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City of Cupertino
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The City of Cupertino
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DEVELOPMENT AGREEMENT FOR THE MARINA PLAZA

BY AND AMONG

CITY OF CUPERTINO

AND

MARINA PLAZA, LLC
a California Limited Liability Company

AND

CUPERTINO 10145, LLC
a California Limited Liability Company

Effective Date: _____, 2016

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DEVELOPMENT AGREEMENT

This Development Agreement ("**Agreement**"), dated as of _____, 2016 ("**Effective Date**"), is entered into pursuant to the Development Agreement Law, by and between the CITY OF CUPERTINO, a California municipal corporation ("**City**"), on the one hand and MARINA PLAZA, LLC, a California limited liability company ("**Residential Developer**"), and CUPERTINO 10145, LLC, a California limited liability company ("**Hotel Developer**", collectively with Hotel Developer, the "**Developer**") on the other. Developer and City are referred to individually in this Agreement as a "**Party**" and collectively as the "**Parties**."

R E C I T A L S

This Agreement is entered into on the basis of 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 section 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 section 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. Hotel Developer is the owner of that certain real property commonly known as 10145 North De Anza Boulevard (APN 326-34-043) in Cupertino, California more particularly described and depicted Exhibits A-1 and B attached hereto and incorporated herein ("**Hotel Parcel**") and Residential Developer is the owner of that certain real property commonly known as 10118-10122 Bandley Drive (APN 326-32-066) in Cupertino, California more particularly described and depicted in Exhibits A-2 and B attached hereto and incorporated herein ("**Residential Parcel**"). The Hotel Parcel and the Residential Parcel are referred to collectively as the "**Property**." The Property is currently developed with two commercial buildings, including a single story shopping center with a grocery store and restaurant, totaling approximately 48,724 square feet.

D. De Anza Venture, LLC, a two member California limited liability company whose members are Hotel Developer and Residential Developer ("**De Anza Venture**"), has submitted applications, on behalf of Developer, to the City for a Development Permit (DP-2015-05) (the "**Development Permit**"), an Architectural and Site Approval Permit (ASA-2015-22) (the "**Architectural and Site Approval Permit**"), a Use Permit (U-2015-06) (the "**Use**

Permit"), a Tree Removal Permit (TR-2015-14) (the "**Tree Removal Permit**"), an exception to the Heart of the City Specific Plan for a setback (EXC-2016-03) (the "**Heart of the City Exception**"), a Fence Exception (EXC-2016-05) ("**Fence Exception**"), and a Development Agreement (DA-2016-01) (the "**Development Agreement**"), plus further applications for approvals necessary or convenient to develop the Property. These applications are in furtherance of the request by De Anza Venture to redevelop the existing commercial buildings on the Property with a 122-room full service neighborhood business hotel on the Hotel Parcel, and two mixed-use buildings with 188 apartments units, and approximately 22,600 square feet of commercial space on the Residential Parcel and associated facilities and infrastructure (collectively the "**Project**"). Developer anticipates that prior to development of the Property, Hotel Developer and Residential Developer will transfer their respective interests in the Property, and concurrently assign their respective rights and obligations under this Agreement, to De Anza Venture, which will then develop the Project on the Property. Developer also intends to file for a lot line adjustment adjusting the boundary between the Residential Parcel and the Hotel Parcel prior to beginning construction.

E. The Project is the subject of a Mitigated Negative Declaration ("**MND**") prepared pursuant to the California Environmental Quality Act ("**CEQA**") (Public Resources Code section 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. The Planning Commission on July 26, 2016 recommended to the City Council certification of the MND, and approval of the Development Permit, the Architectural and Site Approval Permit, the Use Permit, the Tree Removal Permit, the Heart of the City Exception, and the Fence Exception by adoption of the following resolutions:

1. Certification of the MND by Resolution No. 6809;

2. Approval of the Development Permit by Resolution No. 6809;

3. Approval of the Architectural and Site Approval Permit by Resolution No. 6808;

4. Approval of the Use Permit by Resolution No. 6810;

5. Approval of the Tree Removal Permit by Resolution 6811;

6. Approval of the Heart of the City Exception by Resolution No. 6812;

7. Approval of the Fence Exception by Resolution No. 6813;

G. Prior to or concurrently with approval of this Agreement, the City has taken or will take actions to review and plan for the future development and use of the Project ("**Existing Approvals**"). Developer has consented to the applications for the Existing Approvals. The Existing Approvals include:

8. Certification of the MND by Resolution No. 16-__ adopted by the City Council on September 6, 2016;

9. Approval of the Development Permit by Resolution No. 16-__ adopted by the City Council on September 6, 2016;

10. Approval of the Architectural and Site Approval Permit by Resolution No. 16-__ adopted by the City Council on September 6, 2016;

11. Approval of the Use Permit by Resolution No. 16-__ adopted by the City Council on September 6, 2016;

12. Approval of the Tree Removal Permit by Resolution No. 16-__ adopted by the City Council on September 6, 2016;

13. Approval of the Heart of the City Exception by Resolution No. 16-__ adopted by the City Council on September 6, 2016;

14. Approval of the Fence Exception by Resolution No. 16-__ adopted by the City Council on September 6, 2016.

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

I. City specifically finds, as required by Municipal Code section 19.144.110, that the Agreement 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 not be 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 the development of the Project by providing a greater degree of requisite certainty.

J. City and Developer have reached mutual agreement and desire to voluntarily enter into this Agreement to facilitate development 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 pursuant to Government Code section 65867 and Municipal Code section 19.144.090. The 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. On September 6, 2016, the City Council introduced Ordinance No. 16-__, approving this Agreement and authorizing its execution, and adopted that Ordinance on _____, 2016 (the "**Enacting Ordinance**"). The Enacting Ordinance became effective on _____, 2016.

A G R E E M E N T

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 8.3.1.

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

*"**Affiliated Party**"* is defined in Section 10.1.

"***Affordable Housing Agreement***" is defined in Section 3.12.

*"**Affordable Units**"* is defined in Section 3.12.

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

*"**Agreement to be Recorded**"* is defined in Section 5.4.

*"**Applicable City Regulations**"* means (a) all City ordinances, rules, regulations, official policies, standards and specifications set forth in this Agreement and the Existing Approvals, including the specific conditions of approval adopted with respect to the Existing Approvals; (b) with respect to matters not addressed by this Agreement or the Existing Approvals but governing permitted uses of the Property; building locations, sizes, densities, intensities, design and heights; site design, setbacks, lot coverage and open space; parking; and Exactions, those ordinances, rules, regulations, official policies, standards and specifications in force and effect on the Effective Date; and (c) with respect to all other matters, including building, plumbing, mechanical and electrical codes, the ordinances, rules, regulations, official policies, standards and specifications in force and effect as may be enacted, adopted and amended from time to time, including New City Laws, except those in conflict with this Agreement or the Existing Approvals.

*"**Applicable Law**"* means the Applicable City Regulations and all State and Federal laws and regulations applicable to the Property and the Project as enacted, adopted and amended from time to time. City laws, rules, regulations and policies applicable to the Property and/or the Project are further described in Section 3.3.

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

*"**Assignee**"* is defined in Section 10.1.

*"**Assignment**"* is defined in Section 10.1.2.

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

*"**CEQA Guidelines**"* means the State CEQA Guidelines (California Code of Regulations, Title 14, section 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.

"***Citywide Transportation Impact Fee***" is defined in Section 4.1.4.

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

*"**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, as defined below.

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

*"**Consumer Price Index**"* shall mean the United States Department of Labor's Bureau of Labor Statistics Consumer Price Index, All Urban Consumer, All Items, San Francisco-Oakland-San Jose, California, or the successor of such index.

*"**CUSD**"* is defined in Section 5.1.1.

*"**De Anza Venture**"* is defined in Recital D.

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

*"**Developer**"* means, collectively, Hotel Developer, and Residential Developer.

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

*"**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.

*"**Fence Exception**"* is defined in Recital D.

*"**FUHSD**"* is defined in Section 5.1.1.

*"**General Plan**"* means the City of Cupertino's General Plan 2000-2020, as amended through the Effective Date.

*"**General Plan EIR**"* means the General Plan Amendment, Housing Element Update, and associated Rezoning Project 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.

*"**Heart of the City Exception**"* is defined in Recital D.

*"**Hotel**"* means the approximately 122 room full service neighborhood business hotel to be constructed as part of the Project.

*"**Hotel Developer**"* means Cupertino 10145, LLC, a California limited liability company, and its permitted successors and assigns.

*"**Hotel Parcel**"* is defined in Recital C.

*"**Hotel Rooms**"* means all guest hotel units within the Hotel, which as of the Effective Date, are estimated to total 122 Hotel Rooms. "**Hotel Room**" means each of the individual Hotel Rooms.

*"**Housing Mitigation Fees**"* are defined in Section 4.1.1.

*"**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.

*"**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.

*"**MND**"* is defined in Recital E.

*"**Mortgage**"* 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.

*"**Negotiated Transportation Infrastructure Contribution**"* is defined in Section 4.1.4.

*"**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 Subsequent Project Approvals to be obtained from entities other than the City.

*"**Park Impact Fees**"* are defined in Section 4.1.2.

*"**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**"* means, collectively, the Hotel Parcel and the Residential Parcel.

"***Public Art Contribution***" is defined in Section 4.1.3.

*"**Residential Developer**"* means Marina Plaza, LLC, a California limited liability company, and its permitted successors and assigns.

*"**Residential Parcel**"* is defined in Recital C.

*"**Residential Units**"* means all of the residential rental apartment units in the Project, which as of the Effective Date, are estimated to total 188 Residential Units.

*"**School District Agreement**"* is defined in Section 5.1.1.

*"**Subdivision Map Act**"* means California Government Code sections 66410 through 66499.58, as it may be amended from time to time.

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

*"**TDM Program**"* is defined in Section 5.1.2.

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

*"**TMA**"* is defined in Section 5.1.2.

*"**TMA Payment***" is defined in Section 5.1.2.

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

"***Unaffiliated Third Party Purchaser***" means a purchaser which does not own, and whose shareholders, members, partners or other beneficial owners do not own (and in the case of a person, whose parents, siblings, spouse, children, or heirs do not own), directly or indirectly through one or more other entities or trusts, any equity, partnership, membership or other beneficial interest in the entity or entities owning the Property or the Project, or any portion thereof, at the time the final certificate of occupancy for the Project is issued or at any other time prior to consummation of the purchase and sale transaction.

*"**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 that the Enacting Ordinance is adopted, and (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 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. Following the expiration of the Term, or the earlier completion of the development of the Project and satisfaction of all Developer's obligations in connection therewith, this Agreement shall be deemed terminated and of no further force and effect.

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 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 necessary performance of the obligations of Developer hereunder have been duly authorized by all necessary company action and all necessary 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.

During the Term of this Agreement, Developer shall, upon learning of any fact or condition which 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 accordance with and subject to the Project Approvals, Applicable Law and 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:

a) Two mixed-use buildings containing a total of 188 Residential Units, approximately 22,600 square feet of commercial space, and associated facilities and residential infrastructure;

b) A 122-room full service neighborhood business hotel; and

c) Underground and surface parking structures;

The number of Residential Units and Hotel Rooms. as well as the amount of square footage for commercial use, are subject to the Project and Agreement amendment processes as set forth in Sections 8.2 and 8.3 herein. The Residential Units are approved as rental apartments only. Any changes to the map for the Property, including, but not limited, to parcelization or condominiumization of the Residential Units, shall require further City review and approval. In the event of a conflict between the Project Approvals and the terms of this Section 3.3, the Project Approvals shall govern.

3.4 Applicable Law. City and Developer acknowledge and agree that City is restricted in its authority to limit its police power by contract and that the limitations, reservations and exceptions contained in this Agreement are intended to reserve to City all of its police power that cannot be so limited. Notwithstanding the foregoing reservation by City, it is the intent of City and Developer that this Agreement be construed to provide Developer with the maximum rights afforded by law, including but not limited to, the Development Agreement Statute. Therefore, subject to the limitations in Section 3.5, 3.7, and 3.9, the laws, rules, regulations, official policies, standards and specifications of City applicable to the development of the Property and/or the Project shall be (collectively, "**Applicable Law**"):

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

(b) 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, heights and sizes, requirements for on- and off-site infrastructure and public improvements, fees and exactions, including without limitation ordinances, regulations, policies and enactments regulating the timing or density on hillside development, in each case only to the extent in full force and effect on the Effective Date;

(c) 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 such New City Laws are uniformly applied on a City-wide basis to all substantially similar types of Development Projects and properties;

(d) 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;

(e) New City Laws that are necessary to protect 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;

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

(g) 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. The Project may be built in phases in response to market conditions and other factors. The Parties acknowledge that Developer cannot at this time predict when or the rate at which or the order in which phases will be developed. Such decisions depend upon numerous factors which are not within the control of Developer, such as market orientation and demand, Developer's business needs, interest rates, competition and other similar factors. 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*, 37 Cal.3d 465 (1984), 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. Notwithstanding the adoption of any New City Laws, including an initiative adopted after the Effective Date by City's electorate to the contrary, the Parties acknowledge that, except for the Affordable Units, which shall be developed as set forth in Section 3.12 below, and as otherwise provided for in this Agreement, Developer shall have the vested right to develop the Project in such order and at such rate and at such times as Developer deems appropriate in its sole discretion.

