

ORDINANCE NO. _____-14

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SUNNYVALE APPROVING AND ADOPTING A DEVELOPMENT AGREEMENT BETWEEN LANDBANK INVESTMENTS, LLC AND THE CITY OF SUNNYVALE RELATED TO THE DEVELOPMENT OF PROPERTY COMMONLY KNOWN AS THE LANDBANK CENTRAL & WOLFE CAMPUS PROJECT

WHEREAS, to strengthen the public planning process, encourage private participation in comprehensive planning and reduce the economic risk of development, the Legislature of the State of California adopted Government Code Sections 65864 *et seq.* (the Development Agreement Statute) which authorizes cities to enter into agreements for the development of real property in order to establish certain development rights in such property; and

WHEREAS, pursuant to Government Code Section 65865 the City has adopted rules and regulations establishing procedures and requirements for consideration of development agreements as set forth in Resolution No. 371-81; and

WHEREAS, LandBank Investments, LLC (“Applicant”) proposes to construct a commercial development on nine (9) separate parcels located within a 17.84-acre area bounded in the north by East Arques Avenue, to the west by North Wolfe Road, to the south of the Project site is Central Expressway, and to the east is the terminus of East California Avenue, the development of which will require future approvals from the City, potentially including, but not limited to, tentative maps, final subdivision maps, private streets, easement vacations, encroachment permits, demolition permits, grading permits, building permits and certificates of occupancy; and

WHEREAS, the LandBank Central & Wolfe Campus Project (“the Project”) is a large development of three interconnected six-story buildings (four office floors above two floors of podium parking), an associated parking garage, and other related improvements on the Property, and a development agreement is appropriate for the property to ensure that the Project will be completed in accordance with the City requirements; and

WHEREAS, a copy of the proposed Development Agreement is attached hereto and incorporated herein as Exhibit “A” to this ordinance; and

WHEREAS, as part of its consideration of the Project, the City prepared a Draft and Final Environmental Impact Report (collectively, “EIR”) on the Project pursuant to the California Environmental Quality Act (Public Resources Code Sections 21000 *et seq.*, “CEQA”), the Guidelines for Implementation of the California Environmental Quality Act (14 California Code of Regulations, Sections 15000 *et seq.*, the “State EIR Guidelines”) and the City’s Local Guidelines for Implementing CEQA (the “Local Guidelines”); and

WHEREAS, pursuant to the Development Agreement Statute and City regulations, the planning commission held duly noticed public hearings on August 25, 2014 and September 22, 2014 on the proposed Project and has found that the proposed Development Agreement is consistent with the objectives of the general plan, compatible with the uses authorized for the project area, in conformity with public convenience and beneficial to the public welfare, and will not adversely impact the orderly development of property; and

WHEREAS, the City Council, after published notice, held a public hearing on _____, 2014, concerning the proposed Project, and has considered the reports and documents presented by City staff, the planning commission's recommendation, and the written and oral comments presented at the public hearing.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF SUNNYVALE DOES ORDAIN AS FOLLOWS:

SECTION 1. FINDINGS. The City Council hereby finds and declares that the above recitals are true and correct. The City Council finds the provisions of the Development Agreement are consistent with the City's General Plan and the LandBank Central & Wolfe Campus Project as they will exist on the effective date of this ordinance, and hereby incorporates the findings regarding General Plan conformity contained in the Planning Commission findings dated August 25, 2104 and September 22, 2014. The City Council finds that the provisions of the Development Agreement are compatible with the uses authorized in the regulations prescribed for the land use district in which the real property is located; are in conformity with public convenience and good land use practice; are not detrimental to the public health, safety and general welfare; are of a beneficial effect on the order development of property and the preservation of property values; and are consistent with the requirement of Resolution 371-81. The City Council finds that the Applicant is providing a public benefit to the City by, among other things, contributing additional payments for the installation, maintenance and replacement of landscaping and other beautification projects, housing mitigation funds, process for allocation of sales and use taxes to the City associated with the Project, and additional traffic improvement funds to the City. The City Council further finds that development of facilities to serve the Project will require several years to complete, and a development agreement is appropriate for the property to ensure that the Project will be completed.

SECTION 2. DEVELOPMENT AGREEMENT ADOPTED. The Development Agreement, as set forth in Exhibit "A", is hereby adopted, subject to such minor, conforming and clarifying changes consistent with the terms thereof as may be approved by the City Manager, in consultation with the City Attorney prior to execution thereof, including completion of references and status of planning approvals, and completion and conformity of all exhibits thereto, and conformity to the General Plan and LandBank Central & Wolfe Campus Project, and amended and approved by the City Council. The City Manager and the City Clerk of the City of Sunnyvale are hereby authorized and directed to execute and attest, respectively, the Agreement on behalf of the City of Sunnyvale.

