopted initiative restricting the timing of development to prevail over such parties' agreement. Therefore, notwithstanding the adoption of any initiative after the Effective Date by City's electorate to the contrary, the Parties acknowledge that, except as otherwise provided for in this Agreement, Developer shall have the vested right during the Term and any extensions thereof to develop the Project at such time as Developer deems appropriate in the exercise of its sole and subjective business judgment.

3.6 Compliance with Laws. Developer, at its sole cost and expense, shall comply with the requirements of, and obtain all permits and approvals required by local, State and Federal agencies having jurisdiction over the Property or Project. Furthermore, Developer shall carry out the Project work in conformity with all Applicable Law, including applicable state labor laws and standards; Applicable City Regulations; and all applicable disabled and handicapped access requirements, including the Americans With Disabilities Act, 42 U.S.C. sections 12101 *et seq.*, Government Code sections 4450 *et seq.*, Government Code sections 11135 *et seq.*, and the Unruh Civil Rights Act, California Civil Code sections 51 *et seq.*

3.7 No Conflicting Enactments. Except as otherwise provided in this Agreement, City shall not impose on the Project (whether by action of the City Council or by initiative, referendum or other means, including development moratorium or additional Project conditions on Subsequent Approvals) any New City Law that is in conflict with this Agreement or the Existing Approvals or, once approved, the Subsequent Approvals. Without limiting the generality of the foregoing, except as otherwise provided herein, City shall not (a) apply to the Property any change in land use designation or permitted use, density or intensity of development of the Property; (b) apply to the Property any change in off-site infrastructure or utility requirements or limit or control the availability of or ability to obtain public utilities, services, or facilities (provided, however, nothing herein shall be deemed to exempt the Project or the Property from any water use rationing requirements that may be imposed from time to time in the future and nothing herein shall be deemed a commitment to reserve potable water or sanitary sewer capacity which the Parties acknowledge City does not control); (c) modify or control building setbacks, square footages or heights; the location of buildings and structures; parking requirements; or grading in a manner that is inconsistent with or more restrictive than the terms included in the Existing Approvals or this Agreement; or (d) limit or control the rate, timing, phasing or sequencing of the approval, development or construction of all or any part of the Project.

3.8 Changes in the Law. As provided in section 65869.5 of the Development Agreement Law, this Agreement shall not preclude the applicability to the Project of changes in laws, regulations, plans, or policies, to the extent that such changes are specifically mandated and required by changes in State or Federal laws or by changes in laws, regulations, plans or policies of special districts or other governmental entities, other than the City, created or operating pursuant to the laws of the State of California ("**Changes in the Law**"). If Changes in the Law prevent or preclude compliance with one or more provisions of this Agreement, the Parties shall

meet and confer in good faith in order to determine whether such provisions of this Agreement shall be modified or suspended, or performance thereof delayed, as may be necessary to comply with Changes in the Law. Nothing in this Agreement shall preclude Developer from contesting by any available means (including administrative or judicial proceedings) the applicability to the Project of any such Changes in the Law.

3.9 Initiatives and Referenda. If any New City Law is enacted or imposed by initiative or referendum, or by the City Council directly or indirectly in connection with any proposed initiative or referendum, which New City Law would conflict with this Agreement or reduce the development rights provided by this Agreement and the Project Approvals, such New City Law shall not apply to the Project. No moratorium or other limitation (whether relating to the rate, timing, phasing, density, height or sequencing of development) affecting subdivision maps, building permits or other entitlements to use property that are approved or to be approved, issued or granted within the City, or portions of the City, shall apply to the Project. City, except to submit to vote of the electorate initiatives and referendums required by Applicable Law to be placed on a ballot, shall not adopt or enact any New City Law, or take any other action which would violate the express provisions of this Agreement or the Project Approvals. Developer reserves the right to challenge in court any New City Law that would conflict with this Agreement or reduce the vested development rights provided by this Agreement. Notwithstanding the foregoing, the Parties acknowledge that City's approval of this Agreement is a legislative action subject to referendum. Developer further acknowledges and agrees that City does not have authority or jurisdiction over any other public agency's ability to grant governmental approvals or permits or to impose a moratorium or other limitation that may affect the Project.

3.10 Regulation by Other Public Agencies. Developer acknowledges that other public agencies not within the control of City possess authority to regulate aspects of the development of the Property separately from or jointly with City, and this Agreement does not limit the authority of such other public agencies. Developer will, at the time required in accordance with Developer's project and construction schedule, apply for all such other permits and approvals as may be required by other governmental or quasi-governmental entities in connection with the development of, or the provision of services to, the Project. Developer acknowledges that City does not control the amount of any fees imposed by such other agencies. If such fees are imposed upon Developer and are in excess of those allowed by Applicable Law and Developer wishes to object to such fees, Developer may pay such fees under protest. City agrees not to delay issuance of permits or other Subsequent Approvals and entitlements under these circumstances, provided Developer provides City with proof of payment of such fees.

3.11 No Reservation of Sanitary Sewer or Potable Water Capacity. City has found the Project to be consistent with the General Plan that anticipates that there will be sufficient potable water and sanitary sewer capacity to serve future development contemplated by the General Plan, including the Project, through the Term. However, nothing in this Agreement is intended to provide any reservation of potable water or sanitary sewer capacity.

ARTICLE 4
FEES

4.1 Impact Fees. Except as otherwise expressly provided herein, during the Term and any extension thereof City shall have the right to impose and Developer shall pay only such Impact Fees as City has adopted as of the Effective Date, including those set forth in the Project Approvals ("**Existing Impact Fees**"). For convenience of reference, the Existing Impact Fees are identified in **Exhibit D** attached hereto and incorporated herein. Any Existing Impact Fees that are in existence as of the Effective Date but are inadvertently omitted from **Exhibit D** may still be charged. In the event of such inadvertent omission, the Parties shall revise **Exhibit D** to correct such error. Payment of the Existing Impact Fees shall be at the rates in effect when such fees are due. Notwithstanding the above and subject to Developer's right to protest and/or pursue a challenge in law or equity to any new or increased Impact Fees, if City elects in its sole discretion to approve any extension to the Term, in addition to the Existing Impact Fees it may impose any new or increased Impact Fees City may have duly adopted as of the date of such approval.

4.2 Processing Fees. Subject to Developer's right to protest and/or pursue a challenge in law or equity to any new or increased Processing Fee, City may charge and Developer agrees to pay all Processing Fees for processing Development Project applications, including but not limited to any required supplemental or other further environmental review, plan checking and inspection and monitoring for land use approvals, design review, grading and building permits, General Plan maintenance fees, and other permits and entitlements required to implement the Project, at the rates which are in effect on a City-wide basis at the time those permits, approvals, entitlements, reviews or inspections are applied for, requested, or required. Without limiting the above, by entering into this Agreement Developer accepts and shall not protest or challenge imposition of the types and amounts of Processing Fees in effect as of the Effective Date.

4.3 Other Agency Fees. Nothing in this Agreement shall preclude City from collecting fees from Developer that are lawfully imposed on the Project by another agency having jurisdiction over the Project, which the City is required to collect on behalf of such other agencies ("**Other Agency Fees**").

4.4 Taxes and Assessments. City may impose and Developer agrees to pay any and all existing, new, modified, or increased taxes and assessments imposed in accordance with the laws in effect as of the date due, at the rate in effect at the time of payment, including without limitation, the construction taxes imposed by Chapter 3.32 of the Municipal Code ("**Construction Tax**").

4.5 Connection Fees. Subject to Developer's right to protest and/or pursue a challenge in law or equity to any new or increased Connection Fee, City may charge, and Developer shall pay any Connection Fee that is lawfully adopted.

ARTICLE 5
PUBLIC BENEFITS

5.1 Public Benefits Obligations. In consideration of the rights and benefits conferred by City to Developer under this Agreement, Developer shall perform the public benefit obligations and pay to City the contributions set forth in this Article 5 all within the times set forth herein.

5.1.1 Community Amenity Funding. Developer agrees to pay City Five Hundred Thousand Dollars ($500,000.00) in installments as described below, for City's use in the City Council's discretion subject to the following suggested guidelines ("**Community Amenity Payment**"), which payment shall be in addition to any Impact Fees otherwise due. Once paid, each installment of the Community Amenity Payment shall be nonrefundable, except as provided in Section 5.1.1.2 below.

5.1.1.1 The Community Amenity Payment shall be made in installments as follows:

(1) Within ninety (90) days after the Effective Date, Developer shall pay City a first installment of the Community Amenity Payment in the amount of Fifty Thousand Dollars ($50,000.00).

(2) On or before December 1st of each year, beginning on the first December 1st after the Effective Date, until the Community Amenity Payment is paid in full, as part of each annual review and together with submission of the Annual Review Form, Developer shall pay City an installment of the Community Amenity Payment in the amount of Fifty Thousand Dollars ($50,000.00).

(3) At the time of issuance of the first Building Permit for the Project, Developer shall pay twenty-five percent (25%) of the remainder of the Community Amenity Payment.

(4) At the time of issuance of the first Certificate of Occupancy for the Project, Developer shall pay the remainder of the Community Amenity Payment.

(5) In the event of a Litigation Challenge (described below in Section 9.3), all unpaid Community Amenity Payment installments shall be postponed until final resolution of the Litigation Challenge.

5.1.1.2 Except as specified herein, the Community Benefit Payment installments Developer pays to City shall be nonrefundable even if the Project is not built or occupied, and Developer acknowledges that such installments and the timing of their payment constitute partial consideration for City entering into this Agreement and are paid at Developer's risk. Notwithstanding the above, if this Agreement is terminated or the Project is not constructed due to City's bad faith action or failure to act regarding the Project Approvals leading to the City's uncured Default, which is not resolved after completion of the dispute resolution process

in Section 12.8, then upon final judgment by a court of competent jurisdiction in Developer's favor such payments shall be refundable to Developer.

5.1.1.3 Funds may be used in any part of the City to benefit residents, businesses, and visitors, including on projects that will enhance and enrich the experience of the most proximate City residents, retail and restaurant customers, and hotel guests.

5.1.1.4 Without limiting City's discretion in its use of the Community Amenity Payment, the following types of uses or activities have been identified as candidates:

(1) Local transportation facilities, such as bicycle lanes, projects identified in the 2016 Cupertino Bicycle Transportation Plan, or projects identified in the 2018 Cupertino Pedestrian Transportation Plan (without replacing fair-share impact fees also owed by Developer);

(2) Start-up costs for the Transportation Management Association ("**TMA**");

(3) Permanent local public art projects or temporary exhibits (in addition to any public art installation or payment otherwise owed); and

(4) Landscaping beautification improvements in public parks, parkways or roadway medians.

5.1.2 Shuttle Service. To reduce automobile use in Cupertino, with the attendant effects on traffic and air quality, Developer shall provide a shuttle service available for the following purposes (the "**Shuttle Service**"):

5.1.2.1 for hotel guests traveling between the hotel and San Jose and San Francisco International Airports and major employment centers ("**Destinations**") and for residents of the City between the hotel and Destinations at reduced rates;

5.1.2.2 subject to availability, for residents of City, employees of businesses located in the City, and the general public ("**Non-Hotel Shuttle Passengers**") to travel between the Project and Destinations. Developer shall charge Non-Hotel Shuttle Passengers a fee that does not exceed fifty percent (50%) of any fee Developer charges hotel guests for the shuttle service. (If Developer does not charge hotel guests for the shuttle service, then Developer shall not charge Non-Hotel Shuttle Passengers for the shuttle service.) Developer shall establish a process for informing Non-Hotel Shuttle Passengers of shuttle schedules and the opportunity to reserve space in the shuttles, including, but not limited to, information on the Project's website(s), on-line reservations, and by posting signs with lettering in 48-point type (or larger) in prominent locations in the common areas of the Project.