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. section 12101, *et seq*., Government Code section 4450, *et seq*., Government Code section 11135, *et seq*., and the Unruh Civil Rights Act, Civil Code section 51, *et seq*.

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) any New City Law that is in conflict with this Agreement or the Existing Approvals. Without limiting the generality of the foregoing, City shall not (a) apply to the Property any change in land use designation or permitted use of the Property; (b) limit or control the 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); (c) limit 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 limitations 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**"). In the event 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, and City and Developer shall agree to such action as may be reasonably required. 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, 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 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 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 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 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. In the event that 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. The 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 which 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.

3.12 Affordable Housing. Prior to or concurrently with the recordation of this Agreement, Developer and City shall enter into and record an Affordable Housing Agreement in the form attached as Exhibit C ("**Affordable Housing Agreement**"), which shall provide, among other things, for: (1) the provision of a total of sixteen (16) affordable units in the Project, which are to be occupied exclusively by, and rented to, households of very low income ("**Affordable Units**"); (2) a concurrent term for all Affordable Units of the later of (i) fifty five (55) years from the issuance of the final certificate of occupancy for the Project or (ii) the date the Project buildings are either (a) demolished or (b) converted to a non-residential use by Developer with any City-issued approvals and permits that may be required; and (3) the priority of the Affordable Housing Agreement over any liens or deeds of trust recorded against the Property other than a lien for current unpaid property taxes. Developer further acknowledges, under Civil Code Sections 1954.52(b) and 1954.53(a)(2), that it has agreed to limit rents in the Affordable Units in consideration for the City's agreements to enter into a Development Agreement for the Project and for the City's provision of Density Bonus Incentives, as defined in the Affordable Housing Agreement. Developer hereby agrees that any Affordable Units provided pursuant to this Agreement are not subject to Civil Code Section 1954.52(a) or any other provision of the Costa-Hawkins Act inconsistent with controls on rents, and further agrees that any limitations on rents imposed on the Affordable Units are in conformance with the Costa-Hawkins Act.

ARTICLE 4
FEES

4.1 Impact Fees. Except as otherwise provided in Section 4.1.4 below with respect to the potential Citywide Transportation Impact Fee, for one (1) year following the Effective Date, City has the right to impose 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. Notwithstanding any other provision of this Agreement, after one (1) year following the Effective Date, payment of the Existing Impact Fees shall be at the rates in effect when such fees are due, provided, however, that Developer shall have the right, in its sole and absolute discretion, to elect to prepay in full any Existing Impact Fees (including the Citywide Transportation Impact Fee if and when adopted) otherwise required under this Agreement, and if such prepayment is made to the City, then the Existing Impact Fees (including the Citywide Transportation Impact Fee if and when adopted) shall be paid at the rate in effect at time of payment.

4.1.1 Housing Mitigation Fees. Notwithstanding anything to the contrary in City Resolution No. 15-036, in lieu of and in full satisfaction of, the affordable housing mitigation fees payable pursuant to the fee program adopted by City Resolution No. 15-036 (the "**Housing Mitigation Fees**") that would be applicable to the Project and currently estimated, as of the Effective Date, at Seven Million One Hundred Forty Thousand Four Hundred Fifteen Dollars ($7,140,415.00), Developer shall comply with the obligation to provide the Affordable Units as set forth in Section 3.12 of this Agreement and shall pay a Housing Mitigation Fee balance of Three Million Two Hundred Eighty Four Thousand Four Hundred Fifteen Dollars ($3,284,415.00) payable at the time of issuance of the first building permit (the "**Housing Mitigation Balance**"). The Housing Mitigation Balance will increase annually starting one (1) year after the Effective Date based on increases in the Consumer Price Index over the prior one-year period. If Developer modifies the Project pursuant to Section 8 of this Agreement and such amendment results in a change in the number of Residential Units, Hotel Rooms, or square footage of commercial or retail space, the Housing Mitigation Fees shall be recalculated according to Housing Mitigation Fees in effect at the time of payment.

4.1.2 Park Impact Fees. Developer shall pay to City in full at the time of issuance of the first building permit for the Project those parkland impact fees payable pursuant to the fee program codified in Municipal Code Chapter 13.08 (the "**Park Impact Fees**") at the rate in effect at the time of payment, except that if Developer pays the Park Impact Fees within one (1) year after the Effective Date, the Park Impact Fees shall be Twenty One Thousand Six Hundred Dollars ($21,600.00) per Residential Unit. The sixteen (16) Affordable Units shall not be subject to the Park Impact Fees. Based on an estimated 188 Residential Units, and excepting the sixteen (16) Affordable Units, the total Park Impact Fees for the Project if paid within one (1) year of the Effective Date, are estimated to be Three Million Seven Hundred Fifteen Thousand Two Hundred Dollars ($3,715,200.00). If Developer modifies the Project pursuant to Section 8 of this Agreement and such amendment results in a change in the number of Residential Units, the Park Impact Fees shall be calculated by multiplying the revised number of Residential Units by the per unit rate in effect at time of payment. Developer hereby waives its right to claim a credit against park fees available to Developer pursuant to Section 13.08.070 of the Municipal Code for private and public recreation and open space within the Project.

4.1.3 Public Art Contribution. Notwithstanding anything to the contrary in Municipal Code Chapter 19.148, Developer shall expend not less than the lesser of: (1) one-quarter of one percent (0.25%) of the total project budget; or (2) One Hundred Thousand Dollars ($100,000.00) for public artwork, including but not limited to design, fabrication, and installation as part of the Project ("**Public Art Contribution**"). Developer shall be allowed to meet its Public Art Contribution obligation by providing public artwork within the Project at a cost of not less than the value of the minimum Public Art Contribution. The public artwork shall be approved by City and installed prior to issuance of the first certificate of occupancy for the Project.

4.1.4 Transportation Impact Fees. The Parties acknowledge that, as of the Effective Date, City has not adopted citywide traffic Impact Fees, but is in the process of considering a citywide regional transportation Impact Fee that would be applicable to the Project and other similarly situated Development Projects in the City ("**Citywide Transportation Impact Fee**"). If City has not adopted a Citywide Transportation Impact Fee within one (1) year

of the Effective Date, Developer shall pay to the City an amount of Four Hundred Thirteen Thousand Nine Hundred Fifty Two Dollars ($413,952.00) as a negotiated transportation infrastructure contribution ("**Negotiated Transportation Infrastructure Contribution**"). The Negotiated Transportation Infrastructure Contribution shall be payable at the time of the first building permit for the Project. If Developer modifies the Project pursuant to Section 8 of this Agreement and such amendment results in a change in the number of Residential Units, Hotel Rooms, or square footage of commercial or retail space, the Negotiated Transportation Infrastructure Contribution shall be adjusted according to the formula in Exhibit E. If City adopts a Citywide Transportation Impact Fee within one (1) year of the Effective Date, Developer shall pay the lesser of (i) the Negotiated Transportation Infrastructure Contribution or (ii) the Citywide Transportation Impact Fee at the rate in effect at the time of payment. In the event that City adopts a Citywide Transportation Impact Fee within one (1) year of the Effective Date, Developer has paid the Negotiated Transportation Infrastructure Contribution, and the amount of such Citywide Transportation Impact Fee is less than the amount of the Negotiated Transportation Infrastructure Contribution, City shall credit Developer the difference by (1) first applying the credit to any fees or payments owed to City no later than the date of issuance of the final certificate of occupancy; then (2) after application of all applicable credits, up to the date that is one (1) year from the issuance of the final certificate of occupancy, refunding the remainder of the difference. If City adopts a Citywide Transportation Impact Fee more than one (1) year from the Effective Date, Developer shall have no right to any refund of the difference between the amount of the Negotiated Transportation Infrastructure Contribution and the amount of such Citywide Transportation Impact Fee.

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, which are in effect on a citywide basis at the time those permits, approvals or entitlements are applied for.

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 pursuant to Applicable Law ("**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**"). The City acknowledges and agrees that the Affordable Units which shall not be subject to the 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.

4.6 Right to Challenge Fees. Developer reserves the right to protest or pursue a challenge in law or equity to any new or increased fee. In the event Developer desires to challenge such new or increased fee, Developer shall pay the fee under protest. The City agrees

not to delay issuance of permits, approvals or entitlements pending resolution of such protest or challenge to the fee.

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 Agreement, including in this Article 5, all within the times set forth herein.

5.1.1 School District Agreement. The Parties acknowledge that within ninety (90) days of the Effective Date, or at such later date as the City Manager may agree, Developer will enter into one or more school impact mitigation agreements ("**School District Agreement**") with Fremont Union High School District (**"FUHSD"**) and Cupertino Union School District (**"CUSD"**) providing for payment of statutory school impact fees and the following additional voluntary community educational benefits: (a) annual monetary contributions payable directly to FUHSD and CUSD of not less than Eighteen Thousand Dollars ($18,000) and Forty Six Thousand Dollars ($46,000), respectively, commencing no later than the date of issuance of the first temporary Certificate of Occupancy for any Residential Unit and payable annually thereafter upon the anniversary of such date; (b) use of no fewer than five (5) days of Hotel Room use per year by each of FUHSD and CUSD at no charge; and (c) use of the community room on the Residential Parcel from time to time by FUHSD or CUSD when available at no charge and pursuant to the terms of the School District Agreement. If the two residential buildings on the Residential Parcel are developed as separate phases, then the minimum annual payment amounts set forth in clause (a) above may be prorated based on the ratio of the number of Residential Units in the residential building for which a temporary Certificate of Occupancy has been issued as compared to the total number of Residential Units in the Project. The effectiveness of the School District Agreement and Developer's obligations thereunder may be contingent upon City's issuance of a building permit for the Project. Developer's failure to timely enter into a School District Agreement conforming to the terms of this Section or Developer's breach of the School District Agreement once such agreement has been entered into shall be considered a Default under this Agreement. The School District Agreement shall remain in effect until the earlier of: (i) the date which is twenty (20) years following the issuance of the first temporary Certificate of Occupancy for a Residential Unit or (ii) the date upon which title to the Property and the Project is transferred to an Unaffiliated Third Party Purchaser through a bona-fide arms-length purchase and sale transaction occurring at any time following issuance of the last final certificate of occupancy for the Project. The person or entity seeking to terminate the School District Agreement under clause (ii) above shall have the burden of proving that the shareholder(s), member(s), partner(s), or other beneficial owner(s) of the Unaffiliated Third Party Purchaser did not have as of the date the final certificate of occupancy for the Project was issued, or at any other time prior to consummation of the purchase and sale transaction, any equity, partnership, membership or other beneficial interest in the Project or the Property or the entity or entities which owned the Property or the Project. Nothing in this Section 5.1.1. shall prevent Developer and FUHSD and CUSD from entering into a School District Agreement having a longer term or providing for greater financial contributions than the minimums

specified above or prohibit an Unaffiliated Third Party Purchaser from agreeing to extend the term of the School District Agreement beyond the minimum term set forth above.

5.1.2 Transportation Benefits. Pursuant to the conditions of approval for the Project Approvals, Developer shall fund and fully implement a Transportation Demand Management Program ("**TDM Program**") for the Project. In addition, the Parties agree that if (a) a Transportation Management Association ("**TMA**") is formed whose coverage area includes the Property, and (b) the TMA includes the operation or funding of a shuttle that includes a shuttle stop within 400 feet of the Property, Developer shall make an initial payment and annual payments to support the establishment and operation of the TMA (collectively, the "**TMA Payments**"). Upon the establishment of such a TMA, Developer shall make an initial one-time payment to City in the amount of Fifty Thousand Dollars ($50,000.00) to fund a portion of the start-up costs of such TMA within thirty (30) days following City's demand. On January 1 of the calendar year following such initial payment, and each January 1 thereafter, Developer shall make an annual payment to City equal to the lesser of (A) the Project's proportionate share of estimated ridership for the TMA program, or (B) the Annual Maximum Contribution. "Annual Maximum Contribution" means Twenty Thousand Dollars ($20,000.00) per year as increased annually based on increases in the Consumer Price Index over the prior one-year period.

Except as the Parties may otherwise agree, the TMA Payments shall represent Developer's sole contribution and obligation towards the formation of the TMA. If the City Council does not authorize the formation and ongoing operation of a TMA during the Term, Developer shall have no further obligation under this Agreement to make the TMA Payments. Other than the obligations of this Section 5.1.3, Developer shall have no further obligations under this Agreement with respect to any TMA in Cupertino. Developer reserves the right to elect, in its sole and absolute discretion, to join any TMA if and when formed. If a TMA is formed, the City and Developer shall review, on an annual basis, the TDM Program to ensure that there is a minimum of duplicative efforts.

5.1.3 Public Improvements. Pursuant to the conditions of approval for the Existing Approvals, Developer agreed to construct certain public improvements including traffic signal modifications at a cost of One Hundred Fifty Thousand Dollars ($150,000), bicycle and pedestrian improvements at a cost of Thirty Five Thousand Dollars ($35,000), and a bus shelter and benches at a cost of Forty Thousand Dollars ($40,000) (collectively, "**Public Improvements**"). Prior to the issuance of the first building permit, Developer shall execute, acknowledge and deliver to City for recordation in the Official Records of Santa Clara County, a public improvements agreement in a form reasonably acceptable to the City Attorney requiring Developer to, among other things, complete construction and installation of the Public Improvements in accordance with plans and specifications approved by the City Engineer, within twenty four (24) months following the issuance of the first building permit for the Project, dedicate such public improvements to City upon satisfactory completion thereof, provide a one year warranty with respect to material and workmanship, post completion and labor and materials security, guarantee completion of such work and payment of all labor and materials required, maintain adequate insurance, and indemnify and defend City and all its related parties with respect to any claim arising from performance of such work.