SECTION 3. CEQA. The environmental effects of the proposed Development Agreement were analyzed in the Landbank Central & Wolfe Campus Environmental Impact Report (the

“EIR”), SCH #2013082063. The City Council reviewed the EIR and found that it reflects the independent judgment of the City Council and its staff, and is an adequate and extensive assessment of the environmental impacts of the Development Agreement. The City Council certified the EIR as having been prepared in compliance with the requirements of the California Environmental Quality Act (“CEQA”), made necessary findings, adopted a statement of overriding considerations related to certain impacts on air quality, traffic volumes at area intersection, and cumulative impacts on traffic volumes, and adopted a Mitigation Monitoring and Reporting Program (Resolution No. ___-14). The City Council incorporates by this reference the findings and mitigations measures contained in the EIR as to the environmental effects of the Development Agreement, together with the additional findings contained in this Resolution. The Director of Community Development shall file a Notice of Determination with the County Clerk under Title 14, California Code of Regulations Section 15075.

SECTION 4. RECORDATION. The City Clerk is hereby directed to record the Development Agreement with the county recorder in compliance with the provisions of Government Code Section 65868.5.

SECTION 5. CONSTITUTIONALITY; SEVERABILITY. If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid by a court of competent jurisdiction, such decision or decisions shall not affect the validity of the remaining portions of this ordinance. The City Council hereby declares that it would have adopted this ordinance, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more section, subsection, sentence, clause or phrase be declared invalid.

SECTION 6. EFFECTIVE DATE. This ordinance shall be in full force and effect thirty (30) days from and after the date of its adoption.

SECTION 7. POSTING AND PUBLICATION. The City Clerk is directed to cause copies of this ordinance to be posted in three (3) prominent places in the City of Sunnyvale and to cause publication of a notice once in The Sun, the official newspaper for publication of legal notices of the City of Sunnyvale, setting forth the date of adoption, the title of this ordinance, and a list of places where copies of this ordinance are posted, within fifteen (15) days after adoption of this ordinance.

Introduced at a regular meeting of the City Council held on _____, 2014, and adopted as an ordinance of the City of Sunnyvale at a regular meeting of the City Council held on _____, 2014, by the following vote:

AYES:
NOES:
ABSTAIN:
ABSENT:
RECUSAL:

ATTEST:

APPROVED:

City Clerk

Mayor

(SEAL)

Date of Attestation: _____

APPROVED AS TO FORM:

City Attorney

EXHIBIT A

DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT (the "**Agreement**") is made and entered into as of the Effective Date determined under Section 2.3 below in the City of Sunnyvale by and between the CITY OF SUNNYVALE, a chartered municipal corporation ("**City**"), and the entities identified in Section 2.1.2 and on the signature page to this Agreement (collectively, "**Land Owner**"), pursuant to the authority of Sections 65864 – 65869.5 of the California Government Code and City Resolution No. 371-81. The City and the Land Owner are, from time to time, individually referred to in this Agreement as a "**Party**" and collectively referred to as the "**Parties.**"

RECITALS

A. The Sunnyvale City Council (the "**City Council**") has found that development agreements may strengthen the public planning process, encourage private participation and comprehensive planning, and reduce the economic costs of development. The City has adopted Resolution No. 371-81 (the "**Development Agreement Resolution**") to establish procedures and requirements for the consideration of development agreements proposed pursuant to California Government Code Sections 65864 – 65869.5.

B. California Government Code Section 65865(a) authorizes the City to enter into a development agreement with any person or entity having a legal or equitable interest in the real property that is the subject of the development agreement. Land Owner is the fee owner of the real property located within the City of Sunnyvale as further described in **Exhibit A** attached hereto and incorporated herein by reference (the "**Property**").

C. Land Owner proposes to construct a commercial development of three interconnected six-story buildings (four office floors above two floors of podium parking) an associated parking garage, and other related improvements on the Property, known as the Landbank Central & Wolfe Campus Project as described in the application for approvals and entitlements listed in Recital D below and the Environmental Impact Report for the Landbank Central & Wolfe Campus (SCH#2013082063) and (prior to any mergers of parcels) comprising nine separate legal parcels designated as Santa Clara County Assessor Parcel Numbers 205-33-002, 205-33-005, 205-33-010, 205-33-009, 205-33-014, 205-33-013, 205-33-012, 205-33-011, and 205-33-007 (the "**Landbank Project**").