5.1.3 Meeting Rooms. Developer shall allow City and Cupertino Public Schools to use up to 100% of the Project's meeting rooms on a complimentary basis for official City business purposes and for educational purposes ("**Meeting Room Benefit**"). The City/School shall request reservations for the Meeting Room Benefit at least fifteen (15) days in advance of any proposed use. The Meeting Room Benefit shall be limited to twelve (12) days

per year. Each day of a multiple-day event shall be considered a separate day for purposes of calculating the 12-day per year limit. Unused days from one calendar year shall not be carried over to the following year. Such use shall be subject to availability, but an existing City/School reservation cannot be canceled in favor of a paying user within fifteen (15) days before the City/School event. Developer shall provide complimentary utilities and audio-visual services for the City/School event. Developer shall make catering services for such uses available at a twenty-five percent (25%) discount from regular charges (provided, however, that to the extent the discount results in a charge less than the actual costs of the catering services, user shall be required to pay the actual costs), but the user will not be required to use the Project's catering services. The City/School user may incorporate the Project's logo and photos of the Project interior and exterior in promotional materials for the event. The Project shall provide marquees or other signs in the common areas of the Project identifying the event and directing persons to the location of the event.

5.1.4 Rooftop Amenity. The Project shall include an enclosed publicly accessible rooftop amenity ("**Rooftop Amenity**"), including but not limited to outdoor deck seating, bar, or restaurant, not to exceed the height of any rooftop mechanical equipment enclosure, for as long as the Project, all or in part, is in operation as a hotel. The Rooftop Amenity will likely be used for weddings, community events, birthday parties, graduations, baptisms, company events, or other types of events ("Events"). The Rooftop Amenity will be closed to the general public during preparation for and during Events. At all other times, seven days per week except holidays, the Rooftop Amenity shall be open to the public for lunch between 11:30 am or other time based on demand and close at an appropriate time in the afternoon based on demand. The Rooftop Amenity shall be open to the public again at 5:30 pm and close at 10:00 pm or other time based on demand. Developer shall place advertisements in local media and post signs in the lobby of the Project notifying the public of the availability of the Rooftop Amenity and the hours of operation.

5.2 Transient Occupancy Tax Requirement. In consideration of the rights and benefits conferred by City to Developer under this Agreement, and in recognition that the transient occupancy tax ("**TOT**") to be generated by the hotel is a significant incentive for City to enter into this Agreement, any hotel or similar business operating on the Property shall comply with the provisions of California Revenue and Taxation Code section 7280, Municipal Code section 3.12 and any other applicable law (collectively, "**TOT Law**"), as they may change from time to time, so as to assure that the TOT may be collected from the rentor of a room at the hotel ("**TOT Requirement**"). Without limiting the foregoing, to the extent permitted by law Developer shall not allow any person to occupy a particular room for longer than thirty consecutive calendar days, counting portions of days as full days, and shall require any person desiring to stay longer to check out of the hotel and check back in to the hotel more than 24 hours after checking out, or otherwise as may be required by the TOT Law, so as to preserve the ability to collect the TOT from such persons. Developer shall collect the TOT from all rentors unless such rentor has been exempted by City and has documented such exemption as may be required by the TOT Law. Developer shall charge the TOT at the rate adopted by City, as it may change from time to time, and remit the TOT to City as required by City regulations. If despite the prohibition on rentals of more than thirty (30) any person's stay, for any reason, extends beyond the time allowed under the TOT Law for collection of TOT, so that Developer may no longer collect TOT for the additional days, Developer shall pay City an amount equivalent to the

TOT that otherwise might have been collected (the "**TOT In-lieu Payment**"), remitted along with TOT collected.

5.3 Upscale Hotel. Developer has represented to City that the Project will provide a facility described as an "upper upscale boutique hotel", which City interprets in part to mean that the hotel will charge higher rates and will provide better amenities than most hotels, which in turn means that the hotel will generate more TOT and add to Cupertino's prestige. City has relied on this characterization and benefits as an incentive to enter into this Agreement. Therefore, any hotel or similar business operating on the Property shall meet or exceed the standards to qualify as "Upper Upscale" as promulgated by Smith Travel Research ("**STR**"), or if the STR rating system no longer is available then another similar source of hotel rating mutually acceptable to the Parties (the "**Minimum Hotel Standard**").

5.4 City of Cupertino Business License. Developer, at its expense, shall obtain and maintain a City of Cupertino business license at all times and shall include a provision in all general contractor agreements for the Project requiring each such general contractor to obtain and maintain a City of Cupertino business license during performance of construction work ("**Business License Requirement**").

5.5 Sales Tax Point of Sale Designation. Developer shall use good faith, diligent efforts to the extent allowed by law to require all persons and entities providing bulk lumber, concrete, structural steel, and pre-fabricated building components, such as roof trusses, to be used in connection with the construction and development of, or incorporated into, the Project, to (a) obtain a use tax direct payment permit; (b) elect to obtain a subcontractor permit for the job site of a contract valued at Five Million Dollars ($5,000,000) or more; or (c) otherwise designate the Property as the place of use of material incorporated in the Project to have the local portion of the sales and use tax distributed directly to City instead of through the county-wide pool. Developer shall instruct its general contractor(s) for the Project to, and shall cause such general contractor(s) to instruct its/their subcontractors to, cooperate with City to ensure that the local sales/use tax derived from construction of the Project is allocated to City to the fullest extent possible. To assist City in its efforts to ensure that such local sales/use tax is so allocated to City, Developer shall on an annual basis, or more frequently upon City's request, provide City with such information as shall be reasonably requested by City regarding subcontractors working on the Project with contracts in excess of the amount set forth above, including a description of all applicable work and materials and the dollar value of such subcontracts, and, if applicable, evidence of their designation, such as approvals or applications for the direct payment permit, of City as the place of use of such work and materials. City may use such information to contact each subcontractor who may qualify for local allocation of use taxes to City.

5.6 Waiver of Certain Rights in Connection With Public Benefit Covenants. The Parties acknowledge that some of the Public Benefit Covenants offered by Developer in this Section 5 may exceed those necessary to address impacts of development of the Project, and that absent this Agreement, such "non-nexus" Public Benefit Covenants may not legally be required of Developer or imposed as conditions of the Project Approvals or Subsequent Approvals. Developer understands and acknowledges the foregoing, and further acknowledges that, but for its willingness to enter into this Agreement to confirm its willingness and obligation to provide the Public Benefit Covenants, the City would not have approved the Project. In addition,

Developer acknowledges that the provisions in this Agreement for all Exactions and payment by Developer of Impact Fees constitute a material inducement to the City in its decision to enter into this Agreement. On the basis of the foregoing, Developer waives any right under Laws to object to, challenge, or contest the requirements in this Agreement for the provision of the Public Benefit Covenants, including applicable provisions of Government Code sections 66020-66025, as the same may hereafter be amended from time to time, and the provisions of Government Code sections 65958 and 65959 as the same may hereafter be amended from time to time. In addition, Developer waives such rights in connection with the imposition of conditions of approval and other obligations as part of Project Approvals and Subsequent Approvals under this Agreement, to the extent that such conditions and obligations are not inconsistent with the provisions of this Agreement and the Applicable City Regulations. The provisions of this Section 5.7 shall survive the expiration of the Term or Termination of this Agreement as Surviving Provisions and shall remain in effect until performance by the Parties of their obligations under this Section 5 in full.

5.7 Ongoing Obligations. The public benefit obligations required in this Article 5 ("**Public Benefit Covenants**") are ongoing obligations that shall survive and continue in effect after the expiration of the Term of this Agreement and after Termination of this Agreement, shall be binding on the successors and assigns of the Parties, and the burdens and benefits of this Agreement shall inure to all successors in interest to the Parties in accordance with Government Code section 65868.5 and the following criteria.

5.7.1 No later than 10 days after the Effective Date, the Clerk of the City Council shall record a copy of this Agreement in the Official Records of the County of Santa Clara.

5.7.2 This Agreement shall be subordinate only to the **Accepted Conditions of Title** listed in **Exhibit E**. This Agreement shall not be subordinate to any Mortgage.

5.7.3 It is the intent of the Parties that each and all of the Public Benefit Covenants in this Article 5 are for the mutual benefit of the owner of the Property and adjoining City property and every portion of each thereof (the Property and adjoining City property collectively, the "Parcels."). Each and all of the covenants, obligations, conditions, and restrictions set forth in this Article 5 touches and concerns and shall affect, relate to, and run with the land of each of the Parcels and every portion of each thereof, and shall apply to and bind the respective successor owners of each of the Parcels and every portion of each thereof, for the benefit of each of the other Parcels and every portion of each thereof (except to the extent otherwise stated herein). Each and all of the covenants, obligations, conditions, and restrictions set forth in this Article 5 are imposed on each portion of and interest in each of the Parcels as mutual equitable servitudes in favor of each and all other portions of and interests in the Parcels and constitute covenants running with the land pursuant to applicable law, including, without limitation, section 65868.5 of the Government Code and section 1468 of the Civil Code of the State of California.

5.7.4 The Shuttle Service, Meeting Room Benefit, Rooftop Amenity, and Minimum Hotel Standard shall survive, continue, and remain in effect so long as and whenever a hotel or similar type of business operates on the Property.

5.7.5 The City of Cupertino Business License requirement and Sales Tax Point of Sale Designation shall survive, continue, and remain in effect so long as and whenever a hotel or similar type of business operates on the Property.

ARTICLE 6
ANNUAL REVIEW

6.1 Annual Review.

6.1.1 Purpose. As required by California Government Code section 65865.1 and Municipal Code section 19.144.060(H), City and Developer shall review this Agreement and all actions taken pursuant to the terms of this Agreement with respect to the development of the Project every twelve (12) months to determine good faith compliance with this Agreement. Specifically, City's annual review shall be conducted for the purposes of determining compliance by Developer with its obligations under this Agreement and document the status of Project development. Annual review shall continue after the Term, so City may determine compliance with the ongoing public benefit obligations described in Article 5.

6.1.2 Conduct of Annual Review. The annual review shall be conducted as provided in this Section 6.1.2. By December 1st of each year, Developer shall provide documentation of its good faith substantial compliance with this Agreement and the terms of the Public Benefits Covenants during the previous calendar year, including a completed Annual Review Form in the form provided in **Exhibit F** and such other information as may reasonably be requested by the City Manager. If the City Manager finds good faith compliance by Developer with the terms of this Agreement and the Public Benefit Covenants, Developer shall be notified in writing and the review for that period shall be concluded. If the City Manager is not satisfied that Developer is performing in accordance with the terms and conditions of this Agreement or one or more of the Public Benefit Covenants, the City Manager shall prepare a written report specifying why the Developer may not be in good faith compliance, refer the matter to the City Council, and notify Developer in writing at least fifteen (15) business days in advance of the time at which the matter will be considered by the City Council. This notice shall include the time and place of the City Council's public hearing to evaluate good faith compliance with this Agreement and the Public Benefit Covenants, a copy of the City Manager's report and recommendations, if any, and any other information reasonably necessary to inform Developer of the nature of the proceeding. The City Council shall conduct a public hearing at which Developer must submit evidence that it has complied in good faith with the terms and conditions of this Agreement and the Public Benefit Covenants. Developer shall be given an opportunity to be heard at the hearing. The findings of the City Council on whether Developer has complied in good faith for the period under review shall be based upon substantial evidence in the record. If the City Council determines, based upon substantial evidence, that Developer has complied in good faith with the terms and conditions of this Agreement and the Public Benefit Covenants, the review for that period shall be concluded. If the City Council determines, based upon substantial evidence in the record, that Developer has not complied in good faith with one or more terms and conditions of this Agreement or the Public Benefit Covenants, or there are significant questions as to whether Developer has substantially complied in good faith, the City Council, at its option, may continue the hearing and may notify Developer of the City's intent to meet and confer with Developer within thirty (30) days after such determination, prior to taking further action.