5.2 City of Cupertino Business License. Developer, at its expense, shall obtain and maintain a City of Cupertino business license at all times during the Term, 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 the work of construction.

5.3 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 ($5,000,000.00) or more; or (c) otherwise designate the Property as the place of use of material used in the construction of the Project in order 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 cause such general contractor(s) to instruct its/their subcontractors to, cooperate with City to ensure 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.

5.4 Use of Hotel Conference Rooms. Prior to or concurrently with the recordation of this Agreement, Developer and City shall enter into and record an Agreement to Be Recorded Affecting Real Property with respect to the Hotel substantially in the form attached as Exhibit F ("**Agreement to be Recorded**"). The Agreement to be Recorded provides, among other things, that the City shall be entitled to use the conference rooms at the Hotel subject to certain terms and conditions, and that the Hotel shall not operate as an extended stay hotel.

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. Each annual review shall also document the status of the Project development.

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 compliance with this Agreement during the previous calendar year, including a completed Annual Review Form in the form provided in Exhibit G and such other information as may reasonably be requested by the Planning Director. If the Planning Director finds good faith compliance by Developer with the terms of this Agreement, Developer shall be notified in writing and the review for that period shall be concluded. If the Planning Director is not satisfied that Developer is performing in accordance with the terms and conditions of this Agreement, the Planning Director shall prepare a written report specifying why Developer may not be in good faith compliance with this Agreement, 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, a copy of the Planning Director'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. Developer shall be given an opportunity to be heard at the hearing. The findings of the City Council on whether Developer has complied with this Agreement 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, 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 the terms and conditions of this Agreement, or there are significant questions as to whether Developer has complied with the terms and conditions of this Agreement, 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 of such determination, prior to taking further action. Following such meeting, the City Council shall resume the hearing in order to further consider the matter and to make a determination regarding Developer's good faith compliance with the terms and conditions of this Agreement. In the event City determines Developer is not in good faith compliance with the terms and conditions of this Agreement, City may give 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 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 this Section 6.1.2, Developer is found to be in compliance with this Agreement, 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, and (b) Developer is not in Default. 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 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, grading permits, building permits, design review permits, sewer and water connection 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 and the terms and conditions of this Agreement.

7.2 Scope of Review of Subsequent Approvals. By approving the Existing Approvals, City has made a final policy decision that the Project is in the best interests of the public health, safety and general welfare. Accordingly, City shall not use its authority in considering any application for a discretionary Subsequent Approval to change the policy decisions reflected by the Existing Approvals or otherwise to prevent or delay development of the Project as set forth in the Project Approvals.

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 (Developer shall pay such costs at cost plus the then-applicable rate for administrative costs, which is 15% as of the Effective Date); (b) if legally required, providing notice and holding public hearings; and (c) acting on any such pending Subsequent Approval application.

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 hereto 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 Amendments. Upon Developer's written request for an amendment or modification to the Project 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 Amendment**" and shall not be considered an amendment to the applicable Project Approvals 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. Lot line adjustments, 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 or facilities that do not substantially alter the design concepts of the Project, and minor adjustments to the Site Map or Property Description shall be treated as Administrative Project Amendments.

8.2.2 Major Project Amendments. Any amendment to the Project Approvals or Subsequent Project Approvals which is determined not to be an Administrative Project

Amendment as set forth above in Section 8.2.1 shall be deemed a "**Major Project 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 to determine if an amendment is a Major Project Amendment subject to this Section 8.2.2 or an Administrative Project Amendment subject to Section 8.2.1 above.

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 of this Agreement; (b) permitted uses of the Property; (c) provisions for the reservation or dedication of land; (d) conditions, terms restrictions or requirements for subsequent discretionary actions; (e) increases in the density or intensity of the use of the Property or the maximum height or size of proposed buildings; or (f) monetary contributions by Developer, 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 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 above.

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.

8.5 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.

8.6 Reliance on Project MND. The MND which has been certified by City as being in compliance with CEQA, addresses the potential environmental impacts of the entire Project as it is described in the Project Approvals. It is agreed that, in acting on any discretionary

Subsequent Approvals for the Project, City will rely on the MND to satisfy the requirements of CEQA to the fullest extent permissible by CEQA and City will not require a new initial study, negative declaration or subsequent or supplemental MND unless required by CEQA and will not impose on the Project any mitigation measures or other conditions of approval other than those specifically imposed by the Project Approvals or this Agreement or specifically required by Applicable Law.

8.7 Subsequent CEQA Review. In the event that any additional CEQA documentation is legally required for any discretionary Subsequent Approval, then the scope of such documentation shall be focused, to the extent possible consistent with CEQA, on the specific subject matter of the Subsequent Approval, and the City, at Developer's expense, shall conduct such additional CEQA review as expeditiously as possible.

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

9.1 Insurance Requirements. Prior to commencement of construction activities and through completion of all construction activities (including demolition) for the Project, 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 two million ($2,000,000.00) combined single limit, including contractual liability together with a comprehensive automobile liability policy in the amount of one million ($1,000,000.00), 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 the 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.

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 present and future Claims, including Claims for any bodily injury, death, or property damage, resulting directly or indirectly from the development or construction of the Project by or on behalf of Developer, 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, except to the extent such Claims arise from the sole active negligence or willful misconduct of City or City Parties. 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 all 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 pursuant to Labor Code sections 1726 and 1781.

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; (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 reasonable costs of such representation to be paid by Developer; (c) Developer shall reimburse City, within ten (10) business days following City's written demand therefor, which may be made from time to time during the course of such litigation, all reasonable costs incurred by City in connection with the Litigation Challenge, including City's administrative, legal, and court costs and City Attorney oversight expenses; and (d) 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 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 in accordance with Applicable Law, and City reserves its full legislative discretion with respect thereto. If Developer opts not to contest or defend such Litigation Challenge, City shall have no obligation to do so.

ARTICLE 10
ASSIGNMENT, TRANSFER AND NOTICE

10.1 Assignment. Because of the necessity to coordinate development of the entirety of the Property pursuant to plans for the Project, particularly with respect to the provision of on- and off-site public improvements and public services and benefits, certain restrictions on the right of Developer to assign or transfer its interest under this Agreement with respect to the Property, or any portion thereof, are necessary in order 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 to City to enter into this Agreement. Developer shall have the right to sell or transfer its fee interest, or ground lease its interests in the Property, in whole or in part (provided that no such partial transfer shall violate the provisions of the Subdivision Map Act) to any person, partnership, joint venture, firm, company, corporation or other entity (any of the foregoing, an "**Assignee**") subject to the written consent of City, which shall not be unreasonably withheld, delayed or conditioned, provided that Developer may assign its rights under this Agreement without the consent of City to any corporation, limited liability company, partnership or other entity which is controlling of, controlled by, or under common control with Developer, and

"control," for purposes of this definition, 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**"). City's written consent, as required above, shall be provided by City within thirty (30) days of City's receipt of the notice provided in Section 10.1.2 below, if Developer has satisfied all of the following conditions:

10.1.1 No Default. Developer is not in Default under this Agreement or the Assignee agrees to cure any Default;

10.1.2 Notice. Developer shall provide the City with written notice of any proposed transfer or assignment of Developer's rights or obligations hereunder (each, an "**Assignment**") at least thirty (30) days prior to such Assignment. Each such notice of proposed Assignment shall be accompanied by evidence of Assignee's assumption of Developer's obligations hereunder in the form of Exhibit H, which shall be recorded in the Official Records of Santa Clara County; and

10.1.3 Payment of Costs. Developer shall pay the actual costs borne by City in connection with its review of the proposed Assignment, including the costs incurred by the City Attorney's office.

Assignee shall succeed to the rights, duties and obligations of Developer only with respect to the parcel or parcels, or portion of the Property so purchased, transferred, ground leased or assigned, and Developer shall continue to be obligated under this Agreement with respect to any remaining portions of the Property retained by Developer and not assigned.

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 all or a portion of the Property, Developer shall continue to be obligated under this Agreement as to all or the portion of the Property so transferred unless City has consented to the assignment as provided above.

10.3 Assignment to Financial Institutions or Mortgagee. Notwithstanding any other provisions 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 and such financing shall not require consent from City. Developer shall provide a copy of the deed of trust and notice of any such financing assignment to City within ten (10) business days following execution thereof.

In addition, nothing contained in this Agreement shall prevent a transfer or assignment of the Property, or any portion thereof, to a financial institution or Mortgagee as a result of a foreclosure of a Mortgage or deed in lieu of foreclosure, and any lender or Mortgagee acquiring the Property, or any portion thereof, as a result of foreclosure or a deed in lieu of foreclosure shall take such Property subject to the terms of this Agreement; provided, however, in no event shall such lender or Mortgagee be liable for any Default of Developer arising prior to acquisition of title to the Property by such lender or Mortgagee (other than continuing Defaults for which Mortgagee shall be liable); and provided further in no event shall any lender or Mortgagee or its

successors or assigns be entitled to a building permit or occupancy certificate for any portion of the Project until all outstanding obligations of Developer have been performed, and until any and all outstanding Defaults have been cured.

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 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 improvement 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 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. Developer shall provide City with a copy of the deed of trust or mortgage within ten (10) days after its recording in the official records of Santa Clara County; 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 and the other Project 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. Except as otherwise provided in this Section 11.2, all of the terms and conditions contained in this Agreement, the other Project Approvals, the Agreement to be Recorded, School District Agreement, and the Affordable Housing Agreement, shall be binding upon and effective against and shall run to the benefit of any person or entity, including any Mortgagee, 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 from the date the City delivers the Notice of Default to Developer.

11.4 No Supersedure. Nothing in 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 Section 11.4 constitute an obligation of City to such Mortgagee, except as to the notice requirements of Article 11.

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 would qualify as a Minor 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 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, shall be deemed to be a cure, provided that if the cure is not diligently prosecuted to completion, then no additional cure period shall 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 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 Approvals 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. 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 specific performance for the purpose of causing Developer to satisfy such condition.

12.5 Legal Actions.

12.5.1 Institution of Legal Actions. In addition to any other rights or remedies, a Party may institute legal action 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 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 the Federal District Court for the Northern District of the State of California 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. In the event that any legal action is commenced by Developer against City, service of process on City shall be made by personal service upon the City Clerk of City or in such other manner as may be provided by law. In the event that any legal action is commenced by City against Developer, service of process on Developer shall be made 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 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 to the extent herein specified 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. Nothing in this Section 12.8 shall in any way be interpreted as requiring that Developer, City and/or City's designee 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 this Agreement is terminated, neither Party shall have any further rights or obligations hereunder, except for those obligations of Developer set forth in Section 9.2 and Section 9.3.

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 the City to amend this Agreement in accordance with the Development Agreement Statute and/or to amend the Project Approvals; (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 the City. If the condemnation is not a Material Condemnation, Developer shall have no right to request termination of this Agreement pursuant to this Section 13.1. Nothing in this Agreement shall be deemed, 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 (by merger, consolidation, or otherwise) and assigns, and all other persons or entities acquiring the Property, or any interest therein, and shall inure to the benefit of the Parties and their respective successors and assigns, as provided in Government Code section 65868.5.

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 the City and Developer as follows:

If to City:	City Clerk City of Cupertino 10300 Torre Avenue Cupertino, CA 95014-3202 Telephone: (408)777-3200
with a copy to:	City Attorney City of Cupertino 10300 Torre Avenue Cupertino, CA 95014-3202 Telephone: (408)777-3200
And:	City Manager City of Cupertino 10300 Torre Avenue Cupertino, CA 95014-3202 Telephone: (408)777-3200
If to Marina Plaza, LLC:	Albert Wang Marina Plaza, LLC. 4546 El Camino Real, Suite 222 Los Altos, CA 94022
with a copy to	Samuel A. Chuck Rossi, Hamerslough, Reischl & Chuck, PLC 1960 The Alameda, Suite 200 San Jose, CA 95126
If to Cupertino 10145, LLC:	Albert Wang Cupertino 10145, LLC. 4546 El Camino Real, Suite 222 Los Altos, CA 94022
with a copy to	Samuel A. Chuck Rossi, Hamerslough, Reischl & Chuck, PLC 1960 The Alameda, Suite 200 San Jose, CA 95126

Notices to be deemed effective if 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 Party.

13.4 Permitted Delays. Performance by either of the Parties 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 including, without limitation, an inability to perform caused by (a) calamities, including without limitation earthquakes, floods, and fire; (b) civil commotion; (c) riots or terrorist acts; (d) strikes or other forms of material labor disputes; (e) shortages of materials or supplies; or (f) vandalism. A Party's financial inability to perform or obtain financing or adverse economic conditions generally shall not be grounds for claiming a Permitted Delay. 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 within thirty (30) days after the occurrence of the conditions which establish the grounds for the claim. If notice by the Party claiming such extension is sent to the other Party more than thirty (30) days after the commencement of the cause, the period shall commence to run only thirty (30) days prior to the giving of such notice. The period of Permitted Delay shall last no longer than the conditions preventing performance. In no event shall any Permitted Delay extend the Term of this Agreement.