D. The following approvals, entitlements, and findings have been adopted by the City with respect to the Property:

- i. The City Council certified an Environmental Impact Report for the Landbank Central & Wolfe Campus (SCH#2013082063) (comprised of the Draft Environmental Impact Report and the Final Environmental Impact Reports, collectively the "**EIR**"). As required by CEQA, the City adopted written findings and a Mitigation Monitoring and Reporting Program on _____, 2014.

- ii. The City Council amended the Sunnyvale Zoning Ordinance with respect to the Property by Ordinance No. _____ introduced on _____, 2014, and adopted on _____, 2014.
- iii. The City Council approved this Agreement as more fully set forth in Recital I below.
- iv. The City Council approved Vesting Tentative Map #_____, on _____, 2014, to merge 9 parcels and vacate the City right-of-way and other easements in the area of the Property identified as Santa Ana Court (the “**Parcel Map**”).
- v. The City Council approved Special Development Permit #_____, on _____, 2014, to allow construction of the Landbank Project.

The City actions included in subsections i – v above listed are collectively the "**City Approvals.**"

E. The development of the Landbank Project will require future discretionary and ministerial approvals from the City, potentially including, but not limited to, public easement vacations, encroachment permits, tree removal permits, demolition permits, grading permits, building permits, and certificates of occupancy ("**Land Owner Approvals**"). "Land Owner Approvals" also include any review required by the California Environmental Quality Act ("**CEQA**") (Pub. Res. Code §§21000 et seq.), including implementation of all mitigation measures, monitoring programs, and conditions adopted as a result of environmental review of the City Approvals.

F. To ensure that the intent of the City and Land Owner with respect to the City Approvals are carried out, the Parties desire voluntarily to enter into this Agreement to facilitate development of the Landbank Project subject to the conditions and requirements included in this Agreement.

G. The City Council finds that the provisions of this Agreement are consistent with the Sunnyvale General Plan as it exists on the date of adoption of this Agreement.

H. The City Council finds that the Land Owner will be providing public benefits to the City by providing the benefits described in Section 3.10 of this Agreement. The Council further finds that the Landbank Project is a large development that may require several years to complete, and a development agreement is appropriate for the Property to ensure that the Project will be completed in accordance with the City Approvals.

I. In exchange for and in consideration of the public benefits to be provided by Land Owner and the Landbank Project as described in Section 3.10 of this Agreement, Land Owner desires to receive assurance that it has vested rights to proceed with the Landbank Project in accordance with the “Applicable Law,” and therefore desires to enter into this Agreement.

J. As required by the Sunnyvale Development Agreement Resolution:

- i. The Director of Community Development or designee reviewed the application for this Agreement and prepared a staff report and recommendation, which stated whether or not this Agreement is consistent with the Sunnyvale General Plan and any applicable specific plan.
- ii. The Sunnyvale Planning Commission held public hearings on August 25 and September 22, 2014, and made a recommendation to the City Council as required by the Development Agreement Resolution.
- iii. The City Council reviewed this Agreement at a public hearing held on _____, 2014. The City Council approved this Agreement by Ordinance No. _____ introduced on _____, 2014, and adopted on _____, 2014. Ordinance No. _____ became effective on _____.

NOW, THEREFORE, with reference to the foregoing recitals and in consideration of the mutual promises, obligations and covenants herein contained, the sufficiency of which is hereby acknowledged, City and Land Owner agree as follows:

**ARTICLE I
DEFINITIONS**

1.1 Definitions. The following defined terms are used in this Agreement:

- 1.1.1 "Agreement" is defined in the first paragraph, page 1.
- 1.1.2 "Applicable Law" is defined in Section 3.1.3.
- 1.1.3 "Assignee" is defined in Section 8.2.1.
- 1.1.4 "CEQA" is defined in Recital E.
- 1.1.5 "City" is defined in the first paragraph, page 1.
- 1.1.6 "City Approvals" is defined in Recital D.
- 1.1.7 "City Council" is defined in Recital A.
- 1.1.8 "City Law" is defined in Section 3.2.
- 1.1.9 "Default" is defined in Section 6.1.
- 1.1.10 "Development Agreement Resolution" is defined in Recital A.
- 1.1.11 "Effective Date" is defined in Section 2.3.
- 1.1.12 "FAR" is defined in Section 3.2.1.