Following such meeting, the City Council shall resume the hearing to further consider the matter and make a determination regarding Developer's good faith compliance. In the event the City Council determines Developer is not in good faith compliance with the terms and conditions of this Agreement, City may give the Developer a written Notice of Breach, in which case the provisions of Section 12.1, below, shall apply.

6.1.3 Failure to Conduct Annual Review. Failure of City to conduct an annual review shall not constitute a waiver by the City of its rights to otherwise enforce the provisions of this Agreement, nor shall Developer have or assert any defense to such enforcement by reason of any such failure to conduct an annual review.

6.1.4 Certificate of Compliance. If, at the conclusion of the annual review described in Section 6.1.2, the Developer is found to be in good faith compliance with this Agreement and the Public Benefits Covenants, City shall, upon request by Developer, issue a Certificate of Compliance ("**Certificate**") to Developer stating that after the most recent annual review and based upon the information actually known to an appropriate official of City specified in such Certificate that: (a) this Agreement remains in effect (for the remainder of the Term), and (b) the Developer is not in Default of this Agreement or the Public Benefits Covenants. The Certificate shall be in a recordable form, shall contain information necessary to communicate constructive record notice of the finding of compliance, and shall state the anticipated date of commencement of the next annual review. Developer may record the Certificate at its sole cost and expense without cost or expense to City.

ARTICLE 7
COOPERATION AND IMPLEMENTATION

7.1 Subsequent Approvals. Certain subsequent land use approvals, entitlements, and permits other than the Existing Approvals, will be necessary or desirable for implementation of the Project ("**Subsequent Approvals**"). The Subsequent Approvals may include, without limitation, the following: amendments of the Existing Approvals, demolition and grading permits, excavation permits, building permits, design review permits, sign permits, sewer and water connection permits, encroachment permits, certificates of occupancy, lot line adjustments or lot merger, site plans, development plans, land use plans, building plans and specifications, and any amendments to, or repealing of, any of the foregoing. Except as otherwise expressly provided herein, the City shall not impose requirements or conditions upon the development and construction of the Project that are inconsistent with the Existing Approvals, including the terms and conditions of this Agreement, and any Subsequent Approvals as may be obtained from time to time.

7.2 Scope of Review of Subsequent Approvals. City, in approving the Existing Approvals and vesting the Project through this Agreement, is limiting its future discretion with respect to the Project and Subsequent Approvals to determining whether the application for a Subsequent Approval is consistent with and meets the criteria set forth in the Applicable City Regulations, Existing Approvals, and where applicable, other Project Approvals previously granted. Subject to the foregoing, City reserves discretion to impose appropriate Exactions in connection with issuance of Subsequent Approvals, as necessary to bring the Subsequent Approval into compliance with Applicable Law and Existing Approvals. At such time as any

Subsequent Approval applicable to the Property is approved by City, then such Subsequent Approval shall become subject to all the terms and conditions of this Agreement applicable to Project Approvals and shall be automatically vested and treated as a Project Approval.

7.3 Processing Applications for Subsequent Approvals.

7.3.1 Timely Submittals by Developer. Developer acknowledges that City cannot begin processing applications for Subsequent Approvals until Developer submits complete applications on a timely basis. Developer shall use diligent good faith efforts to (a) provide to City in a timely manner any and all documents, applications, plans, and other information necessary for City to carry out its obligations hereunder; and (b) cause Developer's planners, engineers, and all other consultants to provide to City in a timely manner all such documents, applications, plans, and other materials required under Applicable Law. It is the express intent of Developer and City to cooperate and diligently work to obtain any and all Subsequent Approvals.

7.3.2 Timely Processing by City. Upon submission by Developer of all appropriate applications and Processing Fees for any pending Subsequent Approval, City shall, to the full extent allowed by Applicable Law, promptly and diligently, subject to City ordinances, policies, and procedures regarding hiring and contracting, commence and complete all steps necessary to act on Developer's currently pending Subsequent Approval applications including: (a) providing at Developer's expense and subject to Developer's request and prior approval, reasonable overtime staff assistance, additional staff and/or staff consultants for concurrent, expedited planning and processing of each pending Subsequent Approval application; (b) if legally required, providing notice and holding public hearings; and (c) acting on any such pending Subsequent Approval application. To the greatest extent permitted by the Existing Approvals or Applicable Law, City Staff will process Subsequent Approvals administratively. Developer's obligation to pay for the processing of Subsequent Approvals, including staff time, materials, and third-party consultants, shall be based on the City's actual out-of-pocket costs, plus a fifteen percent (15%) markup of consultant costs, per existing policy, to cover City's costs of managing such third-party consultants and administering their contracts.

7.3.3 CEQA. In connection with its consideration and approval of Existing Approvals, the City prepared and adopted the MND, which evaluated the environmental effects of the Existing Approvals for the Project and has adopted mitigation measures to reduce the significant environmental effects therefrom. The Parties acknowledge that certain Subsequent Approvals may legally require additional analysis under CEQA. Nothing contained in this Agreement is intended to prevent or limit City from complying with CEQA. In acting on Subsequent Approvals, City will rely on the MND to the fullest extent permissible by CEQA as determined by City in the exercise of its independent judgment. If additional environmental review is required for a Subsequent Approval, City shall limit such additional review to the scope of analysis mandated by CEQA and shall not adopt new mitigation measures except as legally required, all as determined by City as the lead agency under CEQA in the exercise of its independent judgment.

7.4 Other Agency Subsequent Approvals; Authority of City. City shall cooperate with Developer, to the extent appropriate and as permitted by Applicable Law, in Developer's

efforts to obtain, as may be required, Other Agency Subsequent Approvals. Notwithstanding the issuance to Developer of Other Agency Subsequent Approvals, Developer agrees that City shall have the right to review, modify, approve and/or reject any and all submissions subject to the Other Agency Subsequent Approvals which, but for the authority of the other governmental or quasi-governmental entities issuing the Other Agency Subsequent Approvals, would otherwise require City approval. Developer agrees that City may review, modify, approve, and/or reject any such materials or applications to ensure consistency with this Agreement and the Project Approvals and Developer shall incorporate any and all changes required by City prior to submitting such materials and applications to the other governmental or quasi-governmental entities for review and/or approval.

ARTICLE 8
AMENDMENT OF AGREEMENT AND PROJECT APPROVALS

8.1 Amendment by Written Consent. Except as otherwise expressly provided herein (including Section 6.1 relating to City's annual review and Section 12.3 relating to termination in the event of a breach), this Agreement may be terminated, modified, or amended only by mutual written consent of the Parties or their successors in interest or assignees and in accordance with the provisions of Government Code sections 65967, 65867.5 and 65868.

8.2 Project Approval Amendments. To the extent permitted by Applicable Law, Project Approvals may, from time to time, be amended in the following manner:

8.2.1 Administrative Project Approval Amendments. Upon Developer's written request for an amendment or modification to the Project Approvals or Subsequent Approvals, the City Manager shall determine: (i) whether the requested amendment or modification is minor when considered in light of the Project as a whole; and (ii) whether the requested amendment or modification is consistent with this Agreement and Applicable Law. If the City Manager or his/her designee finds, in his or her sole discretion, that the proposed amendment or modification is minor, consistent with this Agreement and Applicable Law, and will result in no new significant impacts not addressed and mitigated in the MND, the amendment or modification shall be determined to be an "**Administrative Project Approval Amendment**" and shall not require an amendment to this Agreement. Upon the City Manager's approval, any Administrative Project Amendment shall be automatically incorporated into the applicable Project Approvals and this Agreement. Without limiting the foregoing, and by way of example, after City approval of the Existing Approvals, Developer requests for lot line adjustments, minor changes in improvement plans, minor changes in land uses involving minimal acreage, minor alterations in vehicle circulation patterns or vehicle access points, minor changes in the amount of parking and parking layout, changes in pathway alignments, substitutions of comparable landscaping for any landscaping shown on any final development plan or landscape plan, variations in the location of structures that do not substantially alter the infrastructure connections, facilities that do not substantially alter the design concepts of the Project, and minor adjustments to the Site Map or Property Description may be treated as Administrative Project Amendments.

8.2.2 Major Project Amendments. Any amendment to the Project Approvals which the City Manager determines is not an Administrative Project Approval Amendment as set

forth above in Section 8.2.1 shall be deemed a "**Major Project Amendment**." A Major Project Amendment shall be processed in the same manner and require the same approvals as the original Project Approval, including, where so required, giving of notice and a public hearing before the Planning Commission and City Council in accordance with Applicable Law. The City Manager or his or her designee shall have the authority to determine if an amendment is a Major Project Amendment subject to this Section 8.2.2 or an Administrative Project Approval Amendment subject to Section 8.2.1.

8.3 Amendment of this Agreement. This Agreement may be amended from time to time, in whole or in part, by mutual written consent of the Parties or their successors in interest, as follows:

8.3.1 Administrative Agreement Amendments. Any amendment to this Agreement which does not substantially affect (a) the Term; (b) permitted uses of the Property; (c) provisions for the reservation or dedication of land; (d) conditions, terms, restrictions or requirements for Project Approvals or Subsequent Approvals; (e) increases in the density or intensity of the use of the Property or the maximum height or size of proposed buildings; (f) monetary payments by Developer; or (g) the provision of Public Benefit Covenants described in Article 5, shall be deemed an "**Administrative Agreement Amendment**" and the City Manager or his or her designee, except to the extent otherwise required by Applicable Law, may approve the Administrative Agreement Amendment without notice and public hearing.

8.3.2 Major Agreement Amendments. Any amendment to this Agreement which is determined not to be an Administrative Agreement Amendment as set forth above in Section 8.3.1 shall be deemed a "**Major Agreement Amendment**" and shall require giving of notice and a public hearing before the Planning Commission and City Council in accordance with Applicable Law. The City Manager or his or her designee shall have the authority in her or her sole discretion to determine if an amendment is a Major Agreement Amendment subject to this Section 8.3.2 or an Administrative Agreement Amendment subject to Section 8.3.1.

8.3.3 Requirement for Writing. No modification, amendment or other change to this Agreement or any provision hereof shall be effective for any purpose unless specifically set forth in a writing which refers expressly to this Agreement and is signed by duly authorized representatives of both Parties or their successors in interest. A copy of any change shall be provided to the City Council within thirty (30) days of its execution.

8.4 Amendments to Development Agreement Statute. This Agreement has been entered into in reliance upon the provisions of the Development Agreement Statute as those provisions existed as of the date of execution of this Agreement. No amendment or addition to those provisions which would materially affect the interpretation or enforceability of this Agreement shall be applicable to this Agreement, unless such amendment or addition is specifically required by the California State Legislature or is mandated by a court of competent jurisdiction. If such amendment or change is permissive (as opposed to mandatory), this Agreement shall not be affected by same unless the Parties mutually agree in writing to amend this Agreement to permit such applicability.