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 failures or delays by either 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 such Party of its right to institute and maintain any actions or proceedings which it may deem necessary to protect, assert or enforce any such rights or remedies. 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 may terminate this Agreement 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 mutual consent in writing of the Parties in accordance with the provisions of this Agreement.

13.12 Other Necessary Acts. Each Party shall execute and deliver to the other all such further instruments and documents as may be reasonably necessary to carry out 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 the City.

13.14 Entire Agreement. This Agreement (including all Recitals, 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 the City requesting the City to certify in writing (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; (c) that Developer is not in Default of the performance of its obligations, or if in Default, to describe therein the nature and extent of any such Defaults; (d) those obligations under this Agreement 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 expended by the City Attorney's office in connection therewith. 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 Recordation of Termination. Upon completion of the Project and Developer's payment of all Impact Fees under Article 4 and other payments under Article 5 and recordation of the Affordable Housing Agreement and Agreement to be Recorded, or upon any earlier termination of this Agreement upon the mutual written consent of the Parties or as otherwise expressly provided herein, a written statement acknowledging Developer's satisfaction of all obligations under this Agreement or such termination, in form and content reasonably satisfactory to the Parties, shall be executed by the Parties, and shall be recorded by City or Developer in the Official Records of Santa Clara County.

13.17 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.

13.18 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.

13.19 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.

13.20 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.

13.21 Joint and Several Liability. Except as otherwise expressly provided herein, if Developer consists of more than one person or entity, then the obligations of each such person and/or entity shall be joint and several.

13.22 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 Description

Exhibit B: Site Map

Exhibit C: Affordable Housing Agreement

Exhibit D: Existing Impact Fees

Exhibit E: Transportation Impact Fee Formula

Exhibit F: Agreement to be Recorded

Exhibit G: Annual Review Form

Exhibit H: 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: _____
David Brandt, City Manager
[Signature must be notarized]

ATTEST:

By: _____
Grace Schmidt, City Clerk

APPROVED AS TO FORM:

By: _____
Randolph Stevenson Hom, City Attorney

DEVELOPER:

CUPERTINO 10145, LLC, a California limited liability company

By: _____
Name: _____
Its: _____
[Signatures must be notarized]

By: _____
Name: _____
Its: _____
[Signatures must be notarized]

AND

MARINA PLAZA, LLC, a California limited liability company

By: _____
Name: _____
Its: _____
[Signatures must be notarized]

By: _____
Name: _____
Its: _____
[Signatures must be notarized]

De Anza Venture, LLC, a California limited liability company, the applicant of record and the intended developer for the Project hereby consents to the terms described in the Agreement.

DE ANZA VENTURE, LLC,
a California limited liability company

By: _____
Name: _____
Its: _____
[Signatures must be notarized]

By: _____
Name: _____
Its: _____
[Signatures must be notarized]

[Notary Acknowledgements To Be Inserted]

EXHIBIT A-1

HOTEL PARCEL DESCRIPTION

10145 NORTH DE ANZA BOULEVARD (APN 326-034-043)

All that certain Real Property in the City of Cupertino, County of Santa Clara, State of California, described as follows:

PARCEL ONE:

LOT 1, AS SHOWN ON THAT CERTAIN MAP ENTITLED, "TRACT NO. 5162", WHICH MAP WAS FILED FOR RECORD IN THE OFFICE OF THE RECORDER OF THE COUNTY OF SANTA CLARA, STATE OF CALIFORNIA, ON MAY 2, 1972, IN BOOK 300 OF MAPS AT PAGES 26 AND 27.

PARCEL TWO:

AN EASEMENT FOR INGRESS AND EGRESS OVER A STRIP OF LAND 14.50 FEET IN WIDTH THE EASTERLY AND NORTHERLY LINES OF WHICH ARE MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE SOUTHWESTERLY CORNER OF THE ABOVE DESCRIBED LOT; THENCE FROM SAID POINT OF BEGINNING AND ALONG THE GENERAL WESTERLY BOUNDARY LINE OF SAID LOT NORTH 0°01’04" WEST, 142.71 FEET AND SOUTH 89°58’56" WEST, 27.00 FEET AND THE TERMINUS OF THE LINES DESCRIBED HEREIN.

EXHIBIT A-2

RESIDENTIAL PARCEL DESCRIPTION

10118-10122 BANDLEY DRIVE (APN 326-32-066)

All that certain Real Property in the City of Cupertino, County of Santa Clara, State of California, described as follows:

PARCEL ONE

ALL OF PARCEL "A" AS SHOWN UPON THAT CERTAIN MAP ENTITLED, "PARCEL MAP BEING A PORTION OF NW ¼ OF SECTION 13, T. 7S., R. 1W., M.D.B.& M.", WHICH MAP WAS FILED FOR RECORD IN THE OFFICE OF THE RECORDER OF THE COUNTY OF SANTA CLARA, STATE OF CALIFORNIA, ON FEBRUARY 15, 1978 IN BOOK 412 OF MAPS, AT PAGE 50.

PARCEL TWO:

AN EASEMENT FOR THE PURPOSE OF VEHICULAR AND PEDESTRIAN INGRESS AND EGRESS, AS CONVEYED BY THAT CERTAIN GRANT OF EASEMENT RECORDED JULY 17, 1981 IN BOOK G221, PAGE 162, AND BY COVENANT REGARDING EASEMENT RECORDED JULY 17, 1981 IN BOOK G221, PAGE 184, OFFICIAL RECORDS, BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

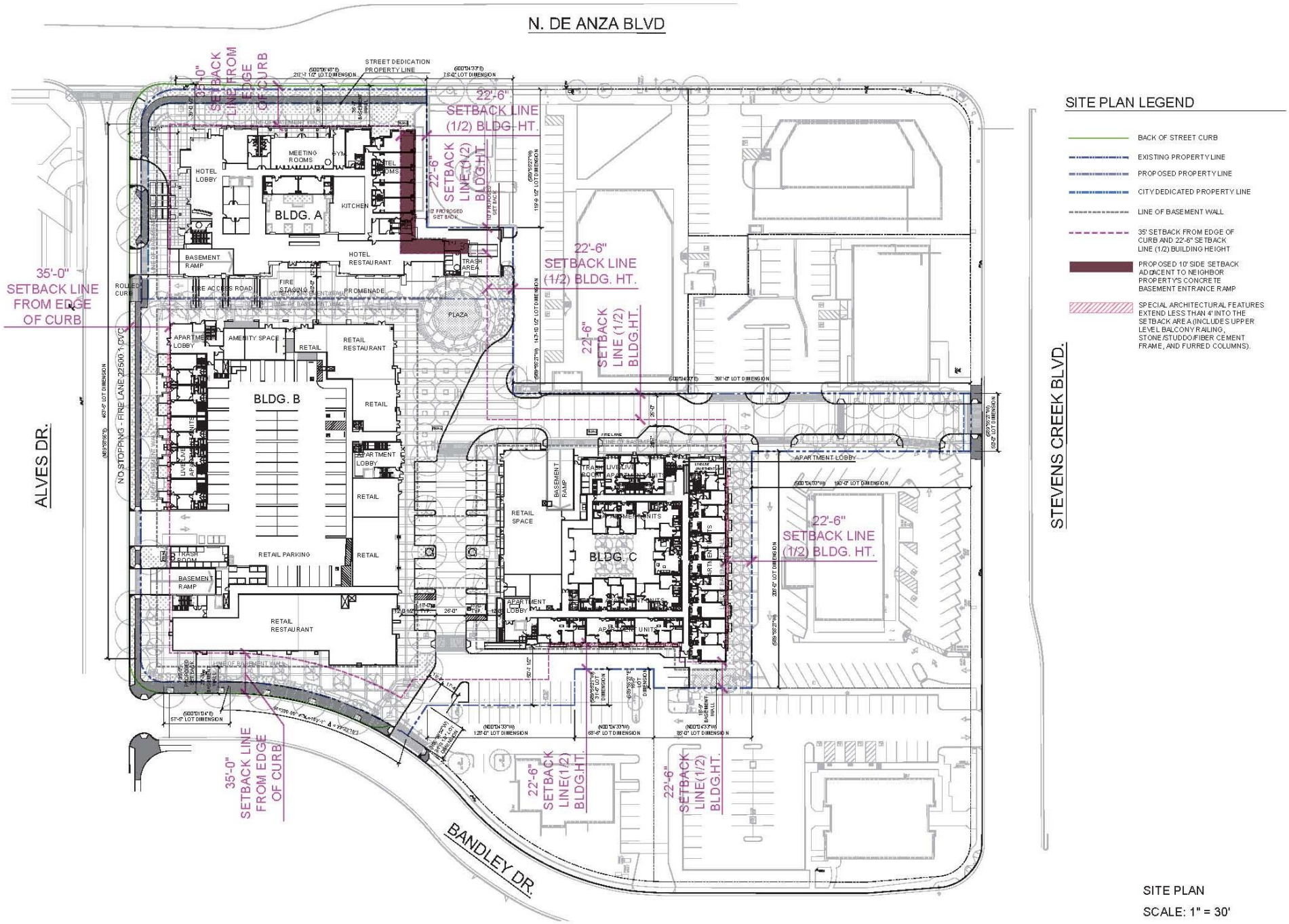
THE SOUTHERLY 27 FEET OF PARCEL "B" AS SAID PARCEL "B" IS SHOWN UPON THAT CERTAIN PARCEL MAP RECORDED IN BOOK 412 OF MAPS, AT PAGE 50, SANTA CLARA COUNTY RECORDS.

PARCEL THREE:

RECIPROCAL EASEMENTS AS DESCRIBED IN THAT CERTAIN "RECIPROCAL EASEMENT AGREEMENT" EXECUTED BY NORCAL ASSOCIATES, A CALIFORNIA PARTNERSHIP AND COAST FEDERAL SAVINGS AND LOAN ASSOCIATION, A UNITED STATES CORPORATION, RECORDED JULY 18, 1979 IN BOOK E648, PAGE 568 AND BY THAT CERTAIN "DECLARATION OF ESTABLISHMENT OF COVENANTS, CONDITIONS AND RESTRICTIONS AND RECIPROCAL EASEMENTS" RECORDED AUGUST 22, 1979 IN BOOK E742, PAGE 703 AND AS AMENDED BY DOCUMENT RECORDED APRIL 15, 1980 IN BOOK F272, PAGE 71, OF OFFICIAL RECORDS.

EXHIBIT B

SITE MAP



SITE PLAN LEGEND

- BACK OF STREET CURB
- EXISTING PROPERTY LINE
- PROPOSED PROPERTY LINE
- CITY DEDICATED PROPERTY LINE
- LINE OF BASEMENT WALL
- 35' SETBACK FROM EDGE OF CURB AND 22'-6" SETBACK LINE (1/2) BUILDING HEIGHT
- PROPOSED 10' SIDE SETBACK ADJACENT TO NEIGHBOR PROPERTY'S CONCRETE BASEMENT ENTRANCE RAMP
- SPECIAL ARCHITECTURAL FEATURES EXTEND LESS THAN 4' INTO THE SETBACK AREA (INCLUDES UPPER LEVEL BALCONY RAILING, STONE/STUDDO/FIBER CEMENT FRAME, AND FURRED COLUMNS).

SITE PLAN

SCALE: 1" = 30'

MARINA PLAZA

10145 DE ANZA BLVD. AND 10122 BANDLEY DR. CUPERTINO, CALIFORNIA
De Anza Venture, LLC

JOB NO. 1250.001
DATE 05-19-16

DAHLIN group
5865 Owens Drive
Pleasanton, CA 94588
925-251-7200

A.1

EXHIBIT C

AFFORDABLE HOUSING AGREEMENT AND DECLARATION OF RESTRICTIVE COVENANTS

RECORDING REQUESTED BY AND
WHEN RECORDED MAIL TO:

City of Cupertino
10300 Torre Avenue
Cupertino, CA 95014
Attn.: City Manager

No fee for recording pursuant to
Government Code Section 27383

(Space above for Recorder's Use)

AFFORDABLE HOUSING AGREEMENT AND DECLARATION OF RESTRICTIVE COVENANTS

This AFFORDABLE HOUSING AGREEMENT AND DECLARATION OF RESTRICTIVE COVENANTS ("Agreement") is entered into as of this __ day of ____ 2016 ("Effective Date") by and between the CITY OF CUPERTINO, a municipal corporation (the "City"), and MARINA PLAZA, LLC, a California limited liability company (the "Developer"), (individually a "Party" and together the "Parties"), with reference to the following facts:

A. Developer is the owner of that certain real property commonly known as 10118-10122 Bandley Drive (APN 326-32-066) in Cupertino, California (the "Property") more particularly described and depicted in Attachment 1 attached to this Agreement and incorporated by this reference. The Property, together with that certain real property commonly known as 10145 North De Anza Boulevard (APN 326-34-043) ("Hotel Parcel") owned by Cupertino 10145 LLC, a California limited liability company ("Cupertino 10145"), comprise the "Site."