- 1.1.13 "EIR" is defined in Recital D.
- 1.1.14 "Impact Fee" is defined in Section 3.2.7.
- 1.1.15 "Jobsite Sub-Permit" is defined in Section
- 1.1.16 "Landbank Project" is defined in Recital C.
- 1.1.17 "Land Owner" is defined in the first paragraph, page 1.
- 1.1.18 "Land Owner Approvals" is defined in Recital E.
- 1.1.19 "Mortgage" is defined in Section 9.1.
- 1.1.20 "Mortgagee" is defined in Section 9.1.
- 1.1.21 "Notice of Breach" is defined in Section 6.2.
- 1.1.22 "Notice of Non-Breach" is defined in Section 6.2.
- 1.1.23 "Parcel Map" is defined in Recital D.
- 1.1.24 "Party" and "Parties" are defined in the first paragraph, page 1.
- 1.1.25 "Property" is defined in Recital B.
- 1.1.26 "SBOE" is defined in Section 3.10.4.
- 1.1.27 "Sole Authorized Representative" is defined in Section 2.1.2
- 1.1.28 "Term" is defined in Section 2.5.
- 1.1.29 "Third Party Challenge" is defined in Section 12.2.
- 1.1.30 "Vesting Statute" is defined in Section 3.10.6.

1.2 Capitalized Terms.

If any capitalized terms contained in this Agreement are not defined above, then any such terms shall have the meaning otherwise ascribed to them in this Agreement.

ARTICLE II GENERAL PROVISIONS

2.1 Parties.

2.1.1 The City.

(a) The City is a chartered municipal corporation duly organized and validly existing under the laws of the State of California. The office of the City is located at 456 W. Olive Avenue, Sunnyvale, California 94088-3707. "City," as used in this Agreement, includes the City of Sunnyvale and any assignee or successor to its rights, powers and responsibilities.

(b) The City represents and warrants that, as of the Effective Date of this Agreement:

(i) The execution and delivery of this Agreement and the performance of the obligations of City have been duly authorized by all necessary actions and approvals required for a municipal corporation;

(ii) The City is in good standing and has all necessary powers under the laws of the State of California and in all other respects to enter into and perform the approvals, undertakings and obligations of this Agreement; and

(iii) This Agreement is a valid obligation of City enforceable in accordance with its terms.

2.1.2 The Land Owner.

(a) Each of the entities constituting Land Owner and which are signatories to this Agreement is the owner of a legal parcel constituting a portion of the Property, and such entities are all affiliated by being under common control. After recording the Parcel Map, the collective landowners shall be tenants in common unless prior to, upon, or following such recording, they convey their respective interests in the Property to one or more entities. Land Owner shall provide written notice to the City of its Sole Authorized Representative with authority to act on behalf of Land Owner with respect to this Agreement, and, until further notice, Land Owner designates Landbank Investments, LLC as its Sole Authorized Representative to act on behalf of Land Owner for the purposes of this Agreement. If a change in the identity of the Sole Authorized Representative occurs, Land Owner shall provide written notice to the City of the identity and contact information of its Sole Authorized Representative to act on behalf of Land Owner for purposes of this Agreement. For the purposes of this Agreement the Land Owner's office is: c/o Landbank Investments, 1164 Chestnut Street, Menlo Park, CA 94025. "Land Owner," as used in this Agreement shall mean and include any assignee of or successor in interest to fee title to any legal parcel constituting all or any portion of the Property. The failure of City to provide notice to anyone other than the Sole Authorized Representative shall not invalidate the effectiveness of any notice given to Land Owner.

(b) Land Owner represents and warrants that, as of the Effective Date of this Agreement, Land Owner is:

(i) The sole fee owner of its respective legal parcel constituting a portion of the Property, and no other person or entity holds any legal or equitable interests in such portion of the Property;

(ii) Duly formed or organized and validly existing under the laws of the State of California;

(iii) Qualified and authorized to do business in the State of California and has duly complied with all requirements pertaining thereto; and

(iv) In good standing and has all necessary powers under the laws of the State of California to own property and in all other respects to enter into and perform the undertakings and obligations of this Agreement.

(c) Land Owner further represents and warrants:

(i) That no approvals or consents of any persons are necessary for the execution, delivery or performance of this Agreement by Land Owner, except as have been obtained;

(ii) That the execution and delivery of this Agreement and the performance of the obligations hereunder either by Landbank Investments, LLC, on behalf of the Land Owner, or by its Sole Authorized Representative who has been duly authorized by Land Owner pursuant to necessary actions and approvals on behalf of Land Owner; and

(iii) That this Agreement is a valid obligation of Land Owner enforceable in accordance with its terms.

2.1.3 Relationship of City and Land Owner.

It is understood that this Agreement is a contract that has been negotiated and voluntarily entered into by City and Land Owner and that the Land Owner is an independent contractor and not an agent or partner of City.

City and Land Owner hereby renounce the existence of any form of joint venture or partnership between them, and agree that nothing contained in this Agreement or in any document executed in connection with this Agreement shall be construed as making City and Land Owner joint venturers or partners.

2.2 Description of Property.

The Property which is the subject of this Agreement is described in **Exhibit A** attached hereto.