ARTICLE 9
INSURANCE, INDEMNITY AND COOPERATION IN THE EVENT OF LEGAL CHALLENGE

9.1 Insurance Requirements. Prior to commencement of construction activities (including demolition) and through completion of all construction activities for the Project, including but not limited to a final certificate of occupancy, Developer shall procure and maintain, or cause its contractor(s) to procure and maintain, a commercial general liability policy in an amount not less than Five Million Dollars ($5,000,000) combined single limit, including contractual liability together with a comprehensive automobile liability policy in the amount of Two Million Dollars ($2,000,000), combined single limit. Such policy or policies shall be written on an occurrence form. Developer's insurance shall be placed with insurers with a current A.M. Best's rating of no less than A-:VII or a rating otherwise approved by City in its sole discretion. Developer shall furnish at City's request appropriate certificate(s) of insurance evidencing the insurance coverage required hereunder, and City Parties shall be named as additional insured parties in such policies. The certificate of insurance shall contain a statement of obligation on the part of the carrier to notify City of any material change, cancellation or termination of the coverage at least thirty (30) days in advance of the effective date of any such material change, cancellation or termination (ten (10) days advance notice in the case of cancellation for nonpayment of premiums) where the insurance carrier provides such notice to Developer. Coverage provided hereunder by Developer shall be primary insurance and shall not be contributing with any insurance, self-insurance or joint self-insurance maintained by City, and the policy shall contain such an endorsement. The insurance policy or the endorsement shall contain a waiver of subrogation for the benefit of City. The insurance policy shall not contain an exclusion for inverse condemnation.

9.2 Indemnity and Hold Harmless. Developer shall indemnify, defend (with counsel reasonably acceptable to City) and hold harmless City Parties from and against any and all Claims, including Claims for any bodily injury, death, or property damage, resulting directly or indirectly from the development or construction of the Project and, if applicable from compliance with the terms of this Agreement, and/or from any other acts or omissions of Developer under this Agreement, whether such acts or omissions are by Developer or any of Developer's contractors, subcontractors, agents or employees; provided that Developer's obligation to indemnify and hold harmless (but not Developer's duty to defend) may be limited to the extent such Claims are found to arise solely from the active negligence or willful misconduct of any City Party. This Section 9.2 includes any and all present and future Claims arising out of or in any way connected with Developer's or its contractors' obligations to comply with any applicable State Labor Code requirements and implementing regulations of the Department of Industrial Relations pertaining to "public works" (collectively, "**Prevailing Wage Laws**"), including all claims that may be made by contractors, subcontractors, or other third party claimants under Labor Code sections 1726 and 1781. Developer's obligations under this Section 9.2 shall survive expiration or earlier termination of this Agreement.

9.3 Defense and Cooperation in the Event of a Litigation Challenge. City and Developer shall cooperate in the defense of any court action or proceeding instituted by a third party or other governmental entity or official challenging the validity of any provision of this Agreement, or the Project Approvals ("**Litigation Challenge**"), and the Parties shall keep each

other informed of all developments relating to such defense, subject only to confidentiality requirements that may prevent the communication of such information. To the extent Developer desires to contest or defend such Litigation Challenge, (a) Developer shall take the lead role defending such Litigation Challenge and may, in its sole discretion, elect to be represented by the legal counsel of its choice, with the costs of such representation, including Developer's administrative, legal and court costs, paid solely by Developer; (b) City may, in its sole discretion, elect to be separately represented by the legal counsel of its choice in any such action or proceeding with the costs of such representation including City's administrative, legal, and court costs and City Attorney oversight expenses, paid by Developer; and (c) Developer shall indemnify, defend, and hold harmless City Parties from and against any damages, attorneys' fees or cost awards, including attorneys' fees awarded under Code of Civil Procedure section 1021.5, assessed or awarded against City by way of judgment, settlement, or stipulation. Any proposed settlement of a Litigation Challenge shall be subject to City's and Developer's approval not to be unreasonably withheld, conditioned, or delayed. If the terms of the proposed settlement would constitute an amendment or modification of this Agreement or any Project Approvals, the settlement shall not become effective unless such amendment or modification is approved by City and Developer in accordance with Applicable Law, and City reserves its full legislative discretion with respect to any such City approval. If Developer opts not to contest or defend such Litigation Challenge, City shall have no obligation to do so. Developer shall reimburse City for its costs incurred in connection with the Litigation Challenge within ten (10) business days following City's written demand therefor, which may be made from time to time during such litigation. Developer's obligations under this Section 9.3 shall survive expiration or earlier termination of this Agreement.

ARTICLE 10
ASSIGNMENT, TRANSFER AND NOTICE

10.1 Assignment. A material consideration and incentive for City agreeing to enter this Agreement are those Public Benefit Covenants described in Article 5 that are dependent on the Property being developed and operated on a long-term basis as an "Upper Upscale" hotel as described in Section 5.3. For that reason, certain restrictions on the right of Developer to assign or transfer its interest under this Agreement with respect to the Property during the Term are necessary to assure the achievement of the goals, objectives, and public benefits of the Project and this Agreement. Developer agrees to and accepts the restrictions set forth in this Section 10.1 as reasonable and as a material inducement for City to enter into this Agreement.

10.1.1 Assignment Criteria. Developer shall have the right to sell or transfer its fee interest, or ground lease its interests in the Property, or convey or assign its right to operate a hotel or similar business on the Property, or enter into a contract for operation of a hotel or similar business, to any person, partnership, joint venture, firm, company, corporation, or other entity (any of the foregoing, an "**Assignee**") subject to the reasonable satisfaction and written consent of the City Manager, which shall not be unreasonably withheld, delayed, or conditioned, if Developer or the Assignee satisfies the following conditions:

10.1.1.1 The proposed Assignee provides acceptable and verifiable documentation that it is in the business of developing, owning, and/or operating "Upper Upscale" hotels as described in Section 5.3 and has substantial experience in such hotel

operations, such experience being at a minimum developing, owning, and/or operating two or more such hotels within the preceding ten years;

10.1.1.2 The proposed Assignee provides acceptable and verifiable documentation that it has sufficient financial resources to undertake development and/or operation of the Property as an "Upper Upscale" hotel and perform the obligations of Developer under this Agreement, including providing the Public Benefit Covenants;

10.1.1.3 Developer is not in Default under this Agreement or under any Public Benefit Covenant, or the Assignee agrees to cure any Default promptly after the assignment;

10.1.2 Affiliate Assignment. Notwithstanding the foregoing, Developer may assign its rights under this Agreement without the consent of City (but after providing City the notice and Assignee's assumption agreement pursuant to Section 10.1.3) to any corporation, limited liability company, partnership, or other entity which controls, is controlled by, or is under common control with Developer. "Control" for purposes of this section 10.1.2 means effective management and control of the other entity, subject only to major events requiring the consent or approval of the other owners of such entity ("**Affiliated Party**").

10.1.3 Notice. At least thirty (30) days prior to Developer's desired assignment date, Developer shall provide City with written notice of any proposed transfer or assignment of Developer's rights or obligations hereunder (each, an "**Assignment**") together with such information needed to document satisfaction of the conditions in Section 10.1 required for an Assignment, and request City's consent to such Assignment as provided herein. Each such notice shall be accompanied by evidence of Assignee's assumption of Developer's obligations hereunder in the form of **Exhibit G**, which shall be recorded in the Official Records of Santa Clara County (assuming City approves the Assignment) concurrent with transfer to the Assignee. City shall provide its written consent or other response within thirty (30) days after City's receipt of the notice and required documentation.

10.1.4 Payment of Costs. Developer shall pay the actual costs borne by City in connection with its review of the proposed Assignment, including costs of attorney review.

10.2 Release of Transferring Developer. Except with respect to a permitted transfer and assignment to an Affiliated Party, notwithstanding any sale, transfer, or assignment of the Property, Developer shall continue to be obligated under this Agreement as to all of the Property so transferred unless City has consented to the assignment as provided above and receives and records Assignee's assumption agreement.

10.3 Assignment to Financial Institutions or Mortgagee.

10.3.1 Notwithstanding any other provision of this Agreement, Developer may assign all or any part of its rights and duties under this Agreement to any financial institution or Mortgagee from which Developer has borrowed funds for use in constructing the Project or otherwise developing the Property. Neither such assignment nor the financing shall require consent from City; provided, City shall be given notice of such intended assignment at least ten business days beforehand, and before such assignment may take effect such financial institution

or Mortgagee shall give City confirmation acknowledging and agreeing that its interest in the Property is subject to this Agreement and, both during and after the Term, to the Public Benefit Covenants. Developer shall provide a copy of the deed of trust to City within ten (10) business days following execution thereof. A conditional assignment or other transfer by a financial institution or Mortgagee back to Developer as part of any financing transaction shall not require City's consent.

10.3.2 Any person acquiring title or taking possession of the Property from a financial institution or Mortgagee following a foreclosure or deed in lieu of foreclosure must satisfy the criteria for an Assignee in Section 10.1.1, with documentation of such satisfaction provided to City before transfer of title or possession.

10.4 Successive Assignment. In the event there is more than one Assignment under the provisions of this Article 10, the provisions of this Article 10 shall apply to each successive Assignment and Assignee.

ARTICLE 11
MORTGAGEE PROTECTION

11.1 Mortgagee Protection. Neither entering into this Agreement nor a breach hereof shall defeat, render invalid, diminish, or impair the lien of any mortgage, deed of trust, security agreement, and other like security instrument encumbering all or any portion of the Property or any of Developer's rights under this Agreement ("**Mortgage**") made in good faith and for value. Nothing in this Agreement shall prevent or limit Developer, at its sole discretion, from granting one or more Mortgages encumbering all or a portion of Developer's interest in the Property or portion thereof or improvements thereon as security for one or more loans or other financing, but all of the terms and conditions contained in this Agreement shall be binding upon and effective against and shall run to the benefit of a Mortgagee who acquires title or possession to the Property, or any portion thereof, by foreclosure, trustee's sale, deed in lieu of foreclosure, or otherwise. Any Mortgage shall be subject and subordinate to this Agreement even if this Agreement has not yet been recorded. Developer's failure to provide the City with a copy of the Mortgage within ten (10) days after its recording in the official records of Santa Clara County and a copy of a recorded document or documents demonstrating that the Mortgage has been subordinated to this Agreement shall be a Default; provided, however, that Developer's failure to provide such document shall not affect any Mortgage, including without limitation, the validity, priority or enforceability of such Mortgage.

11.2 Mortgagee Not Obligated. No Mortgagee (including one who acquires title or possession to the Property, or any portion thereof, by foreclosure, trustee's sale, deed in lieu of foreclosure, or otherwise) shall have any obligation to construct or complete construction of improvements, or to guarantee such construction or completion; provided, however, that a Mortgagee shall not be entitled to devote the Property to any use except in full compliance with this Agreement, the Project Approvals, and Subsequent Approvals nor to construct any improvements thereon or institute any uses other than those uses or improvements provided for or authorized by this Agreement, or otherwise under the Project Approvals and Subsequent Approvals. Except as otherwise provided in this Section 11.2, all of the terms and conditions contained in this Agreement, the other Project Approvals, and Subsequent Approvals shall be

binding upon and effective against and shall run to the benefit of any person or entity, including any Mortgagee, or its transferee, who acquires title or possession to the Property, or any portion thereof.

11.3 Notice of Default to Mortgagee. If City receives a notice from a Mortgagee requesting a copy of any Notice of Default given Developer hereunder and specifying the address for service thereof, then City agrees to use its diligent, good faith efforts to deliver to such Mortgagee, concurrently with service thereon to Developer, any Notice of Default given to Developer. Each Mortgagee shall have the right during the same period available to Developer 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 of Default. If a Mortgagee is required to obtain possession in order to cure any Default, the time to cure shall be tolled so long as the Mortgagee is attempting to obtain possession, including by appointment of a receiver or foreclosure, but in no event may this period exceed 120 days after the date City delivers the Notice of Default to Developer.