B. The Site is the subject of a Development Agreement (DA-2016-01) (the "Development Agreement") concerning the redevelopment of the existing commercial buildings on the Site with two mixed-use buildings containing 188 dwelling units, approximately 22,600 square feet of commercial space on the Property as well as a 122-room full service neighborhood business hotel on the Hotel Parcel, and associated facilities and infrastructure (collectively the "Project"). On September 6, 2016, De Anza Venture LLC, a two member California limited liability company whose members consist of Developer and Cupertino 10145 ("De Anza Venture"), received discretionary approvals from the City for the Project, including a Development Permit (DP-2015-05), an Architectural and Site Approval Permit (ASA-2015-22), a Use Permit (U-2015-06), a Tree Removal Permit (TR-2016-14), an exception to the Heart of the City Specific Plan for a setback (EXC-2016-03), a Fence Exception (EXC-2016-05), and the Development Agreement (collectively, the "Project Approvals"). Cupertino 10145 and Developer intend to transfer their respective interests in the Site, and concurrently assign their

respective rights and obligations under the Development Agreement, to De Anza Venture, who will develop the Project on the Site.

C. Cupertino Municipal Code Chapter 19.56 codifies the City's density bonus ordinance, which the City adopted to conform to State Density Bonus Law (Government Code Section 65915 – 65918) (together "Density Bonus Law"). Density Bonus Law allows a density bonus, concessions, and other regulatory incentives when a developer proposes to provide rental housing affordable to Very Low Income Households.

D. As part of the Project, Developer has sought and agreed to construct sixteen (16) dwelling units (11% of the total 139 dwelling units otherwise permitted in the Project) to be affordable and rented to Very Low Income Households (the "Affordable Units") for the Term as defined below. Under Density Bonus Law, Developer has applied for, and the City has granted, the following modifications to its usual development standards in exchange for the Developer's provision of the Affordable Units:

1. A density bonus of thirty-five percent (35%), or forty-nine (49) additional dwelling units (the "Density Bonus").

2. A reduction in parking otherwise required for the Affordable Units to provide one parking space per one-bedroom unit rather than two parking spaces (the "Parking Modification"). The Density Bonus and Parking Modification are collectively "Density Bonus Incentives."

E. Density Bonus Law requires the City to ensure, and the Developer to agree to, continued affordability of the Affordable Units. To ensure their continued affordability for the Term, this Agreement shall be executed and recorded against the Property prior to the recordation of any parcel map or final subdivision map or issuance of building permits for the Project, whichever occurs first.

F. In consideration of the valuable land use and economic benefits conferred by the City upon the Property under Density Bonus Law, Developer, for itself, its successors, heirs, grantees and assigns, hereby desires through this Agreement to comply with the requirements of Density Bonus Law as applied to the Property.

G. In addition, as a material consideration for the long term assurances, vested rights, and other City obligations provided by the Development Agreement and as a material inducement to City to enter into the Development Agreement, Developer offered and agreed to certain terms as specified in the Development Agreement. Section 3.12 of the Development Agreement specifies, among other provisions, that the Developer shall provide sixteen (16) Affordable Units in the Project for the Term and that the Parties shall enter into and record this Agreement prior to or concurrently with the recordation of the Development Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and promises contained in this Agreement and other valuable consideration, it is mutually agreed by and between the Parties as follows.

AGREEMENT

The Parties agree and acknowledge that the above recitals are true and accurate, and are incorporated into this Agreement by this reference.

ARTICLE 1.
DEFINITIONS AND ATTACHMENTS

Section 1.1. Definitions. When used in this Agreement, the following terms shall have the respective meanings assigned to them in this Article 1.

(a) "Affordable Rent" is the maximum allowable Rent for an Affordable Unit, equal to one-twelfth (1/12th) of thirty percent (30%) of fifty percent (50%) of Area Median Income, adjusted for assumed household size of one person in a studio Affordable Unit, two persons in a one-bedroom Affordable Unit, three persons in a two-bedroom Affordable Unit, and one additional person for every additional bedroom thereafter.

(b) "Affordable Units" are defined in Recital D.

(c) "Agreement" is defined in the first paragraph on page 1.

(d) "Area Median Income" is the median Household Income in Santa Clara County as determined periodically by the State of California pursuant to California Code of Regulations, Title 25, Section 6932 or successor provision.

(e) "City" is defined in the first paragraph on page 1 of this Agreement.

(f) "City Council" is the City Council of the City of Cupertino.

(g) "Cupertino 10145" is defined in Recital A.

(h) "De Anza Venture" is defined in Recital B.

(i) "Density Bonus" is defined in Recital D.

(j) "Density Bonus Incentive" is defined in Recital D.

(k) "Density Bonus Law" is defined in Recital C.

(l) "Developer" is defined in the first paragraph on page 1 of this Agreement.

(m) "Development Agreement" is defined in Recital B.

(n) "Director" is the Community Development Director or successor position.

(o) "Effective Date" is defined in the first paragraph on page 1 of this Agreement.

(p) "Eligible Household" is a household which has been determined to be eligible to rent an Affordable Unit in compliance with Density Bonus Law and this Agreement.

(q) "Hotel Parcel" is defined in Recital A.

(r) "Household Income" of a Tenant is determined as provided in the City's Policy and Procedures Manual or successor publication.

(s) "Low Income Household" is a household with a Household Income between fifty percent (50%) and eighty percent (80%) of Area Median Income, adjusted for actual household size.

(t) "Market Rate Units" are dwelling units in the Project that are not Affordable Units.

(u) "Mortgagee" is the holder of any mortgage, deed of trust, security agreement, and other like security instrument encumbering all or any portion of the Property or any of the Developer's rights under this Agreement.

(v) "Parking Modification" is defined in Recital D.

(w) "Party" or "Parties" are defined in the first paragraph on page 1 of this Agreement.

(x) "Policy and Procedures Manual" is the Policy and Procedures Manual for Administering Deed Restricted Affordable Housing Units, or successor publication, adopted from time to time by the City Council.

(y) "Project" is defined in Recital B.

(z) "Project Approvals" are defined in Recital B.

(aa) "Property" is defined in Recital A.

(bb) "Rent" includes monthly rent paid to the Developer, utilities, and all mandatory fees for parking and other housing services associated with the Affordable Unit, including but not limited to parking, bicycle storage, storage lockers, and use of all common areas. An allowance for utilities paid by the Tenant is established by the Santa Clara County Housing Authority, and includes garbage collection, sewer, water, electricity, gas and other heating, cooking and refrigeration fuel, but not telephone service or cable TV, and such allowance must be deducted from the monthly rent paid to the Developer.

(cc) "Site" is defined in Recital A.

(dd) "Tenant" is a household occupying an Affordable Unit pursuant to a valid lease or rental agreement with the Developer.

(ee) "Tenant Lease" is defined in Section 3.5.

(ff) "Term" is defined in Section 3.1.

(gg) "Very Low Income Household" is a household with a Household Income at or below fifty percent (50%) of Area Median Income, adjusted for actual household size.

Section 1.2. Attachments. The following attachments are attached to and incorporated into this Agreement:

Attachment 1 Legal Description of the Property.

Attachment 2 Schedule of Affordable Units.

Attachment 3 Example of Affordable Rents and Maximum Income Level of Tenants for Affordable Units.

ARTICLE 2.
CONSTRUCTION OF PROJECT AND AFFORDABLE RENTAL UNITS

Section 2.1. Affordable Units. To satisfy Developer's affordable housing requirements for the Project under Density Bonus Law and the Development Agreement, Developer shall rent sixteen (16) Affordable Units to Very Low Income Households at Affordable Rents, as specified in Article 3 below, for the Term.

Section 2.2. Construction of Affordable Units. The Affordable Units shall be constructed in proportion to construction of the Market-Rate Units, at a ratio of one Affordable Unit to each eleven (11) Market-Rate Units. No building permit shall be issued for any Market-Rate Unit unless a proportional number of building permits have been issued for Affordable Units, and no certificates of occupancy or final inspections shall be issued for any Market-Rate Units unless a proportional number of certificates of occupancy or final inspections have been issued for Affordable Units. The Director may approve a modified construction schedule if this timing requirement will create unreasonable delays in the issuance of certificates of occupancy for Market-Rate Units and if the Developer provides satisfactory assurance, as approved by the Director, that the Affordable Units will be completed prior to completion of all of the Market-Rate Units. Each Affordable Unit shall be inspected by the City prior to occupancy to determine that it meets the construction and other standards required by this Agreement.

Section 2.3. Appearance, Size and Bedroom Count of Affordable Units.

(a) Appearance and Maintenance of Affordable Units. The Affordable Units in the Project shall be comparable to Market-Rate Units in terms of unit type, number of bedrooms per unit, quality of exterior appearance, and overall quality of construction, except that the Developer may elect to provide the Affordable Units with more bedrooms. Affordable Unit sizes should be generally representative of the unit sizes of the Market-Rate Units, and the Affordable Units shall be dispersed throughout the Project, in accordance with Attachment 2. Interior features and finishes of Affordable Units shall be durable, of good quality, and consistent with contemporary standards for new housing. Developer shall allocate and assign bicycle storage, storage lockers, and other spaces reserved for use by individual units to the Affordable

Units on the same basis as for the Market-Rate Units, and Tenants of the Affordable Units shall have equal access to the Project's common areas as is given to the residents of the Market-Rate Units, but any fee charged for use of common areas or for spaces reserved for individual units shall be included in the Tenant's Rent. Affordable Units with one bedroom shall have one parking space per unit pursuant to Municipal Code section 19.56.040(E). Affordable Units with two bedrooms shall have two parking spaces per unit pursuant to Municipal Code section 19.124.040. Once completed, the Affordable Units shall not be kept vacant or used for any purpose except for residential use and, if vacant, shall be marketed concurrently with the Market-Rate Units and offered for rent to Eligible Households at Affordable Rents.

(b) Location of Affordable Units. As required by the Project Approvals, prior to issuance of any building permit for the Project, Developer shall submit to the Director an Affordable Housing Plan, as described in the Project Approvals, specifying the proposed location of the Affordable Units and the Project's consistency with this Article 2, for the Director's reasonable approval. If, after recordation of this Agreement, Developer desires to change the location of any Affordable Unit within the Project, Developer shall submit a written request for such change to the Director, who may approve such request provided that any relocated Affordable Units shall be consistent with this Article 2, be comparable to those listed in Attachment 2, and contain the same number of bedrooms.

ARTICLE 3.
RENT REGULATORY PROVISIONS

Section 3.1. Term. The "Term" of this Agreement is the period in which each Affordable Unit shall be rented to Very Low Income Households. For all Affordable Units, the Term shall commence upon issuance of each certificate of occupancy for an Affordable Unit and shall expire on the later of (a) fifty-five (55) years from the issuance of the final certificate of occupancy for the Project or (b) the date the Project buildings are either (i) demolished or (ii) converted to a non-residential use by Developer with any City-issued approvals and permits that may be required. Upon issuance of the final certificate of occupancy, City and Developer shall record a certificate specifying the date of issuance of the final certificate of occupancy.

Section 3.2. Affordability and Occupancy Covenants.

(a) Occupancy Requirements. Subject to the provisions of subsection (e) of this Section below, Affordable Units shall be rented to and occupied by or, if vacant, available for occupancy by, Very Low Income Households.

(b) Allowable Rent. Subject to the provisions of subsection (e) of this Section below, the maximum Rent charged to Tenants of the Affordable Units shall not exceed Affordable Rent.

(c) City Approval of Rents. The initial Rents for all Affordable Units shall be approved by the City prior to occupancy at the time the Developer submits to the City the marketing plan required by Section 3.5 below. The City shall review all proposed Rent increases to determine whether the proposed increases are consistent with the provisions of this Agreement. Developer shall certify to the City that Developer is not charging any fee other than

Affordable Rent to Tenants of the Affordable Units for all of the components of Rent defined in Section 1.1(y) above.

(d) Schedule of Affordable Rents. The City has provided the Developer with a schedule of Affordable Rents for the Affordable Units in effect on the date of this Agreement, set forth in attached Attachment 3. The City annually determines Affordable Rents (including utility allowances) based on changes in Area Median Income and utility allowances, and Developer shall obtain a copy of the schedule from the Director.

(e) Increased Income of Tenants.

(i) Increase from Very Low Income to at or below Low Income. If, upon annual recertification of a Tenant's income, the Developer determines that a former Very Low Income Household's income has increased and exceeds the qualifying income for a Very Low Income Household, but does not exceed the qualifying limit for a Low Income Household, then, upon expiration of the Tenant's lease and after sixty (60) days written notice to the Tenant, the Tenant's rent may be increased to Affordable Rent for Low Income Households.

(ii) Increase to Above Low Income. If, upon recertification of a Tenant's Household Income, the Developer determines that the Tenant's Household Income has increased and exceeds the qualifying income for a Low Income Household, then the Tenant shall be given written notice that Tenant shall vacate the Affordable Unit three (3) months from the date of the notice or upon expiration of the Tenant's lease, whichever is later. A three (3) month extension may be granted by the Director in cases of extreme hardship. If, prior to the date by which the Tenant must vacate the Affordable Unit, another Unit in the Project is vacated which is not designated as an Affordable Unit and is of appropriate bedroom size, the Developer may, at the Developer's option, request the Director, pursuant to Section 2.3(b) above, to approve a change in the location of the Affordable Unit; allow the Tenant to remain in the original Unit at market rent; and designate the newly vacated Unit as an Affordable Unit if approved by the Director.