2.3 Effective Date.

This Agreement shall become effective upon execution of this Agreement by the Parties and the recording of this Agreement pursuant to Government Code Section 65868.5 (the "**Effective**

Date"), which date shall in no event be earlier than the occurrence of both of: (a) the effective date of Ordinance No. _____ approving this Development Agreement; and (b) the effective date of the City Approvals. At the request of either party, both parties shall confirm in writing the Effective Date once the Effective Date has occurred.

2.4 Recording.

Within ten (10) days after the occurrence of both of the events described in clauses (a) and (b) of Section 2.3, the City Clerk shall cause recordation of this Agreement with the County Recorder against title to the Property.

2.5 Term.

The duration of this Agreement (the "**Term**") shall commence upon the Effective Date and continue for a period of ten (10) years from the Effective Date. The Agreement may be extended for one additional five (5) year period, upon request of the Land Owner and consent by the City, which consent shall not unreasonably be withheld or delayed and may only be refused if the Land Owner is in material default in the performance of its obligations hereunder at the time of such request. If Land Owner desires to extend the Agreement for the additional five (5) year period, it must request the extension in written notice delivered to the City no later than one hundred eighty (180) days before the expiration date of this Agreement. The City Manager is authorized to consent to the extension on behalf of the City so long as Land Owner is not in material default in the performance of its obligations hereunder. To ensure that the City receives the benefits of its bargain under this Agreement and as consideration for an additional 5-year term, any monetary obligation set forth in Section 3.10, including interest and any other accruals, shall continue to accrue until paid or until expiration of the Agreement. The City Manager's review and consent pursuant to this Section is and shall be treated as "ministerial" within the meaning of CEQA Guideline 15369 (14 Cal. Code Regs. §§15000 et seq.). Failure to deliver such notice within the above-described time period will result in a forfeiture of the five-year extension period.

ARTICLE III DEVELOPMENT OF THE PROPERTY

3.1 Use of the Property and Applicable Law.

3.1.1 Subject to Agreement.

The Property is hereby made subject to the provisions of this Agreement. All development of, or on, the Property, or any portion thereof pursuant to a building permit issued in accordance with the terms of this Agreement, shall be undertaken only in compliance with the provisions of this Agreement and with Applicable Law. Notwithstanding any provisions of this Agreement to the contrary, this Agreement shall not apply to applications for and the issuance of City approvals of permits for, alterations, remodeling, repair and improvements to the existing single-story buildings and other improvements located on the Property before commencement of physical construction of the Landbank Project, however such alterations, remodeling, repairs and improvements maybe subject to City Building Code requirements and applicable impact fees. .

3.1.2 Permitted Uses.

The permitted uses of the Property, the intensity of use, the maximum height and size of proposed buildings, and provisions for reservation or dedication of land for public purposes shall be governed by Applicable Law.

3.1.3 Applicable Law.

"**Applicable Law**" includes the City Approvals, the Land Owner Approvals when approved by the City, and those ordinances, resolutions and governmental regulations, rules, policies and conditions applicable to the Property and in effect on the Effective Date, and except as provided in Sections 3.3, 3.4, 3.6, and 3.10.

3.2 No Conflicting Enactments.

Except as and to the extent required by state or federal law, and subject to the provisions of Sections 3.3, 3.4, 3.6, and 3.10 below, the City shall not impose on the Property any ordinance, resolution, rule, regulation, policy, or condition, whether by action of the City Council or by initiative (each individually, a "**City Law**"), that has any of the following effects on the rights provided by Applicable Law, the City Approvals, or this Agreement:

3.2.1 Reduces the floor area ratio, expressed as a percentage, of the gross floor area of a given building, buildings, or portion of a building with respect to the net area of the parcel of real property on which such building or buildings are located (the "**FAR**"), allowed by City to be developed on the Property;

3.2.2 Changes any land use designation or permitted use of the Property;

3.2.3 Limits or controls the rate, timing, phasing or sequencing of the approval, development, or construction of all or any part of the Property except as set forth in Applicable Law or this Agreement;

3.2.4 Limits or controls the location of buildings, structures, or other improvements of the Landbank Project in a manner that is inconsistent with or more restrictive than the limitations included in the City Approvals or the Land Owner Approvals;

3.2.5 Limits or restricts the timeliness of actions taken by the City in taking ministerial actions related to the Landbank Project such as issuing building permits, making building permit inspections and issuing approvals and issuing certificates of occupancy or requires the issuance of additional ministerial permits or approvals by the City other than those required by Applicable Law;"

3.2.6 Limits the availability of City-provided public utilities, services, or facilities (for example, water or sewer connections or sewage capacity rights), for the Landbank Project unless such limitations are imposed by State or federal law.