11.4 No Supersedure. Nothing in this Article 11 shall be deemed to supersede or release a Mortgagee or modify a Mortgagee's obligations under any subdivision or public improvement agreement or other obligation incurred with respect to the Project outside this Agreement, nor shall any provision of this Article 11 constitute an obligation of City to such Mortgagee, except as to the notice requirements of Section 11.3.

11.5 Mortgagee Requested Amendments. The Parties agree that they will make reasonable amendments to this Agreement, at the expense of Developer, to meet the requirements of any lender or Mortgagee for the Project. For the purposes of this Section 11.5, a reasonable amendment is one that does not relieve Developer of any of its material obligations under this Agreement or impair the ability of the City to enforce the terms of this Agreement. The Parties further agree that any reasonable amendments to the Mortgagee protection provisions of this Agreement required to conform to current industry practice, as determined by City, would qualify as an Administrative Agreement Amendment and may be processed in accordance with the provisions of Article 8 of this Agreement.

ARTICLE 12
DEFAULT; REMEDIES; TERMINATION

12.1 Breach and Default. Subject to a Permitted Delay in Section 13.4 or a mutual extension pursuant to Section 13.11, except as otherwise provided by this Agreement, breach of, failure, or unreasonable delay by either Party to perform any term or condition of this Agreement shall constitute a "**Default**." In the event of any alleged Default of any term, condition, or obligation of this Agreement, the Party alleging such Default shall give the defaulting Party notice in writing specifying the nature of the alleged Default and the manner in which the Default may be satisfactorily cured ("**Notice of Breach**"). The defaulting Party shall cure the Default within thirty (30) days following receipt of the Notice of Breach, provided, however, if the nature of the alleged Default is non-monetary and such that it cannot reasonably be cured within such thirty (30) day period, then the commencement of the cure within such time period, and the diligent prosecution to completion of the cure thereafter at the earliest practicable date, shall be deemed to be a cure, provided that if the cure is not so diligently prosecuted to

completion, then no additional cure period shall be required to be provided. If the alleged failure is cured within the time provided above, then no Default shall exist, and the noticing Party shall take no further action to exercise any remedies available hereunder. If the alleged failure is not cured, then a Default shall exist under this Agreement and the non-defaulting Party may exercise any of the remedies available under this Agreement.

12.2 Withholding of Permits. In the event of a Default by Developer, or following City sending a Notice of Breach to Developer pursuant to Section 12.1 above and during the cure period provided therein, upon a finding by the City Manager that Developer is in breach, City shall have the right to refuse to issue any permit or other Subsequent Approval to which Developer would otherwise have been entitled pursuant to this Agreement until such Default or breach is cured. This provision is in addition to and shall not limit any actions that City may take to enforce the conditions of the Project Approvals.

12.3 Termination. In the event of a Default by a Party, the non-defaulting Party shall have the right to terminate this Agreement upon giving notice of intent to terminate pursuant to Government Code section 65868 and regulations of City implementing such section ("**Termination**"). Following notice of intent to terminate, the matter shall be scheduled for consideration and review in the manner set forth in Government Code section 65867 and City regulations implementing said section. Following consideration of the evidence presented in said review before the City Council, a Party alleging Default by the other Party may give written notice of Termination of this Agreement to the other Party. Termination of this Agreement shall be subject to the provisions of Section 12.9 hereof.

12.4 Specific Performance for Violation of a Condition. If City issues a Project Approval pursuant to this Agreement in reliance upon a specified condition being satisfied by Developer in the future, and if Developer then fails to satisfy such condition, City shall be entitled to an award of specific performance for the purpose of causing Developer to satisfy such condition.

12.5 Legal Actions.

12.5.1 Institution of Legal or Equitable Actions. In addition to any other rights or remedies, a Party may institute legal or equitable action for mandamus, specific performance, or other injunctive or declaratory relief to cure, correct, or remedy any Default, to enforce any covenants or agreements herein, to enjoin any threatened or attempted violation thereof, or to obtain any other remedies consistent with the purpose and terms of this Agreement. Any such legal action shall be brought in the Superior Court for Santa Clara County, California, except for actions that include claims in which a Federal District Court has original jurisdiction, in which case the Northern District of the State of California shall be the proper venue.

12.5.2 Acceptance of Service of Process. If any legal action is commenced by Developer against City, service of process on City shall be made by personal service upon the City Clerk of City or in such other manner as may be provided by law. If any legal action is commenced by City against Developer, service of process on Developer shall be made by personal service upon Developer's General Counsel, Developer's registered agent for service of process, or in such other manner as may be provided by law.

12.6 Rights and Remedies Are Cumulative. The rights and remedies of the Parties are cumulative, and the exercise by a Party of one or more of such rights or remedies shall not preclude the exercise by it, at the same or different times, of any other rights or remedies for the same Default or any other Default by the other Party, except as otherwise expressly provided herein.

12.7 No Damages. In no event shall a Party, or its boards, commissions, officers, agents, or employees, be liable in damages for any Default under this Agreement, it being expressly understood and agreed that the sole legal remedy available to a Party for a breach or violation of this Agreement by the other Party shall be an action in mandamus, specific performance, or other injunctive or declaratory relief to enforce the provisions of this Agreement by the other Party, or to terminate this Agreement. This limitation on damages shall not preclude actions by a Party to enforce payments of monies or fees or the performance of obligations requiring an obligation of money from the other Party under the terms of this Agreement including, but not limited to, obligations to pay the Community Amenity Payment, Annual TMA Fee, attorneys' fees and obligations to advance monies or reimburse monies. In connection with the foregoing provisions, each Party acknowledges, warrants, and represents that it has been fully informed with respect to, and represented by counsel of such Party's choice in connection with, the rights and remedies of such Party hereunder and the waivers herein contained, and after such advice and consultation has presently and actually intended, with full knowledge of such Party's rights and remedies otherwise available at law or in equity, to waive and relinquish such rights and remedies to the extent specified herein, and to rely solely on the remedies provided for herein with respect to any breach of this Agreement by the other Party.

12.8 Resolution of Disputes. With regard to any dispute involving the Project, the resolution of which is not provided for by this Agreement or Applicable Law, a Party shall, at the request of another Party, meet with designated representatives of the requesting Party promptly following its request. The Parties to any such meetings shall attempt in good faith to resolve any such disputes. In the event the Parties are unable to resolve the issue and reach an agreement within thirty (30) days, either Party may initiate non-binding mediation of the dispute by submitting a request to the other Party. The Parties will select a mutually acceptable mediator with knowledge and experience in project development and construction issues of the type at issue, within fourteen (14) days, or if unable to agree on a mediator within said period, either party may submit the matter to mediation at JAMS or other mediation service mutually acceptable to the Parties in accordance with its then applicable rules and policies, with each Party being responsible for its own fees, costs, and expenses of any mediation, including fifty percent (50%) of the mediator's fees, costs, and expenses The Parties will take all practicable steps to complete any mediation within ninety (90) days. Nothing in this Section 12.8 shall in any way be interpreted as requiring that Developer or City reach agreement with regard to those matters being addressed, nor shall the outcome of these meetings be binding in any way on City or Developer unless expressly agreed to in writing by the Parties to such meetings.

12.9 Surviving Provisions. In the event of Termination of this Agreement, neither Party shall have any further rights or obligations hereunder, except for those obligations of Developer which by their terms survive expiration or Termination hereof, including but not limited to those obligations set forth in Article 5 and Sections 9.2 and 9.3 ("**Surviving Provisions**").

ARTICLE 13
GENERAL PROVISIONS

13.1 Condemnation. As used herein, "**Material Condemnation**" means a condemnation of all or a portion of the Property that will have the effect of materially impeding or preventing development of the Project in accordance with this Agreement and the Project Approvals. In the event of a Material Condemnation, Developer may (a) request City to amend this Agreement in accordance with the Development Agreement Statute and/or to amend the Project Approvals, which amendment shall not be unreasonably withheld; (b) decide, in its sole discretion, to challenge the condemnation; or (c) request that City agree to terminate this Agreement by mutual agreement, which agreement shall not be unreasonably withheld, by giving a written request for termination to City. If the condemnation is not a Material Condemnation, Developer shall have no right to request termination of this Agreement under this Section 13.1. Nothing in this Agreement shall be, or deemed to be, any waiver or release by Developer of any compensation or damages awarded pursuant to a Material Condemnation.

13.2 Covenants Binding on Successors and Assigns and Run with Land. Except as otherwise more specifically provided in this Agreement, this Agreement and all of its provisions, rights, powers, standards, terms, covenants, and obligations, shall be binding upon the Parties and their respective successors and assigns by sale, trustee's sale, lease, license, assignment, merger, consolidation, or otherwise, and all other persons or entities acquiring the Property, or any interest therein, whether by operation of law or in any manner whatsoever, and shall inure to the benefit of the Parties and their respective successors and assigns, as provided in Government Code section 65868.5, and shall be enforceable as equitable servitudes and constitute covenants running with the land under applicable laws.

13.3 Notice. Any notice, demand or request which may be permitted, required or desired to be given in connection herewith shall be given in writing and directed to City and Developer as follows:

If to the City:
City Clerk
City of Cupertino
10300 Torre Avenue
Cupertino, CA 95014-3202

with a copy to:
City Attorney
City of Cupertino
10300 Torre Avenue
Cupertino, CA 95014-3202

and a copy to:	City Manager City of Cupertino 10300 Torre Avenue Cupertino, CA 95014-3202
If to Developer:	Northwest Properties LP Attn: John Vidovich 960 N. San Antonio Road #114 Los Altos, CA 94022
with a copy to:	Lender's name, address, and responsible person to be inserted before Agreement signed

Notices to be deemed effective shall be delivered by certified mail, return receipt requested, or commercial courier, with delivery to be effective upon verification of receipt. Any Party may change its respective address for notices by providing written notice of such change to the other Parties.

13.4 Permitted Delays.

13.4.1 Performance by either Party of an obligation hereunder shall be excused during any period of Permitted Delay. "**Permitted Delay**" shall mean delay beyond the reasonable control of a Party caused by an inability to perform caused by (a) calamities, including without limitation earthquakes, floods, and fire; (b) civil commotion; (c) riots or terrorist acts; (d) lockouts, strikes or other forms of material labor disputes; (e) material shortages of labor, equipment, facilities, materials or supplies; (f) vandalism; (g) failure of transportation or freight embargos; (h) condemnation or requisition; (i) litigation challenge, referendum, or initiative; (j) orders of governmental, civil, military, or naval authority, including any development, water, or sewer moratorium; (k) the failure of any governmental agency, public utility, or communication provider to issue a permit, authorization, consent, or approval required for development, construction, use, or operation of the Project or portion thereof within typical, standard or customary timeframes; or (l) unusually severe weather, but only to the extent that such weather or its effects (including, without limitation, dry out time) result in delays that cumulatively exceed twenty (20) days for any winter season. A Party's financial inability to perform or obtain financing or adverse economic conditions shall not be grounds for claiming a Permitted Delay.