Section 3.3. Agreement to Limitation on Rents. The Project has received approval of a Development Agreement and Density Bonus Incentives under Density Bonus Law from the City. These are forms of assistance specified in Chapter 4.3 (commencing with Section 65915) of Division 1 of Title 7 of the Government Code. Sections 1954.52(b) and 1954.53(a)(2) of the Costa-Hawkins Act provide that, where a developer has received such assistance, certain provisions of the Costa-Hawkins Act do not apply if a developer has so agreed by contract. The Developer hereby agrees to limit Rents as provided in this Agreement in consideration of the Developer's receipt of the Density Bonus Incentives and the City's approval of the Development Agreement and further agrees that any limitations on Rents imposed on the Affordable Units are in conformance with the Costa-Hawkins Act. The Developer further warrants and covenants that the terms of this Agreement are fully enforceable.

Section 3.4. Notice to Developer. Developer further acknowledges and agrees that the City, in its review of the Project Approvals, provided adequate and proper notice pursuant to Government Code Section 66020 of Developer's right to protest any requirements for fees, dedications, reservations, and other exactions as may be included in this Agreement, that no

protest in compliance with Section 66020 was made within ninety (90) days of the date that notice was given, and that the period has expired in which Developer may protest any and all fees, dedications, reservations, and other exactions as may be included in this Agreement.

Section 3.5. Lease Provisions. The Developer shall use a form of Tenant lease (the "Tenant Lease") approved by the City for the Affordable Units. The Tenant Lease shall, among other matters:

(a) provide for termination of the lease for failure: (1) to provide any information required under this Agreement or reasonably requested by the Developer to establish or recertify the Tenant's qualification, or the qualification of the Tenant's household, as an Eligible Household in accordance with this Agreement, or (2) to qualify as an Eligible Household as a result of any material misrepresentation made by such Tenant with respect to the Household Income computation or certification;

(b) provide that the Rent may not be raised more often than once every twelve (12) months. The Developer will provide each Tenant with at least sixty (60) days written notice of any increase in Rent applicable to such Tenant;

(c) prohibit subleasing of the Affordable Unit or any portion of the Affordable Unit or any spaces reserved for the use of the Tenant, contain nondiscrimination provisions, and include the Tenant's obligation to inform the Developer of any need for maintenance or repair

(d) allow termination of the tenancy only for an increase in Tenant's Household Income above qualifying income for Low Income Households or for good cause, including violation of the terms and conditions of the Tenant Lease, violations of applicable federal, state, or local law, or other good cause;

(e) include, at Developer's option, the obligation for Tenant to provide a security deposit not exceeding two months' rent;

(f) be for an initial term of one year; and

(g) otherwise conform to the Policy and Procedures Manual.

Section 3.6. Marketing, Income Certification and Reporting.

(a) Required City Approvals. At least sixty (60) days before any Affordable Units in the Project receive a final inspection or certificate of occupancy, the Developer shall notify City of the availability of the Affordable Units and provide to the City its proposed marketing plan for the Affordable Units as described below; the proposed form of Tenant Lease to confirm conformance with the provisions of Section 3.5 above; and proposed Affordable Rents for the Affordable Units, all for City review and approval. The Affordable Units shall be marketed concurrently with the marketing of the Market-Rate Units.

(b) Marketing Plan. The Developer's marketing plan shall be consistent with the provisions of this subsection (b). Upon receipt of the marketing plan, the City shall promptly review the marketing plan and shall approve or disapprove it within thirty (30) days after

submission. If the marketing plan is not approved, the Developer shall submit a revised marketing plan within thirty (30) days.

(i) Section 8 Vouchers and Certificate Holders. The Developer will review applications from prospective tenants of Affordable Units, on the same basis as all other prospective tenants, of persons who are recipients of federal certificates for rent subsidies pursuant to the existing housing program under Section 8 of the United States Housing Act or any successor. The Developer shall not apply selection criteria to Section 8 certificate or voucher holders that are more burdensome than criteria applied to all other prospective tenants for the Affordable Units, nor shall the Developer apply or permit the application of management policies or lease provisions with respect to the Project which have the effect of precluding occupancy of Affordable Units by such prospective tenants.

(ii) Marketing Materials. The marketing plan submitted to the City shall include the following: means to be used to advertise Affordable Units to the public upon initial occupancy and as vacancies occur and maintenance of a waiting list; the amount of any application screening fee to be imposed by Developer, and information to be provided to applicants, including conditions and restrictions applicable to occupancy of the Affordable Units, current Affordable Rent, permitted Rent increases, maximum qualifying income for an Eligible Household, requirement for annual Household Income recertification, preferences, if any, and requirement to vacate the Affordable Unit if the Tenant's Household Income exceeds the maximum qualifying income.

(c) Income Certification.

(i) Prior to Developer's entering into a lease with a prospective tenant of an Affordable Unit, the prospective tenant household shall be certified by the City or its assignee as an Eligible Household.

(ii) Annually thereafter, the Developer will obtain, complete and maintain on file Household Income certifications for each Tenant renting any of the Affordable Units. Developer shall make a good faith effort to verify that the Household Income statement provided by a Tenant is accurate by taking two or more of the following steps as a part of the verification process for all members of the Tenant household age eighteen (18) or older: (a) obtaining a minimum of the three (3) most current pay stubs; (b) obtaining an income tax return for the most recent tax year; (c) conducting a credit agency or similar search; (d) obtaining the three (3) most current savings and checking account bank statements; (e) obtaining an income verification form from a current employer; (f) obtaining an income verification form from the Social Security Administration and/or the California Department of Social Services if an adult member of the Tenant's household receives assistance from either of such agencies; or (g) if the Tenant is unemployed and has no such tax return, obtain another form of independent verification. Copies of annual Tenant Household Income certifications shall be provided to the City or its assignee for review.

(iii) As an alternative to the procedure described in subparagraph (ii) of this subsection (c), Developer may contract with a provider approved by the City to certify Tenant Household Incomes on an annual basis.

(d) Reports to City.

(i) Annual Report. The Developer shall submit to the City on April 1st of each year a report, in a form prescribed by or otherwise acceptable to the City, verifying compliance by Developer with the terms of this Agreement and certified as correct by the Developer. The annual report shall include without limitation: Household Income for all Tenants of Affordable Units at the time of initial occupancy and at recertification; number of persons in each Affordable Unit; amount of Rent charged; other information reasonably required by the City.

(ii) Other Reports. Within fifteen (15) days after receipt of a written request, Developer shall provide any other information or completed forms reasonably requested by the City to ensure compliance with this Agreement.

Section 3.7. Management of Property and Property Maintenance.

(a) Management Responsibilities. Except for the City's initial certification of a Tenant as an Eligible Household, the Developer is responsible for all management functions with respect to the Project, including, without limitation, the annual recertification of household size and Household Income (subject to review by the City or its assignee), selection of Tenants, evictions, collection of Rents and deposits, maintenance, landscaping, routine and extraordinary repairs, replacement of capital items, and security. The City shall have no responsibility over management of the Project.

(b) Property Maintenance. The City places prime importance on quality maintenance to ensure that all developments within the City which include affordable housing units are not allowed to deteriorate due to below-average maintenance. Developer shall provide the Affordable Units with the same level and quality of maintenance, including performance of repairs and periodic replacement of fixtures as the Market-Rate Units. The Developer agrees to maintain all interior and exterior improvements, including landscaping, on the Property in good condition and repair (and, as to landscaping, in a healthy condition) and in accordance with all applicable laws, rules, ordinances, orders and regulations of all federal, state, county, municipal, and other governmental agencies and bodies having or claiming jurisdiction and all their respective departments, bureaus, and officials.

(c) Taxes and Assessments. Developer shall pay all real and personal property taxes, assessments, if any, and charges and all franchise, income, employment, old age benefit, withholding, sales, and other taxes assessed against it, or payable by it, at such times and in such manner as to prevent any penalty from accruing, or any lien or charge from attaching to the Property; provided, however, that Developer shall have the right to contest in good faith, any such taxes, assessments, or charges. In the event Developer exercises its right to contest any tax, assessment, or charge against it, Developer, on final determination of the proceeding or contest, shall immediately pay or discharge any decision or judgment rendered against it, together with all costs, charges and interest.

ARTICLE 4.
ENFORCEMENT

Section 4.1. Covenants Running with the Land. The City and Developer hereby declare their express intent that the covenants and restrictions set forth in this Agreement shall apply to and bind Developer and its heirs, executors, administrators, successors, transferees, and assignees having or acquiring any right, title or interest in or to any part of the Property and shall run with and burden such portions of the Property until terminated in accordance with Section 4.3. Until all or portions of the Property are expressly released from the burdens of this Agreement, each and every contract, deed or other instrument hereafter executed covering or conveying the Property or any portion thereof shall be held conclusively to have been executed, delivered, and accepted subject to such covenants and restrictions, regardless of whether such covenants or restrictions are set forth in such contract, deed or other instrument. In the event of foreclosure or transfer by deed-in-lieu of all or any portion of the Property prior to completion and sale of all of the Affordable Units, title to all or any portion of the Property shall be taken subject to this Agreement. Developer acknowledges that compliance with this Agreement is a requirement of Density Bonus Law and the Project Approvals, and that no event of foreclosure or trustee's sale may remove these requirements from the Property.

Section 4.2. No Subordination; Notice to Mortgagees. In no event shall this Agreement be subordinated to, or recorded subordinate to, a mortgage, deed of trust, or other method of security encumbering the Property, other than current unpaid taxes. 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 from the date the City delivers the notice of default to Developer.

Section 4.3. Release of Property from Agreement.

(a) Prior to the expiration of the Term, Developer shall provide all notifications required by Government Code Sections 65863.10 and 65863.11 or successor provisions and any other notification required by any state, federal, or local law. In addition, at least six (6) months prior to the expiration of the Term for an Affordable Unit, the Developer shall provide a notice by first-class mail, postage prepaid, to all Tenants in the Affordable Units whose Term is expiring. The notice shall contain (a) the anticipated date of the expiration of the Term, (b) any anticipated Rent increase upon the expiration of the Term, (c) a statement that a copy of such notice will be sent to the City, and (d) a statement that a public hearing may be held by the City on the issue and that the Tenant will receive notice of the hearing at least fifteen (15) days in advance of any such hearing. The Developer shall file a copy of the above-described notice with the City Manager.

(b) Upon the expiration of the Term, City shall execute and record a release of the Project, the Property, and each Unit in the Project from the burdens of this Agreement within thirty (30) days following written notice from the Developer, if at the time the Developer is in compliance with all terms of this Agreement.

Section 4.4. Default. Failure of the Developer to satisfy any of Developer's obligations under the terms of this Agreement within thirty (30) days after the delivery of a notice of default from the City will constitute a default under this Agreement, a default under the Development Agreement, and a failure to satisfy the Project Approvals and Density Bonus Law. In addition to remedies for breach of this Agreement, the City may exercise any and all remedies available to it under Density Bonus Law, or otherwise, including but not limited to:

(a) withholding, conditioning, suspending or revoking any permit, license, subdivision approval or map, or other entitlement for the Project, including without limitation final inspections for occupancy and/or certificates of occupancy;

(b) instituting against the Developer, or other parties, a civil action for declaratory relief, injunction or any other equitable relief, or relief at law, including without limitation an action to rescind a transaction and/or to require repayment of any funds received in connection with such a violation;

(c) where one or more persons have received financial benefit as a result of violation of this Agreement or of any requirement imposed under the Density Bonus Law, the City may assess, and institute legal action to recover as necessary, a penalty in any amount up to and including the amount of financial benefit received, in addition to recovery of the benefit received;

(d) requiring the Developer or his/her successors in interest to the Property to pay the City Rent or any other payment received by the Developer for the Affordable Unit from the date of any unauthorized use of the Affordable Unit or in excess of Affordable Rent; and

(e) any other means authorized under the City of Cupertino Municipal Code, Density Bonus Law, or any other federal or state statute.

Section 4.5. Remedies Cumulative. No right, power, or remedy given to the City by the terms of this Agreement or Density Bonus Law is intended to be exclusive of any other right, power, or remedy; and each and every such right, power, or remedy shall be cumulative and in addition to every other right, power, or remedy given to the City by the terms of this Agreement, Density Bonus Law, or by any statute or ordinance or otherwise against Developer and any other person. Neither the failure nor any delay on the part of the City to exercise any such rights and remedies shall operate as a waiver thereof, nor shall any single or partial exercise by the City of any such right or remedy preclude any other or further exercise of such right or remedy, or any other right or remedy.

ARTICLE 5.
GENERAL PROVISIONS

Section 5.1. Appointment of Other Agencies. At its sole discretion, the City may designate, appoint or contract with any other public agency, for-profit or non-profit organization to perform some or all of the City's obligations under this Agreement.

Section 5.2. Records. Developer shall retain all records related to compliance with obligations under this Agreement for a period not less than five (5) years from the date of origination of such records, and make them available to City employees or others designated by the City for inspection and copying on five (5) business days' written notice. The City shall be entitled to monitor compliance with this Agreement and Density Bonus Law, and Developer shall cooperate with City monitoring, including obtaining Tenant Rent and Household Income verification upon request of the City.