3.2.7 Limits or restricts any right specifically granted by the City Approvals, this Agreement, or Applicable Law; or

3.2.8 Subject to the provisions of Section 3.4, imposes exactions or requirements for the dedication of property or the payment of fees imposed to be used to mitigate the physical, social or fiscal impacts of construction, use or occupancy imposed pursuant to Government Code Sections 66000 et seq. (“**Impact Fees**”) in connection with the Landbank Project other than or in addition to those specifically provided for under Applicable Law or this Agreement. Land Owner understands it is required to implement the Mitigation Monitoring Reporting Plan pursuant to the EIR.

3.3 Reservations of Authority.

Notwithstanding the provisions of Section 3.2.1 through 3.2.6, at the time Land Owner Approvals are applied for, the following regulations and provisions shall apply to the Land Owner Approvals:

3.3.1 Processing fees and charges of every kind and nature imposed by the City, including application, inspection, and monitoring fees, which are in force and effect within the jurisdiction of the City for the class of Land Owner Approvals being applied for, which shall be paid at the rate then in effect.

3.3.2 All taxes and assessments and, subject to the provisions of Section 3.4, Impact Fees and other monetary and non-monetary exactions imposed by the City, which are in force and effect within the jurisdiction of the City for the class of Land Owner Approvals being applied for, and which shall be payable at the rate then in effect.

3.3.3 Procedural regulations relating to hearing bodies, petitions, applications, notices, findings, records, hearings, reports, recommendations, appeals, and any other matters of procedure, which are in force and effect within the jurisdiction of the City for the class of Land Owner Approvals being applied for.

3.3.4 Regulations governing construction standards and specifications including, without limitation, the City's building code, plumbing code, mechanical code, electrical code, fire code and grading code, all provisions of Title XVI of the Sunnyvale Municipal Code, and all other uniform construction codes which are in force and effect within the jurisdiction of the City for the class of Land Owner Approvals being applied for.

3.4 Rules and Regulations Enacted After the Effective Date.

The City may, during the term of this Agreement, apply such newer City Laws that are in force and effect within its jurisdiction for the class of Land Owner Approvals being applied for and which are not in conflict with the terms of this Agreement, except that, for a five year period commencing on the Effective Date and ending on the fifth anniversary thereof, the City shall not impose any new taxes, assessments, Impact Fees or other fees, or other monetary and non-monetary exactions, which were not in effect within the City's jurisdiction and applicable to the Landbank Project on the Effective Date (this does not include increases or adjustments to

existing fees or taxes), which would otherwise be applicable to the Landbank Project. To the extent any changed City Law is in conflict with the terms of this Agreement, the terms of this Agreement shall prevail. After the five-year period has expired, the City may impose all taxes, assessments, Impact Fees of any type, affordable housing fees, other fees, or other monetary and non-monetary exactions which are in force and effect within the jurisdiction of the City for a broadly based class of land, projects, discretionary or ministerial approvals, or taxpayers, as applicable, on which they are imposed, regardless of when they were first adopted.

3.5 Initiatives and Referenda.

3.5.1 If any City Law is enacted or imposed by a citizen-sponsored initiative, or by the City Council directly or indirectly in connection with any proposed initiative, which City Law would conflict in any way with this Agreement, such City Law shall not apply to the Property. The Parties, however, acknowledge that the City's approval of this Agreement and the City Approvals identified in subsections ii – iii of Recital D herein are legislative actions subject to referendum.

3.5.2 Without limiting the generality of any of the foregoing, no moratorium or other limitation relating to the rate, timing, phasing or sequencing of development affecting the approval or issuance of subdivision maps, building permits or other Land Owner Approvals shall apply to the Property or to the Landbank Project. Land Owner agrees and understands that the City does not have authority or jurisdiction over another public agency's authority to approve a moratorium or impose any other limitation that may affect the Property.

3.5.3 The timing, sequencing, and phasing of the Landbank Project is solely at the discretion of Land Owner. In particular, the Parties desire to avoid the result of *Pardee Construction Co. v. City of Camarillo* (1984) 37 Cal.3d 465, where the failure of the parties therein to consider and expressly provide for the timing of the development resulted in a later adopted initiative restricting the timing of development to prevail over such parties' agreement. The Parties therefore acknowledge that Land Owner shall have the right to develop the Landbank Project in such phases and at such pace, sequence and time as Land Owner deems appropriate. The City shall cooperate with Land Owner with respect to the Landbank Project and shall undertake such actions as may be necessary or desirable to ensure this Agreement remains in full force and effect.