13.4.2 The Party claiming a Permitted Delay shall notify the other Party of its intent to claim a Permitted Delay, the specific grounds of the same and the anticipated period of the Permitted Delay. An extension of time for any such cause shall be for the period of the Permitted Delay and shall commence to run from the time of the commencement of the cause, if Notice by the Party claiming such extension is sent within thirty (30) days after the commencement of the claimed cause. If Notice is sent after such thirty (30) day period, then the extension shall commence to run no sooner than thirty (30) days prior to the giving of such Notice. The period of Permitted Delay shall last no longer than the conditions preventing

performance. Notwithstanding any other provision hereof to the contrary, the Term of this Agreement shall not be extended by the period of any Permitted Delay.

13.5 Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

13.6 Waivers. Notwithstanding any other provision in this Agreement, any failure of or delay by any Party in asserting any of its rights and remedies under this Agreement shall not operate as a waiver of any such rights or remedies, or deprive the Party of its right to institute and maintain any actions or proceedings which it may deem necessary to protect, assert, or enforce any such rights or remedies. A Party may specifically and expressly waive in writing any condition or breach of this Agreement by the other Party, but no such waiver shall constitute a further or continuing waiver of any preceding or succeeding breach of the same or any other provision. Consent by one Party to any act by the other Party shall not be deemed to imply consent or waiver of the necessity of obtaining such consent for the same or similar acts in the future.

13.7 Construction of Agreement. All Parties have been represented by counsel in the preparation and negotiation of this Agreement, and this Agreement shall be construed according to the fair meaning of its language. The rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be employed in interpreting this Agreement. Unless the context clearly requires otherwise, (a) the plural and singular numbers shall each be deemed to include the other; (b) the masculine, feminine, and neuter genders shall each be deemed to include the others; (c) "shall," "will," or "agrees" are mandatory, and "may" is permissive; (d) "or" is not exclusive; (e) "includes" and "including" are not limiting; and (f) "days" means calendar days unless specifically provided otherwise.

13.8 Headings. Section headings in this Agreement are for convenience only and are not intended to be used in interpreting or construing the terms, covenants, or conditions of this Agreement.

13.9 Severability. If any term or provision of this Agreement, or the application of any term or provision of this Agreement to a specific situation, is found to be invalid, or unenforceable, in whole or in part for any reason, the remaining terms and provisions of this Agreement shall continue in full force and effect unless an essential purpose of this Agreement would be defeated by loss of the invalid or unenforceable provisions, in which case any Party deprived of an essential benefit thereunder shall have the option to terminate this Agreement from and after such determination by providing written notice thereof to the other Party.

13.10 Time is of the Essence. Time is of the essence of this Agreement. All references to time in this Agreement shall refer to the time in effect in the State of California.

13.11 Extension of Time Limits. The time limits set forth in this Agreement may be extended by Permitted Delays or mutual consent in writing of the Parties in accordance with the provisions of this Agreement.

13.12 Other Necessary Acts. Each Party shall in good faith do all things as may reasonably be necessary or appropriate to carry out this Agreement, the Project Approvals, and the Subsequent Approvals, and to execute with acknowledgment or affidavit if required and deliver to the other, file or submit all such further information, instruments, and documents as may be reasonably necessary to carry out the purposes and objectives of the Project Approvals and this Agreement and to provide and secure to the other Party the full and complete enjoyment of its rights and privileges under this Agreement.

13.13 Signatures. The individuals executing this Agreement represent and warrant that they have the right, power, legal capacity, and authority to enter into and to execute this Agreement on behalf of the respective legal entities of Developer and City.

13.14 Entire Agreement. This Agreement (including all Recitals and all exhibits attached hereto, each of which is fully incorporated herein by reference), integrates all of the terms and conditions mentioned herein or incidental hereto, and constitutes the entire understanding of the Parties with respect to the subject matter hereof, and all prior or contemporaneous oral agreements, understandings, representations and statements, and all prior written agreements, understandings, representations, and statements are terminated and superseded by this Agreement.

13.15 Estoppel Certificate. Developer or its lender may, at any time, and from time to time, deliver written notice to City requesting City to certify in writing to Developer or any Mortgagee (a) that this Agreement is in full force and effect; (b) that this Agreement has not been amended or modified or, if so amended or modified, identifying the amendments or modifications, or terminated or if terminated the subject of termination; (c) that Developer is not in Default of the performance of its obligations, or if in Default, describing therein the nature and extent of any such Defaults; (d) those obligations under this Agreement that have been satisfied since the date of the last annual review and those obligations under this Agreement that remain unsatisfied; and (e) such other information or matters relating to this Agreement and/or the Project as may be reasonably requested by Developer. Developer shall pay, within thirty (30) days following receipt of City's invoice, the actual costs borne by City in connection with its review of the proposed estoppel certificate, including the costs of attorney review. The City Manager shall be authorized to execute any certificate requested by Developer hereunder. The form of estoppel certificate shall be in a form reasonably acceptable to the City Attorney. The City Manager shall execute and return such certificate within thirty (30) days following Developer's request therefor. Developer and City acknowledge that a certificate hereunder may be relied upon by tenants, transferees, investors, partners, bond counsel, underwriters, bond holders, and Mortgagees. The request shall clearly indicate that failure of the City to respond within the thirty-day period will lead to a second and final request. Failure to respond to the second and final request within fifteen (15) days of receipt thereof shall be deemed approval of the estoppel certificate.

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

13.17 Negation of Partnership. The Parties specifically acknowledge that the Project is a private development, that no Party to this Agreement is acting as the agent of any other 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 the City, or otherwise, or cause them to be considered joint venturers or members of any joint enterprise.

13.18 No Third-Party Beneficiaries. This Agreement is made and entered into for the sole protection and benefit of the signatory Parties and their successors and assigns, including Mortgagees. No other person shall have any right of action based upon any provision in this Agreement.

13.19 Governing State Law. This Agreement shall be construed in accordance with the laws of the State of California, without reference to its choice of law provisions.

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

Exhibit A: Property Legal Description

Exhibit B: Property Boundary and Depiction of the Project

Exhibit C: Description of the Project

Exhibit D: Existing Impact Fees

Exhibit E: Accepted Conditions of Title

Exhibit F: Annual Review Form

Exhibit G: Form of Assignment and Assumption Agreement

If the recorder refuses to record any exhibit, the City Clerk may replace it with a single sheet bearing the exhibit identification letter, stating the title of the exhibit, the reason it is not being recorded, and that the original, certified by the City Clerk, is in the possession of the City Clerk and will be reattached to the original when it is returned by the recorder to the City Clerk.

[SIGNATURES ON FOLLOWING PAGE]

IN WITNESS WHEREOF, the City and Developer have executed this Agreement as of the Effective Date.

CITY:

CITY OF CUPERTINO, a municipal corporation

By: _____
City Manager
[Signature must be notarized]

ATTEST:

By: _____
Kirsten Squarcia, City Clerk

APPROVED AS TO FORM:

By: _____
Heather Minner, City Attorney

DEVELOPER:

NORTHWEST PROPERTIES LP,
a California limited partnership

By: John Vidovich
Name: Manager, John Vidovich LLC
Its: General Partner

By: _____
Name: _____
Its: _____

[Signatures must be notarized]

ACKNOWLEDGMENTS

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

State of California)
) ss
County of Santa Clara)

On March 30, 2020, before me, Kristin A. Frykland,
(Name of Notary)

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

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

WITNESS my hand and official seal.

(Notary Signature)

KRISTIN A. FRYKLAND
Notary Public – California
Santa Clara County
Commission # 2193808
My Comm. Expires Apr 25, 2021

ACKNOWLEDGMENTS

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

State of California)
) ss
County of _____)

On _____, before me,_____,
(Name of Notary)

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

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

WITNESS my hand and official seal.

_____
(Notary Signature)

EXHIBIT A

PROPERTY DESCRIPTION

THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE CITY OF CUPERTINO, IN THE COUNTY OF SANTA CLARA, STATE OF CALIFORNIA, AND IS DESCRIBED AS FOLLOWS:

PARCEL ONE:

All of Parcel "B", as shown on that certain Map entitled, "Parcel Map being all of Parcel 2 as shown on Parcel Map recorded in Book 265 of Maps, at Page 16", which Map was filed for record in the Office of the Recorder of the County of Santa Clara, State of California, on August 20, 1970 in Book 272 of Maps, at Page 5.

Excepting therefrom the underground water rights, as granted in Deed from Paul Mariani and Mary Frances Mariani, His Wife, Skaggs Payless Drug Stores and Transamerica Title Insurance Company, to City of Cupertino, A Municipal Corporation, dated December 29, 1969 and recorded April 29, 1970 in Book 8905 of Official Records, Page 622.

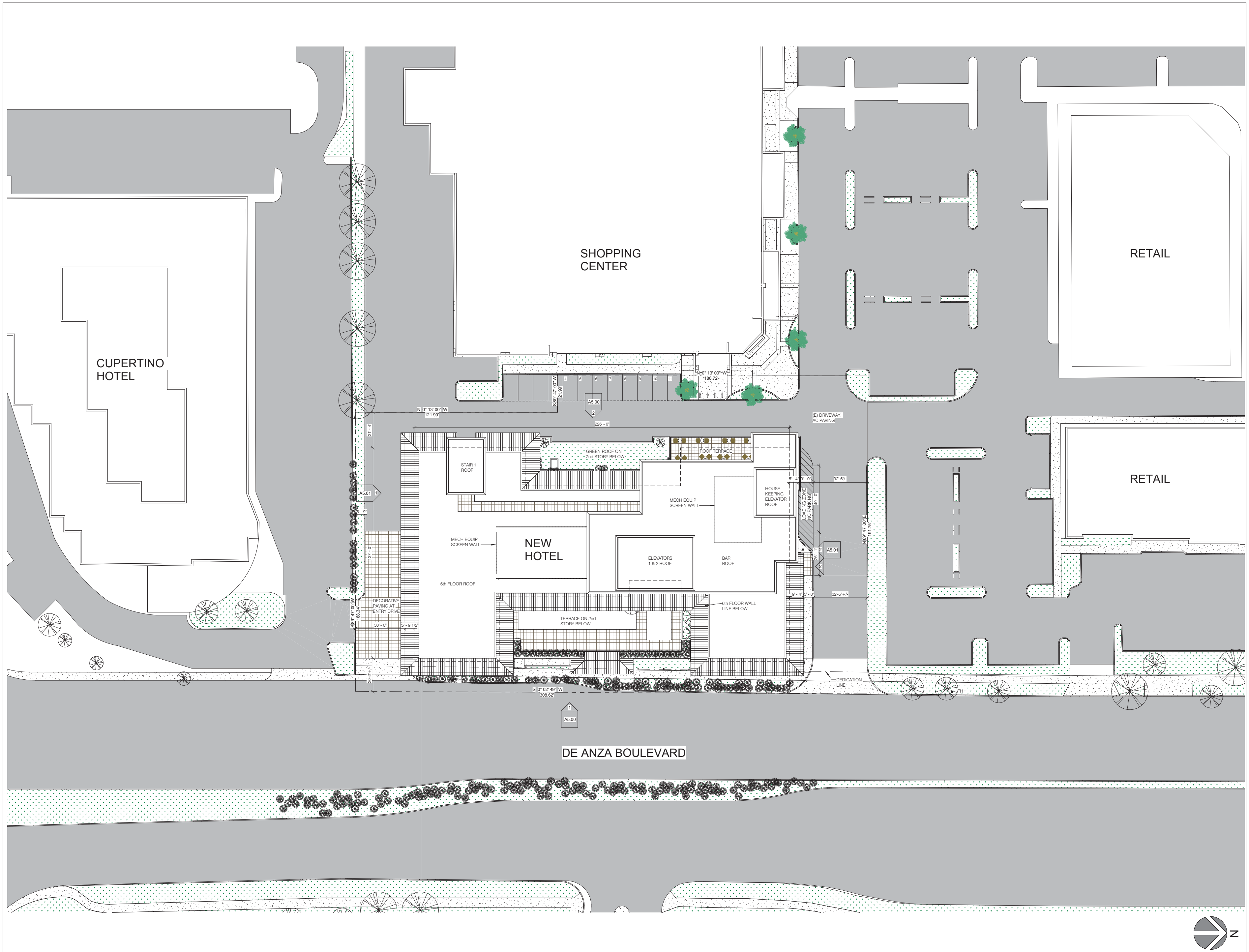
PARCEL TWO:

Non-exclusive easements appurtenant to PARCEL ONE above for pedestrian and vehicular ingress and egress and parking, and also for footings, foundations and eaves, as granted in that certain Declaration of Encumbrances recorded February 27, 1970 in Book 8843, Page 364, of Official Records, and as modified by that certain Amendment to Declaration of Encumbrances recorded July 23, 1970, in Book 8996, page 735, of Official Records, and as further modified by that certain Second Amendment to Declaration of Encumbrances recorded September 8, 2011 as Instrument No. 21307879, of Official Records, and as further modified by that certain Third Amendment to Declaration of Encumbrances recorded October 22, 2012 as Instrument No. 21910015, of Official Records.