Section 5.3. Monitoring Fee. Developer agrees to pay an annual monitoring fee as may be adopted by resolution of the City Council which is in force and effect for a similar class of affordable units.

Section 5.4. Nondiscrimination. All of the Affordable Units shall be available for occupancy to members of the general public. The Developer shall not give preference to any particular class or group of persons in renting or selling the Affordable Units, except to the extent that the Affordable Units are required to be rented and sold to Eligible Households and as required by this Agreement; provided, however, there shall be no discrimination against or segregation of any person or group of persons, on account of race, color, creed, religion, sex, sexual orientation, marital status, national origin, source of income (e.g., SSI), age (except for lawful senior housing), ancestry, or disability, in the leasing, transferring, use, occupancy, tenure, or enjoyment of any Unit nor shall the Developer or any person claiming under or through the Developer, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use, or occupancy of Tenants of any Unit or in connection with the employment of persons for the construction, operation and management of the Project.

Section 5.5. Hold Harmless. Developer will indemnify and hold harmless (without limit as to amount) City and its elected officials, officers, employees and agents in their official capacity (hereinafter collectively referred to as "Indemnitees"), and any of them, from and against all loss, all risk of loss and all damage (including expense) sustained or incurred because of or by reason of any and all claims, demands, suits, actions, judgments and executions for damages of any and every kind and by whomever and whenever made or obtained, allegedly caused by, arising out of or relating in any manner to the Project, the Affordable Units, or Developer's performance or non-performance under this Agreement, including claims pursuant to California Labor Code Section 1720 et seq., and shall protect and defend Indemnitees, and any of them with respect thereto, except to the extent arising from the gross negligence or willful misconduct of the Indemnitees. The provisions of this Section shall survive expiration or other termination of this Agreement or any release of part or all of the Property from the burdens of this Agreement, and the provisions of this Section shall remain in full force and effect.

Section 5.6. Notices. All notices required pursuant to this Agreement shall be in writing and may be given by personal delivery or by registered or certified mail, return receipt requested, to the Party to receive such notice at the addressed set forth below:

TO THE CITY:

City of Cupertino
Office of City Attorney
10300 Torre Avenue
Cupertino, CA 95014

TO THE DEVELOPER:

Albert Wang
Marina Plaza, LLC
4546 El Camino Real, Suite 222
Los Altos, CA 94022

WITH A COPY TO:

Samuel A. Chuck
Rossi, Hamerslough, Reischl & Chuck, PLC
1960 The Alameda, Suite 200
San Jose, CA 95126

Any Party may change the address to which notices are to be sent by notifying the other Parties of the new address, in the manner set forth above.

Section 5.7. Integrated Agreement; Relationship to Other Related Agreements and Documents. This Agreement constitutes the entire Agreement between the Parties and no modification hereof shall be binding unless reduced to writing and signed by the Parties hereto. The parties acknowledge that this Agreement was negotiated concurrently with the Development Agreement. The Parties hereby agree that in the event of a direct conflict between this Agreement and the Development Agreement, this Agreement shall control. In addition, in the event of any direct conflict between a material term of this Agreement (including but not limited to, the Term) and the terms of the Policy and Procedures Manual, this Agreement shall control.

Section 5.8. Each Party's Role in Drafting the Agreement. Each Party to this Agreement has had an opportunity to review the Agreement, confer with legal counsel regarding the meaning of the Agreement, and negotiate revisions to the Agreement. Accordingly, neither Party shall rely upon Civil Code Section 1654 in order to interpret any uncertainty in the meaning of the Agreement.

Section 5.9. Amendment of Agreement; Approvals and Consents.

(a) Amendments to this Agreement shall be subject to the review and approval of the City Council. No amendment may be approved that is inconsistent with State law, the Cupertino Municipal Code, the Development Agreement, or the Policy and Procedure Manual. Upon approval, a restated Agreement or amendments to this Agreement, as appropriate, shall be executed and recorded.

(b) The City has authorized the City Manager to execute this Agreement and has authorized the Director to deliver such approvals or consents as are required by this Agreement. Any consents or approvals required under this Agreement shall not be unreasonably withheld or made, unless it is specifically provided that a sole discretion standard applies.

Section 5.10. No Claims. Nothing contained in this Agreement shall create or justify any claim against the City by any person that Developer may have employed or with whom Developer may have contracted relative to the purchase of materials, supplies or equipment, or the furnishing or the performance of any work or services with respect to the Property or the construction of the Project or construction of the Affordable Units.

Section 5.11. Applicable Law. This Agreement shall be governed by California law. Venue shall be the County of Santa Clara.

Section 5.12. Waivers. Any waiver by the City of any obligation or condition in this Agreement must be in writing. No waiver will be implied from any delay or failure by the City to take action on any breach or default of Developer or to pursue any remedy allowed under this Agreement or applicable law. Any extension of time granted to Developer to perform any obligation under this Agreement shall not operate as a waiver or release from any of its obligations under this Agreement. Consent by the City to any act or omission by Developer shall not be construed to be a consent to any other or subsequent act or omission or to waive the requirement for the City's written consent to future waivers.

Section 5.13. Title of Parts and Sections. Any titles of the sections, subsections, or subparagraphs of this Agreement are inserted for convenience of reference only and shall be disregarded in interpreting any part of the Agreement's provisions.

Section 5.14. Multiple Originals; Counterpart. This Agreement may be executed in multiple originals, each of which is deemed to be an original, and may be signed in counterparts.

Section 5.15. Recording of Agreement. This Agreement shall be recorded against the Property in the Official Records of the County of Santa Clara prior to the recordation of any development agreement, parcel map or final subdivision map or issuance of any building permit for the Project, whichever occurs first.

Section 5.16. Estoppel Certificate. Developer or its lender may, at any time, and from time to time, deliver written notice to the City requesting the City to certify in writing that, to the knowledge of the City (a) this Agreement is in full force and effect and is a binding obligation of the Parties, (b) this Agreement has not been amended or modified or, if so amended or modified, identifying the amendments or modifications, and (c) Developer is not in Default in the

performance of its obligations under this Agreement, or if in Default, to describe the nature of any Defaults. Developer and City acknowledge that a certificate hereunder may be relied upon by the Developer and Mortgagees. The Developer may request the estoppel certificate to be in a recordable form and may record such certificate in the Official Records of Santa Clara County at its sole cost and expense. The City Manager shall be authorized to execute any certificate requested by Developer in a form reasonably approved by the City Attorney. The Developer shall pay all costs borne by City in connection with its review of any proposed estoppel certificate.

Section 5.17. Severability. In the event any limitation, condition, restriction, covenant, or provision contained in this Agreement is to be held invalid, void or unenforceable by any court of competent jurisdiction, the remaining portions of this Agreement shall nevertheless be and remain in full force and effect.

[*Signatures on Following Page*]

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

CITY:

CITY OF CUPERTINO, a municipal corporation

By: _____
David Brandt, City Manager
[Signature must be notarized]

ATTEST:

By: _____
Grace Schmidt, City Clerk

APPROVED AS TO FORM:

By: _____
Randolph Stevenson Hom, City Attorney

DEVELOPER:

MARINA PLAZA, LLC, a California limited liability company

By: _____
Name: _____
Its: _____
[Signatures must be notarized]

By: _____
Name: _____
Its: _____
[Signatures must be notarized]

[Notary Acknowledgements To Be Inserted]

ATTACHMENT 1

PROPERTY DESCRIPTION

10118-10122 BANDLEY DRIVE (APN 326-32-066)

All that certain Real Property in the City of Cupertino, County of Santa Clara, State of California, described as follows:

PARCEL ONE

ALL OF PARCEL "A" AS SHOWN UPON THAT CERTAIN MAP ENTITLED, "PARCEL MAP BEING A PORTION OF NW ¼ OF SECTION 13, T. 7S., R. 1W., M.D.B.& M.", WHICH MAP WAS FILED FOR RECORD IN THE OFFICE OF THE RECORDER OF THE COUNTY OF SANTA CLARA, STATE OF CALIFORNIA, ON FEBRUARY 15, 1978 IN BOOK 412 OF MAPS, AT PAGE 50.

PARCEL TWO:

AN EASEMENT FOR THE PURPOSE OF VEHICULAR AND PEDESTRIAN INGRESS AND EGRESS, AS CONVEYED BY THAT CERTAIN GRANT OF EASEMENT RECORDED JULY 17, 1981 IN BOOK G221, PAGE 162, AND BY COVENANT REGARDING EASEMENT RECORDED JULY 17, 1981 IN BOOK G221, PAGE 184, OFFICIAL RECORDS, BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

THE SOUTHERLY 27 FEET OF PARCEL "B" AS SAID PARCEL "B" IS SHOWN UPON THAT CERTAIN PARCEL MAP RECORDED IN BOOK 412 OF MAPS, AT PAGE 50, SANTA CLARA COUNTY RECORDS.

PARCEL THREE:

RECIPROCAL EASEMENTS AS DESCRIBED IN THAT CERTAIN "RECIPROCAL EASEMENT AGREEMENT" EXECUTED BY NORCAL ASSOCIATES, A CALIFORNIA PARTNERSHIP AND COAST FEDERAL SAVINGS AND LOAN ASSOCIATION, A UNITED STATES CORPORATION, RECORDED JULY 18, 1979 IN BOOK E648, PAGE 568 AND BY THAT CERTAIN "DECLARATION OF ESTABLISHMENT OF COVENANTS, CONDITIONS AND RESTRICTIONS AND RECIPROCAL EASEMENTS" RECORDED AUGUST 22, 1979 IN BOOK E742, PAGE 703 AND AS AMENDED BY DOCUMENT RECORDED APRIL 15, 1980 IN BOOK F272, PAGE 71, OF OFFICIAL RECORDS.

ATTACHMENT 2

SCHEDULE OF AFFORDABLE UNITS

Number of Bedrooms	**Affordable Units**	**Unit Numbers & Location *[May be provided at building permit]***		
		2nd. Floor	**3rd. Floor**	**4th floor**
One				
Two				
TOTALS:	**16**			

ATTACHMENT 3

EXAMPLE OF AFFORDABLE RENTS FOR AFFORDABLE UNITS AND MAXIMUM INCOME LEVEL OF TENANTS

(Provided for reference. These limits are adjusted annually, as determined and published by the City. Project shall be subject to the Affordable Rents and Household Income limits in effect at the time Developer submits marketing plan to City.)

A. Affordable Rents.

Affordable Rent is defined in Section 1.1(a) of this Agreement. The table below illustrates how Affordable Rent is calculated, based upon 2016 State Income Limits adopted by the California Department of Housing and Community Development and contained in California Code of Regulations, Title 25, Section 6932.

Number of Bedrooms	AMI* for Assumed Household Size	50 Percent of AMI	Maximum Annual Rent	Maximum Monthly Affordable Rent** (1/12 of Maximum Annual Rent)
One	$85,700	$42,850	$12,855	**$1,072**
Two	$96,400	$48,200	$14,460	**$1,205**

** AMI is Area Median Income.*

***A reasonable allowance for tenant-paid utilities must be deducted from the Tenant's monthly payments to the Developer. See definition of Rent in Section 1.1(aa) for other fees and charges that must be deducted from the Tenant's monthly payments to the Developer. 2016 utility allowances are available at: http://www.hacsc.org/assets/1/6/2016_Utility_Allowances_for_website_update.pdf*

B. Maximum Household Income of Tenants (Income Limits)

Household Size (Number of Persons)	Maximum Gross Annual Household Income
1	$39,100
2	$44,650
3	$50,250

Income limits for larger households available upon request from the City.

EXHIBIT D

EXISTING IMPACT FEES

1.	Housing Mitigation Fees $7,140,415.00	Section 4.1.1
2.	Park Impact Fees $3,715,200.00	Section 4.1.2
3.	Public Art Contribution Not less than $100,000.00	Section 4.1.3
4.	Negotiated Transportation Infrastructure Contribution $413,952.00	Section 4.1.4

EXHIBIT E

TRANSPORTATION IMPACT FEE FORMULA

If Developer modifies the Project pursuant to Section 8 of this Agreement and such amendment results in a change in the number of Residential Units, Hotel Rooms, or square footage of commercial or retail space, the Negotiated Transportation Infrastructure Contribution in section 4.1.5 shall be adjusted according to the following formula:

Transportation Impact Fee

	Units	Quantity	Fee	Total Fee
Residential	Dwelling Unit	188	$ 3,000.00	$ 564,000.00
Hotel	Room	122	$ 2,000.00	$ 244,000.00
New Retail	Per 1,000 square feet	22.593	$ 8,000.00	$ 180,744.00
Existing Retail	Per 1,000 square feet	-48.724	$ 8,000.00	$ (389,792.00)
	Transportation Impact Fee Total			$ 598,952.00

Transportation Impact Fee to be paid with Reduction from Public Benefits in Section 5.1.3

Transportation Impact Fee Total	$ 598,952.00
Subtract Public Benefits	$ 185,000.00
Total	$ 413,952.00

**Does not include bus shelter and benches*

Exhibit F

AGREEMENT TO BE RECORDED AFFECTING REAL PROPERTY

RECORDING REQUESTED BY AND)
WHEN RECORDED MAIL TO:)
)
City of Cupertino)
10300 Torre Avenue)
Cupertino, CA 95014)
Attn.: City Manager)

No fee for recording pursuant to *(Space above for Recorder's Use)*
Government Code Section 27383

AGREEMENT TO BE RECORDED AFFECTING REAL PROPERTY

This AGREEMENT TO BE RECORDED AFFECTING REAL PROPERTY ("**Agreement**"), dated as of _____, 2016, is made and entered into by and between CUPERTINO 10145, LLC, a California limited liability company ("**Developer**"), and the CITY OF CUPERTINO, a California municipal corporation ("**City**"), (individually a "**Party**" and collectively the "**Parties**").