3.6 Compliance With Requirements of Other Governmental Entities.

3.6.1 Land Owner shall pay all required fees related to the Landbank Project when due to Federal, State, regional, or other local governmental agencies other than the City and acknowledges that City does not control the amount of any such fees.

3.6.2 City shall cooperate with Land Owner in Land Owner's effort to obtain permits and approvals for the Landbank Project from Federal, State, regional, and other local governmental agencies, provided that such cooperation does not require the

City to incur any costs without compensation or reimbursement, or require the City to amend any of the City's policies, regulations, or ordinances.

3.6.3 As provided in California Government Code Section 65869.5, this Agreement shall not preclude the application to the Property 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 regulations. In the event changes in Federal or State law prevent or preclude compliance with one or more provisions of this Agreement, this Agreement shall be modified as may be necessary to comply with such State or Federal laws or regulations. The Parties shall meet and confer in good faith in order to determine whether such provisions of this Agreement shall be modified as may be necessary to comply with changes in the law or regulations and City and Land Owner shall agree to such modification as may be reasonably required. It is the intent of the Parties that any such modification be limited to that which is necessary to comply with such changes and to preserve to the extent possible the original intent of the Parties in entering into this Agreement. This Agreement shall remain in full force and effect to the extent it is not inconsistent with such changes in laws or regulations. Nothing in this Agreement shall preclude the City or Land Owner from contesting by any available means (including administrative or judicial proceedings) the applicability to the Property of any such State or Federal laws or regulations.

3.6.4 To the extent that any laws or regulations are enacted following the Effective Date or existing laws or regulations are changed following the Effective Date, in either case to require Federal or State agencies or the City to take specifically mandated actions which have the effect of preventing, delaying, or modifying development of the Property or any portion thereof, City shall not in any manner be liable for any such prevention, delay, or modification. Such actions may include, but are not limited to, (a) the imposition of air quality or transportation measures or sanctions for violations and actions required to be taken by City or other governmental agencies as a result of such laws and regulations or changes thereto and (b) requirements to participate in regional or local programs and to be subject to such development restrictions as may be deemed necessary or appropriate by the City by reason of such laws and regulations or changes thereto. Likewise, to the extent that any such actions have the effect of precluding or delaying compliance with any term or provision of this Agreement, Land Owner shall not be liable in any manner to City for any damages resulting from such prevention or delay. In the event such changes in the law prevent or preclude compliance with one or more provisions of this Agreement, this Agreement shall be modified as reasonably may be necessary to comply with such State or Federal laws or regulations. The Parties shall meet and confer in good faith in order to determine whether such provisions of this Agreement shall be modified as may be necessary to comply with changes in the law and City and Land Owner shall take such action as may be reasonably required. It is the intent of the Parties that any such modification be limited to that which is necessary and to preserve to the extent possible the original intent of the Parties in entering into this Agreement and also to comply with the new or changed law or regulation. This Agreement shall remain in full force and effect to the extent it is not inconsistent with such changes in laws or regulations.

3.7 City's Police Power.

The Parties acknowledge and agree that the limitations, reservations, and exceptions contained in this Agreement are intended to reserve to the City that part of its police power which cannot be limited by contract, and this Agreement shall be construed to reserve to the City that part of its police power which cannot be restricted by contract. This provision is not intended to undermine the City's intent to be bound by this Agreement, nor the vested rights of Land Owner provided in this Agreement, to the fullest extent allowed by law.

3.8 Development Approvals for the Property Following the Effective Date.

3.8.1 Applications for Land Owner Approvals are anticipated to be submitted to the City by the Land Owner. Applications for Land Owner Approvals shall be processed diligently in good faith by the City and considered in a manner consistent with the rights granted by this Agreement and Applicable Law.

3.8.2 With the City Approvals, the City has made a final policy decision that the development of the Property consistent with the City Approvals is in the best interests of the public health, safety, and general welfare. Accordingly, the City shall not use its authority in considering any application for a Land Owner Approval that is consistent with the City Approvals to change the policy decisions reflected by the City Approvals. Nothing herein shall limit the ability of the City to require the necessary reports, analysis, or studies to assist in determining whether the requested Land Owner Approval is consistent with Applicable Law and this Agreement. City's review of the Land Owner Approvals shall be consistent with this Agreement, including without limitation Section 3.2 of this Agreement. To the extent that is allowed by CEQA, as determined by the City in its reasonable discretion, City shall utilize the EIR to review and consider the environmental effects of the Land Owner Approvals.

3.8.3 Any conditions, terms, restrictions, or requirements imposed by the City on Land Owner Approvals issued after the Effective Date shall not prevent development of the Property for the approved uses and to the approved FAR, and at the rate, timing and sequencing, included in the City Approvals.