APN: 326-10-061

EXHIBIT B

SITE MAP AND DEPICTION OF PROJECT



Winkleman Designs
1795 Amaya Ridge Road
Soquel, CA 95073
Tel 408-353-6700
Fax 408-353-4729
bill@winklemandesigns.com

The De Anza
De Anza Properties
10931 N De Anza Blvd, Cupertino, CA

Site Plan

REVISIONS

No.	Date	Description

Date 11/13/18
Sheet Date 4/19/19
Scale 1" = 20'-0"
Drawn W
Job 17200
Sheet A1.00

4/21/2019 9:48:29 PM

C:\Users\Bill\Documents\DAH-CEN19_7Story_Final_bill@winklemandesigns.com.rvt

Winkleman Designs
1795 Amaya Ridge Road Soquel, CA 95073
408.353.6700 bill@winklemandesigns.com

The De Anza
De Anza Properties
10931 N De Anza Blvd, Cupertino, CA

SE View

A11.01

Drawn Author
Scale
Date 4/19/19

EXHIBIT C

DESCRIPTION OF PROJECT

Northwest Properties LP, the project applicant, is proposing the De Anza Hotel Project ("proposed project") that would involve the construction of a boutique hotel on a 1.29-acre site. The site is currently developed with a commercial building operated as the Goodyear Auto Service Center. The proposed project would involve demolishing the existing commercial building and redeveloping the site with a new 156-room boutique hotel, including event meeting rooms, restaurant, and bars. The proposed project would establish a six-story hotel with four levels of below-grade parking.

The building would have a maximum height of 88 feet, subject to applicable requirements in the General Plan.

EXHIBIT D

EXISTING IMPACT FEES

1. Housing Mitigation Fee – City Code Chapter 19.172

2. Public Art Contribution – City Code Chapter 19.148

3. Citywide Transportation Impact Fee – City Code Chapter 14.02

4. Parkland Dedication In-lieu Fee – City Code Chapter 13.08 (not applicable because hotel use is considered non-residential)

EXHIBIT E

ACCEPTED CONDITIONS OF TITLE

1. Property taxes, which are a lien not yet due and payable, including any assessments collected with taxes to be levied for the fiscal year 2018-2019.

2. Current fiscal year property taxes, including supplemental taxes, escaped assessments, delinquencies, personal property taxes, and any assessments collected with taxes. Current fiscal year taxes are:

Code Area: 013-003
Tax Identification No.: 326-10-061
Fiscal Year: 2019-2020
1st Installment: $12,507.60, Open
2nd Installment: $12,507.60, Open
Exemption: $0.00
Land: $1,801,736.00
Improvements: $0.00
Personal Property: $0.00
Bill No.: 326-10-061-00

3. Special Tax for Santa Clara County Library District Joint Powers Authority Community Facilities District No. 2013- 1, under the Mello-Roos Community Facilities Act of 1982, as disclosed by a Proposed Boundary Map filed for record on April 26, 2013 in Book 48 of Assessment Maps, Page(s) 36-37 as Instrument No. 22194943, Official Records, and further disclosed by Notice of Special Tax Lien recorded January 22, 2014, Instrument No. 22502535, Official Records, payable in continuing installments collected with the real property taxes.

4. The lien of supplemental or escaped assessments of property taxes, if any, made pursuant to the provisions of Chapter 3.5 (commencing with Section 75) or Part 2, Chapter 3, Articles 3 and 4, respectively, of the Revenue and Taxation Code of the State of California as a result of the transfer of title to the vestee named in Schedule A or as a result of changes in ownership or new construction occurring prior to Date of Policy. None Now Due Or Payable.

5. Waiver of any claims for damages to said property by reason of the location, construction, landscaping or maintenance of the freeway adjoining said property, as contained in the deed to the State of California, recorded June 27, 1962, Instrument No. 2233695, Book 5662, Page 424, of Official Records.

6. Easement(s) for the purpose(s) shown below and rights incidental thereto as granted in a document.

Granted to: Cupertino Sanitary District of Santa Clara County

Purpose: To excavate for, install, replace (of the initial or any other size) maintain and use for conveying sewage such pipeline

Recorded: January 19, 1970, Instrument No. 3750067, Book 8803, Page 47, of Official Records

Affects: As Follows:

An easement 10.00 feet in width, the centerline of which is more particularly described as follows:

Beginning on a line drawn parallel with and 60.00 feet Westerly, measured at right angles, from the centerline of Saratoga-Sunnyvale Road, distant along said parallel line North 0 deg. 02' 52" East 323.76 feet from the intersection thereof with the Southerly line of that certain 10-acre parcel conveyed to Paul Andrew Mariani, Jr. et al to Winifred Pauline Thiltgen, et al, by Deed recorded November 12, 1965 in Book 7176 of Official Records at Page 743, Santa Clara County Records; thence from said Point of Beginning, leaving said parallel line South 70 deg. 14' 01" West 142.72 feet to a point on a line drawn parallel with and 276 feet Northerly measured at right angles, from Southerly line, thence along said last described line 89 deg. 47' 00" West 660.00 feet.

7. Covenants, conditions and restrictions but omitting any covenants or restrictions, if any, including but not limited to those based upon race, color, religion, sex, sexual orientation, familial status, marital status, disability, handicap, national origin, citizenship, immigration status, primary language, ancestry, source of income, gender, gender identity, gender expression, medical condition or genetic information, as set forth in applicable state or federal laws, except to the extent that said covenant or restriction is permitted by applicable law, as set forth in the document

Recorded: February 27, 1970, Instrument No. 3769669, Book 8843, Page 364, of Official Records

Modification(s) of said covenants, conditions and restrictions in that certain Amendment to Declaration of Encumbrances

Recorded: July 23, 1970, Instrument No. 3844373, Book 8996, Page 735, of Official Records

Modification(s) of said covenants, conditions and restrictions in that certain Second Amendment to Declaration of Encumbrances

Recorded: September 8, 2011, Instrument No. 21307879, of Official Records

Modification(s) of said covenants, conditions and restrictions in that certain Third Amendment to Declaration of Encumbrances

Recorded: October 22, 2012, Instrument No. 21910015, of Official Records

8. Easement(s) for the purpose(s) shown below and rights incidental thereto as granted in a document.

Granted to: Pacific Telephone and Telegraph Company, a California corporation

Purpose: To construct, place, inspect, maintain, operate, replace and remove facilities consisting of underground conduits, pipes, manholes, service boxes, wires, cables and other electrical conductors, above ground marker posts, risers and service pedestals; underground and above ground switches, fuses, terminals and transformers with associated concrete pads together with a right of way therefore and the right of ingress and egress Recorded: July 1, 1970, Instrument No. 3832386, Book 8972, Page 657, of Official Records

Affects: Said Facilities shall be installed within the strips of land described as follows:

1. A strip of land of the uniform width of 20 feet lying contiguous to and Northerly of the Southerly boundary line of said real property and extending from the Westerly boundary line of the street known as Saratoga-Sunnyvale Road, Westerly 350.0 feet.

2. A strip of land of the uniform width of 12 feet lying contiguous to and Northerly of the Southerly boundary line of said real property and extending from the Westerly boundary line of the 20 foot strip of land hereinbefore described and designated 1, Westerly 852 feet, more or less, to the Westerly boundary line of said real property.

9. Easement(s) for the purpose(s) shown below and rights incidental thereto as delineated or as offered for dedication, on the Parcel Map filed for record on August 20, 1970 in Book 272 of Maps, Page 5.

Purpose: Roof Overhang Easement

Affects: A portion of said land as shown on said Map

10. Covenants, conditions and restrictions but omitting any covenants or restrictions, if any, including but not limited to those based upon race, color, religion, sex, sexual orientation, familial status, marital status, disability, handicap, national origin, citizenship, immigration status, primary language, ancestry, source of income, gender, gender identity, gender expression, medical condition or genetic information, as set forth in applicable state or federal laws, except to the extent that said covenant or restriction is permitted by applicable law, as set forth in the document

Recording Date: October 29, 1971

Recording No: 4125842, Book 9568, Page 164, of Official Records

Said covenants, conditions and restrictions provide that a violation thereof shall not defeat the lien of any mortgage or deed of trust made in good faith and for value.

11. Easement(s) for the purpose(s) shown below and rights incidental thereto as granted in a document.

Granted to: City of Cupertino

Purpose: Public roadway purposes, with the right to construct, repair, operate and maintain any and all Public Utilities and improvements

Recorded: January 4, 1991, Instrument No. 10769097, Book L584, Page 1245, of Official Records

Affects: Being a portion of Parcel B as it appears on Parcel Map filed on August 20, 1970 in Book 272 of Maps, at Page 5, Santa Clara County Records, more particularly described as follows:

Commencing at the intersection of the centerline of Homestead Road and the centerline of De Anza Boulevard shown as Saratoga-Sunnyvale Road on aforementioned Parcel Map; Thence, S. 00 deg. 02' 52" W., 232.38 feet along the said centerline of De Anza Boulevard; Thence, at right angles to the centerline of De Anza Boulevard, N. 89 deg. 57' 08" W., 60.00 feet to the point in the Westerly sideline of the De Anza Boulevard also being the Northeast corner of Parcel A as shown on aforementioned Parcel Map; Thence, along the Westerly sideline of De Anza Boulevard and the Easterly line of said Parcel A, S. 00 deg. 02' 52" W., 117.30 feet to the Southeast corner of said Parcel A and the Northeast corner of Parcel B, as shown on said Map, also being the True Point of Beginning. Thence, from said True Point of Beginning, along the Westerly sideline of De Anza Boulevard and the Easterly line of said Parcel B, S. 00 deg. 02' 52" W., 308.62 feet to the Southeast corner of said Parcel B and the Northeast corner of that certain 2.006 _+ acre parcel shown on Record of Survey filed September 18, 1962 in Book 152 of Maps, at Page 10, Santa Clara County Records. Thence, along the Southerly line of said Parcel B and the Northerly line of said 2.006 _+ acre parcel, S 89 deg. 47' 00" W., 10.00 feet; Thence, N. 00 deg. 43' 13" E., 308.66 feet to the Southerly line of said Parcel A and the Northerly line of said Parcel B; Thence, along the Southerly line of said Parcel A and the Northerly line of said Parcel B, N. 89 deg. 47' 00" E., 6.38 feet to the True Point of Beginning.