RECITALS

A. Developer is the owner of that certain real property commonly known as 10145 North De Anza Boulevard (APN 326-34-043) in Cupertino, California, County of Santa Clara as more particularly described in Attachment 1 attached hereto and incorporated herein by this reference (the "**Hotel Parcel**"). The Hotel Parcel, together with 10118-10122 Bandley Drive (APN 326-32-066) ("**Residential Parcel**") constitute the "**Property**."

B. The City on one hand, and Developer and Marina Plaza, LLC, a California limited liability company (together the "**Property Owners**"), on the other, have entered into a Development Agreement ("**Development Agreement**"), effective _____ and recorded on _____ in the Official Records of Santa Clara County as Instrument No. _____, to facilitate development of the Property subject to certain terms and conditions. Property Owners intend to demolish the existing commercial space on the Property and redevelop the Property with a 122-room full service neighborhood business hotel on the Hotel Parcel ("**Hotel**"), as well as 188 residential rental apartment units and approximately 23,600 square feet of commercial space on the Residential Parcel, and related uses, as further described in the Development Agreement and the Project Approvals referenced therein (collectively the "**Project**"). All capitalized terms not otherwise defined in this Agreement have the meaning ascribed to them in the Development Agreement.

C. Developer and City have agreed to execute and record this Agreement in order to bind Developer and future owners of the Hotel Parcel to certain obligations regarding the

ongoing use and operation of the Hotel and Hotel Parcel and certain other obligations, all as set forth herein.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual benefits accruing to the Parties hereto, and for other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Developer and City on behalf of themselves and their respective heirs, executors, successors, assigns and each successor in interest hereby covenant and agree as follows:

1. No Extended Stay Hotel. Developer hereby covenants and agrees, for itself, its successors, its assigns and every successor in interest to the Hotel Parcel or any part thereof, that for the time period set forth below, no Extended Stay hotel use shall be allowed on the Hotel Parcel. As used herein "Extended Stay" is defined as overnight occupancy for thirty (30) consecutive days or longer; provided, however, that a stay in which a guest "checks out" of the Hotel not less than every twenty-ninth (29th) day shall not be considered an Extended Stay, notwithstanding that such guest immediately checks back into the Hotel.

2. Use of Conference Rooms. Developer hereby covenants and agrees, for itself, its successors, its assigns and every successor in interest to the Hotel Parcel or any part thereof, that the Hotel will contain at least one (1) conference room totaling no less than Five Hundred (500) square feet of conference space ("**Conference Rooms**"). Developer hereby grants City the right to use the Conference Rooms, at no cost to City, for the purpose of hosting meetings and other City events for up to 12 days per year upon thirty (30) days prior written notice to Developer. Use of multiple Conference Rooms in a given day shall be counted as one day per Conference Room. Developer shall have the right to reasonably reject dates requested by City, provided Developer offers City at least three (3) alternative dates, each of which shall be within 15 days of the date originally proposed by City and rejected by Developer. Developer further agrees to provide food, beverages, and other amenities during the City's use of the Conference Rooms at a rate not to exceed the rate offered to the general public for such amenities. City shall indemnify and hold Developer harmless from any property damage, bodily injury, or death arising out of the City's use of the Conference Rooms to the extent caused by the sole or active negligence or willful misconduct of City. Except as otherwise expressly provided in the foregoing sentence, City shall not be liable in any manner for any inconvenience, disturbance, loss of business, nuisance, or other damage arising out of its use of the Conference Rooms.

3. Interference With Financing. No violation or breach of the covenants, conditions, restrictions, provisions or limitations contained in this Agreement shall defeat or render invalid or in any way impair the lien or charge of any mortgage, deed of trust or other financing or security instrument; provided, however, that any successor of Developer to the Hotel Parcel shall be bound by such remaining covenants, conditions, restrictions, limitations and provisions, whether such successor's title was acquired by foreclosure, deed in lieu of foreclosure, trustee's sale or otherwise.

4. Beneficiaries. City is deemed the beneficiary of the terms and provisions of this Agreement and of the covenants running with the land, for and in its own right and for the purposes of protecting the interests of the community and other Parties, public or private, in

whose favor and for whose benefit this Agreement and the covenants running with the land have been provided, without regard to whether City has been, remains or is an owner of any land or interest therein in the Hotel Parcel or the Project. City shall have the right, if the Agreement or covenants are breached, to exercise all rights and remedies, and to maintain any actions or suits at law or in equity or other proper proceedings to enforce the curing of such breaches to which it or any other beneficiaries of this Agreement and covenants may be entitled.

5. Integrated Agreement; Relationship to Other Related Agreements and Documents. This Agreement, including the Recitals and all Attachments (which are hereby incorporated by reference), together with the Development Agreement, including the Recitals and all Exhibits thereto, contains the entire agreement between the Parties with respect to the subject matter hereof, supersedes whatever oral or written understanding they may have had prior to the execution of this Agreement and the Development Agreement. In the event of any express conflict between this Agreement and the Development Agreement, the provisions of the Development Agreement shall control. No waiver, alteration, modification, or termination of this Agreement shall be valid unless made in writing and signed by the authorized Parties hereof.

6. Notices. All notices required pursuant to this Agreement shall be in writing and may be given by personal delivery or by registered or certified mail, return receipt requested, to the Party to receive such notice at the addressed set forth below:

TO THE CITY:

City of Cupertino
Office of City Attorney
10300 Torre Avenue
Cupertino, CA 95014

TO THE DEVELOPER:

Albert Wang
Cupertino 10145, LLC.
4546 El Camino Real, Suite 222
Los Altos, CA 94022

7. Each Party's Role in Drafting the Agreement. Each Party to this Agreement has had an opportunity to review the Agreement, confer with legal counsel regarding the meaning of the Agreement, and negotiate revisions to the Agreement. This Agreement shall be deemed to be jointly prepared by both of the Parties hereto, and any ambiguities or uncertainties herein shall not be construed for or against either of the Parties hereto. The words "including," "included," "include" and words of similar import shall be not be interpreted as words of exclusion but shall instead be interpreted as though followed by the words "but not limited to" or "without limitation." No waiver by City of any breach or default of any provision of this Agreement shall be deemed a waiver of any other provision hereof or of any subsequent breach or default by Developer of the same or any other provision. The invalidity of any provision of this Agreement as determined by a court of competent jurisdiction shall in no way affect the validity of any other provision hereof.

8. Warranties. The Parties represent and warrant that each has the full right, power and authority to carry out its obligations under this Agreement. The individuals executing this Agreement on behalf of the Parties represent and warrant that they have full power and authority to execute and deliver this Agreement on behalf of such Party.

9. Agreement Binding on Successors and Assigns. All provisions of this Agreement, including the benefits and burdens, are equitable servitudes, run with the Hotel Parcel and are binding upon the heirs, executors, successors, assigns and personal representatives of Developer and inure to the benefit of City and its successors and assigns. Each and every contract, deed or other instrument covering, conveying or otherwise transferring the Hotel Parcel or the Hotel or any portion thereof or interest therein shall conclusively be held to have been executed, delivered and accepted subject to this Agreement.

10. No Third Party Beneficiaries. This Agreement shall not be deemed to create any third-party beneficiary rights for any person or entity.

11. Applicable Law. This Agreement shall be governed by California law. The proper venue for any legal action brought under this Agreement shall be the Superior Court for Santa Clara County, California, except for actions that include claims in which the United States District Court for the Northern District of the State of California has original jurisdiction, in which case the Northern District of the State of California shall be the proper venue.

12. Prevailing Party's Fees and Costs. In the event any action is brought by either Party hereto as against the other Party hereto for the enforcement or declaration of any right or remedy in or under this Agreement or for the breach of any covenant or condition hereof, the prevailing Party shall be entitled to recover, and the other Party agrees to pay, all fees and costs to be fixed by the court therein including, but not limited to, reasonable attorneys' fees and costs.

13. Severability. In the event any limitation, condition, restriction, covenant, or provision contained in this Agreement is to be held invalid, void or unenforceable by any court of competent jurisdiction, the remaining portions of this Agreement shall nevertheless be and remain in full force and effect.

14. Recording of Agreement. This Agreement shall be recorded against the Hotel Parcel in the Official Records of the County of Santa Clara concurrent with the recordation of the Development Agreement.

15. Title of Parts and Sections. Any titles of the sections, subsections, or subparagraphs of this Agreement are inserted for convenience of reference only and shall be disregarded in interpreting the Agreement.

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

[Signatures on Following Page]

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

CITY:

CITY OF CUPERTINO, a municipal corporation

By: _____
David Brandt, City Manager
[Signature must be notarized]

ATTEST:

By: _____
Grace Schmidt, City Clerk

APPROVED AS TO FORM:

By: _____
Randolph Stevenson Hom, City Attorney

DEVELOPER:

CUPERTINO 10145, LLC, a California limited liability company

By: _____
Name: _____
Its: _____
[Signatures must be notarized]

By: _____
Name: _____
Its: _____
[Signatures must be notarized]

ATTACHMENT 1

HOTEL PARCEL DESCRIPTION

10145 NORTH DE ANZA BOULEVARD (APN 326-034-043)

All that certain Real Property in the City of Cupertino, County of Santa Clara, State of California, described as follows:

PARCEL ONE:

LOT 1, AS SHOWN ON THAT CERTAIN MAP ENTITLED, "TRACT NO. 5162", WHICH MAP WAS FILED FOR RECORD IN THE OFFICE OF THE RECORDER OF THE COUNTY OF SANTA CLARA, STATE OF CALIFORNIA, ON MAY 2, 1972, IN BOOK 300 OF MAPS AT PAGES 26 AND 27.

PARCEL TWO:

AN EASEMENT FOR INGRESS AND EGRESS OVER A STRIP OF LAND 14.50 FEET IN WIDTH THE EASTERLY AND NORTHERLY LINES OF WHICH ARE MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE SOUTHWESTERLY CORNER OF THE ABOVE DESCRIBED LOT; THENCE FROM SAID POINT OF BEGINNING AND ALONG THE GENERAL WESTERLY BOUNDARY LINE OF SAID LOT NORTH 0°01’04" WEST, 142.71 FEET AND SOUTH 89°58’56" WEST, 27.00 FEET AND THE TERMINUS OF THE LINES DESCRIBED HEREIN.

[Notary Acknowledgements To Be Inserted]

EXHIBIT G

ANNUAL REVIEW FORM

This Annual Review Form is submitted to the City of Cupertino ("**City**") by Cupertino 10145, LLC, a California limited liability company, and Marina Plaza, LLC, a California limited liability company, (collectively "**Developer**") pursuant to the requirements of California Government Code section 65865.1 and Chapter 18.245 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, constructing and leasing residential apartment units allocated under the Development Agreement.

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:

- Affordable Housing Agreement under Section 3.12.

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 under Section 4.1.1.
- Park Impact Fees under Section 4.1.1.
- Public Art Contribution under Section 4.1.3.
- Transportation Impact Fees under Section 4.1.4.

Describe whether Developer's compliance with any of the following public benefits under Article 5 have been satisfied during this annual review period:

- School District Agreement pursuant to Section 5.1.1.
- Public Improvements Agreement pursuant to 5.1.3
- TDM Program and TMA Payment pursuant to Section 5.1.2.

- Business License pursuant to Section 5.2.
- Sales Tax Point of Sale Designation under Section 5.3.
- Agreement to be Recorded pursuant to Section 5.4.

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

Specify whether Developer has assigned the Development Agreement or otherwise conveyed 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 hereto.

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

CUPERTINO 10145, LLC:

CUPERTINO 10145, LLC, a California limited liability company

By: _____
Name: _____
Its: _____

MARINA PLAZA, LLC:

MARINA PLAZA, LLC, a California limited liability company

By: _____
Name: _____
Title: _____

EXHIBIT H

FORM OF ASSIGNMENT AND ASSUMPTION AGREEMENT

RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:

_____
_____
_____
Attention: _____

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 FOR MARINA PLAZA

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**."

R E C I T A L S

A. Assignor and the City of Cupertino, a California municipal corporation ("**City**") have entered into that certain Development Agreement dated as of _____, 2016 ("**DA**") which was recorded in the Official Records of Santa Clara County on _____, 2016 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] [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.] [Assignor has provided the City with documentation establishing that the assignment is appropriate pursuant to Article 10 of the DA because _____.]

A G R E E M E N T S

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 of 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:

[ADDRESS]

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.

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

ASSIGNOR:

_____,
_____

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

ASSIGNEE:

_____,
_____

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 Signatures on Following Page]

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,
California municipal corporation

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

ATTEST:

_____
_____, City Clerk

APPROVED AS TO FORM:

_____
_____, City Attorney

[Notary Acknowledgements To Be Inserted]