12. Easement(s) for the purpose(s) shown below and rights incidental thereto as granted in a document.

Granted to: City of Cupertino, A Municipal Corporation

Purpose: The right to excavate for, install, replace (of the initial or any other size), maintain and use for sidewalk purposes

Recorded: February 23, 1994, Instrument No. 12370977, Book N316, Page 0261, of Official Records

Affects: Being a portion of Parcel B as it appears on Parcel Map filed on August 20, 1970 in Book 272 of Maps, at Page 5, Santa Clara County Records, more particularly described as follows:

Commencing at the intersection of the centerline of Homestead Road and the centerline of De Anza Boulevard shown as Saratoga-Sunnyvale Road on aforementioned Parcel Map; Thence, S. 00 deg. 02' 52" W., 232.38 feet along the said centerline of De Anza Boulevard; Thence, at right angles to the centerline of De Anza Boulevard, N. 89 deg. 57' 08" W., 60.00 feet to the Northeast corner of Parcel A as shown on aforementioned Parcel Map; Thence, along the Easterly line of Parcel A, South 00 deg. 02' 52" West, 117.30 feet to the Southeast corner of said Parcel A and the Northeast corner of Parcel B, as shown on said Map. Thence, along the Southerly line of said Parcel A, South 89 deg. 47' 00" West, 6.38 feet to the True Point of Beginning; Thence, from said True Point of Beginning, along the Westerly sideline of De Anza Boulevard South 00 deg. 43' 13" West, 308.62 feet to the Northerly boundary of that certain 2.006 _+ acre parcel shown on Record of Survey filed September 18, 1962 in Book 152 of Maps, at Page 10, Santa Clara County Records. Thence, along the Southerly line of said Parcel B and the Northerly line of said 2.006 acre _+ Parcel, South 89 deg. 47' 00" West, 5.00 feet.

END OF ACCEPTED CONDITIONS OF TITLE

EXHIBIT F

ANNUAL REVIEW FORM
[TO BE SUBMITTED BY DECEMBER 1ST OF EACH YEAR]

This Annual Review Form is submitted to the City of Cupertino ("**City**") by Northwest Properties LP ("**Developer**") pursuant to the requirements of California Government Code section 65865.1 and Chapter 19.144 of the City's Municipal Code regarding Developer's good faith compliance with its obligations under the Development Agreement between the City and Developer having an Effective Date of _____ ("**Development Agreement**"). All Article and Section references are to the Development Agreement. Any capitalized terms not otherwise defined herein shall have the meanings assigned to them in the Development Agreement.

Annual Review Period: _____ to _____.

Generally summarize the status of Developer's efforts and progress in processing permit applications and constructing the Project.

Generally summarize specific strategies to be followed in the coming year intended to facilitate the processing of permits and/or Project construction.

Specify whether Developer's compliance with any of the following agreements have been satisfied during this annual review period:

- _____?

Specify whether applicable Existing Impact Fees, processing fees, connection fees, and/or other fees due and payable under Article 4 have been paid during this annual review period, including but not limited to the following:

- Housing Mitigation Fees
- Public Art Contribution
- Transportation Impact Fees
- _

Describe Developer's compliance with the following Public Benefit Covenants under Article 5 during this annual review period:

- Community Amenity Payment pursuant to Section 5.1.1.
- Shuttle Service pursuant to Section 5.1.4.
- Meeting Room Benefit pursuant to Section 5.1.5.

- Rooftop Amenity pursuant to Section 5.1.8.
- Transient Occupancy Tax Requirement, including any TOT In-lieu Payment, pursuant to Section 5.2.
- Minimum Hotel Standard pursuant to Section 5.3.
- City of Cupertino Business License pursuant to Section 5.4.
- Sales Tax Point of Sale Designation pursuant to Section 5.5.

Describe whether other applicable Development Agreement obligations were completed during this annual review period.

Describe any extension of the time limits or deadlines in the Development Agreement as a result of Permitted Delay pursuant to Section 13.4.

Specify whether Developer has assigned the Development Agreement or otherwise conveyed the Property during this annual review period.

Specify whether Developer has mortgaged the Property during this annual review period.

The undersigned representative confirms that Developer is:

_____ In good faith compliance with its obligations under the Development Agreement for this annual review period.

_____ Not in good faith compliance with its obligations under the Development Agreement for this annual review period, in response to which Developer is taking the actions set forth in the attachment.

IN WITNESS WHEREOF, Developer has executed this Annual Review Form as of this ____ day of _____, 20__.

DEVELOPER:
Northwest Properties LP

By:_____
Print Name:_____
Its:_____

EXHIBIT G

FORM OF ASSIGNMENT AND ASSUMPTION AGREEMENT

RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:

Gian Martire
City of Cupertino
City Hall
Planning Division
10300 Torre Avenue
Cupertino, CA 95014

Exempt from Recording Fee per Government Code Section 27383

Space Above This Line for Recorder's Use Only

ASSIGNMENT OF RIGHTS AND OBLIGATIONS UNDER DEVELOPMENT AGREEMENT

This Assignment of Rights and Obligations under Development Agreement (this "**Assignment**") is entered into this _____ day of _____, 20__ ("**Effective Date**"), by and between _____, a _____ ("**Assignor**") and _____, a _____ ("**Assignee**"). Assignor and Assignee are collectively referred to herein as the "**Parties.**"

RECITALS

A. Assignor and the City of Cupertino, a California municipal corporation ("**City**") have entered into that certain Development Agreement dated as of _____ ("**DA**") which was recorded in the Official Records of Santa Clara County on _____ as Instrument No. _____.

B. Assignor ***[has requested approval from the City of the assignment to Assignee described herein pursuant to Section 10.1 of the DA]*** **OR** ***[has the right to make the assignment to Assignee under Section 10.1 of the DA.]***

C. ***[City has consented to the assignment described herein pursuant to Section 10.1 of the DA.]*** **OR** ***[Assignor has provided the City with documentation establishing that the assignment is appropriate pursuant to Article 10 of the DA because _____.]***

AGREEMENTS

NOW, THEREFORE, in exchange for the mutual covenants set forth herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. Assignment and Assumption of Interest. Assignor hereby transfers, assigns, and conveys to Assignee all of Assignor's right, title, and interest in and to, and all obligations, duties, responsibilities, conditions, and restrictions under, the DA (the "**Rights and Obligations**"). Assignee, for itself and its successors and assigns, hereby accepts the foregoing assignment, assumes all such Rights and Obligations, and expressly agrees for the benefit of City to pay, perform, and discharge all obligations of Assignor under the DA and to comply with all covenants and conditions of Assignor arising from or under the DA.

2. Governing Law; Venue. This Assignment shall be interpreted and enforced in accordance with the laws of the State of California without regard to principles of conflicts of laws. Any action to enforce or interpret this Assignment shall be filed and litigated exclusively in the Superior Court of Santa Clara County, California or in the Federal District Court for the Northern District of California.

3. Entire Agreement/Amendment. This Assignment constitutes the entire agreement among the Parties with respect to the subject matter hereof and supersedes all prior written and oral agreements with respect to the matters covered by this Assignment. This Assignment may not be amended except by an instrument in writing signed by each of the Parties and consented to in writing by City.

4. Further Assurances. Each Party shall execute and deliver such other certificates, agreements and documents and take such other actions as may be reasonably required to consummate or implement the transactions contemplated by this Assignment and the DA.

5. Benefit and Liability. Subject to the restrictions on transfer set forth in the DA, this Assignment and all the terms, covenants, and conditions hereof shall extend to the benefit of and be binding upon the respective successors and permitted assigns of the Parties.

6. Rights of City. All rights of City under the DA and all obligations to City under the DA which were enforceable by City against Assignor prior to the Effective Date of this Assignment shall be fully enforceable by City against Assignee from and after the Effective Date of this Assignment.

7. Rights of Assignee. All rights of Assignor and obligations to Assignor under the DA which were enforceable by Assignor against City prior to the Effective Date of this Assignment shall be fully enforceable by Assignee against City from and after the Effective Date of this Assignment.

8. Release. As of the Effective Date, Assignor hereby relinquishes all rights under the DA, and all obligations of Assignor under the DA shall be terminated as to, and shall have no more force or effect with respect to, Assignor, and Assignor is hereby released from any and all obligations under the DA.

9. Attorneys' Fees. In the event of any litigation pertaining to this Assignment, the losing party shall pay the prevailing party's litigation costs and expenses, including without limitation reasonable attorneys' fees.

10. City Consent; City Is A Third-Party Beneficiary. City's countersignature below is for the limited purposes of indicating consent to the assignment and assumption and release set forth in this Assignment (if necessary under the DA) pursuant to Sections 10.1 and 10.2 of the DA, and for clarifying that there is privity of contract between City and Assignee with respect to the DA. The City is an intended third-party beneficiary of this Assignment and has the right, but not the obligation, to enforce the provisions hereof.

11. Recordation. Assignor shall cause this Assignment to be recorded in the Official Records of Santa Clara County and shall promptly provide conformed copies of the recorded Assignment to City and Assignee.

12. Address for Notices. Assignee's address for notices, demands, and communications under the DA is as follows:

DeAnza Properties
960 N. San Antonio Rd.
Los Altos, CA Attention: John Vidovich

13. Captions; Interpretation. The section headings used herein are solely for convenience and shall not be used to interpret this Assignment. The Parties acknowledge that this Assignment is the product of negotiation and compromise on the part of both Parties, and the Parties agree that since both have participated in the negotiation and drafting of this Assignment, this Assignment shall not be construed as if prepared by one of the Parties, but rather according to its fair meaning as a whole, as if both Parties had prepared it.

14. Severability. If any term, provision, condition or covenant of this Assignment or its application to any party or circumstances shall be held by a court of competent jurisdiction to any extent invalid or unenforceable, the remainder of this Assignment, or the application of the term, provision, condition, or covenant to persons or circumstances other than those as to whom or which it is held invalid or unenforceable, shall not be affected and shall be valid and enforceable to the fullest extent permitted by law unless the rights and obligations of the Parties have been materially altered or abridged thereby.

15. Counterparts. This Assignment may be executed in counterparts, each of which shall, irrespective of the date of its execution and delivery, be deemed an original, and the counterparts together shall constitute one and the same instrument.

[SIGNATURES START ON NEXT PAGE.]

IN WITNESS WHEREOF Assignor and Assignee have executed this Assignment as of the date first set forth above.

ASSIGNOR:

_____, a
_____

By: **FORM – DO NOT SIGN**
Name: _____
Its: _____

ASSIGNEE:

_____, a
_____

By: **FORM – DO NOT SIGN**
Name: _____
Its: _____

[NOTE: The presence of the signature blocks below in this form shall not be deemed to require the consent of the City to any assignment that does not otherwise require the consent of City under the DA.]

City of Cupertino, a California municipal corporation, hereby consents to the assignment and assumption described in the foregoing Assignment and Assumption Agreement.

CITY:

CITY OF CUPERTINO, a
California municipal corporation

By: **FORM – DO NOT SIGN**
_____, City Manager

ATTEST:

_____
_____, City Clerk

APPROVED AS TO FORM:

_____
_____, City Attorney

ACKNOWLEDGMENTS

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

State of California)
) ss
County of _____)

On _____, before me,_____,
(Name of Notary)

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

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

WITNESS my hand and official seal.

_____
(Notary Signature)

* * * * * * * * * * * * * * * * *

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

State of California)
) ss
County of _____)

On _____, before me,_____,
(Name of Notary)

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

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

WITNESS my hand and official seal.

_____
(Notary Signature)