3.8.4 Notwithstanding the above, as required by Government Code Section 65867.5, any tentative map prepared for a subdivision of the Property within the meaning of Government Code Section 66473.7 shall comply with the requirements thereof.

3.9 Duration of City Approvals and Land Owner Approvals.

The durations of the City Approvals and Land Owner Approvals shall automatically be extended for the duration of this Agreement (including any extension to this Agreement as permitted by Section 2.5) if the duration otherwise applicable to such Approval is shorter than the duration of this Agreement (including any extension).

3.10 Land Owner Obligations.

As a material consideration for the long term assurances, vested rights, and other City obligations provided by this Agreement and as a material inducement to City to enter into this Agreement, Land Owner has offered and agreed to provide the public benefits to the City listed in this Section 3.10 and has further agreed to comply with all of its obligations under this Agreement, including in particular the obligations set forth in this Section 3.10.

3.10.1 Housing Mitigation Payments. The City is currently considering a change to the existing Housing Mitigation Fee. It is the intent of the parties to this Agreement, that Land Owner shall receive full credit for the gross floor area of all of the existing buildings when future fee calculations are performed under this Agreement. The Land Owner shall pay housing mitigation fees for the increase in gross floor area of the overall Project above 35% FAR (272,009 sq. ft.) and exempting the gross floor area of the amenities uses (estimated at 30,000 square feet). The amount of the fee is set by City resolution and is imposed on a per square foot basis. The housing mitigation fee shall be paid prior to the issuance of a building permit. The actual amount of the housing mitigation fee to be paid shall be determined by (a) subtracting 272,009 sq. ft. and the gross floor area of the proposed amenity uses from (b) the gross floor area of the Project (consistent with Sunnyvale Municipal Code Housing Mitigation Fee Ordinance) and then multiplying the result by the rate of the fee in effect at the time of payment. The Landowner may choose to pay the fee at any time prior to issuance of a building permit, including paying all or a portion of the fee in advance of building permit issuance. For example, if the housing mitigation fee were to be paid in the current fiscal year for the proposed 100% FAR building, the housing mitigation fee would be calculated as follows: 777,170 sq. ft., minus 272,009 sq. ft., minus 30,000 sq. ft., multiplied by \$9.74. This would result in a total housing mitigation fee for the Project of \$4,628,068.14.

If Land Owner constructs the Project in phases, the amount of the fee due for each phase shall be determined using the pro rata portion of the Project being constructed and the housing mitigation fee in effect at that time. The mitigation fee payment for each phase shall be calculated using the following formula.

$$\frac{\text{Total Project Gross Floor Area} - \text{Floor Area of the Amenity space} - 272,009 \text{ sf}}{\text{Total Project Gross Floor Area}} \times \text{Gross Floor Area, Project Phase} \times \text{Impact Fee in effect when paid} = \text{Housing Mitigation Fee Due}$$

3.10.2 Contribution Toward Beautification Project. Land Owner shall pay to City two million dollars (\$ 2,000,000.00) as an additional payment to the City for landscape, beautification, or park improvements within the City of Sunnyvale, (“Public Improvements Beautification Fund”) concurrent with the issuance of the first building permit for the first building in the Landbank Project to be constructed on the Property. In order that the City receive benefit of its bargain in this Agreement in consideration of the benefits conferred to Land Owner, a four per cent (4%) rate shall accrue on the

principal balance until paid, commencing on the date of the first anniversary of this Agreement.

3.10.3 Additional Traffic Improvements/Payments. Land Owner shall pay to the City a total of one million dollars (\$1,000,000) as an additional payment to the City for traffic impacts concurrent with the issuance of the first building permit for the first building in the Landbank Project to be constructed on the Property, to be used for citywide transportation improvement projects. In order that the City receive benefit of its bargain in this Agreement in consideration of the benefits conferred to Land Owner, a three per cent (3%) rate shall accrue on the principal balance until paid, commencing on the date of the first anniversary of this Agreement.

3.10.4 Additional 5 percent TDM Trip Reduction Program. As part of the Land Owner Approvals for the 100 percent FAR allowance, Land Owner is required to submit a Transportation Demand Management (TDM) Plan that includes a trip reduction program that results in a.m. and p.m. peak hour trips equivalent to a project with a 70 percent FAR (Conditions of Approval GC-6 and GC-7), which equals a 30 percent peak hour trip reduction. Land Owner shall submit a TDM Plan that includes an additional 5 percent peak hour trip reduction standard for an overall 35 percent reduction from the estimated peak hour trips utilized in the Transportation Impact Analysis for the project, consistent with the requirements set forth in conditions of approval GC-6 and GC-7.

3.10.5 Construction Sales and Use Tax Allocations. To maximize the City's allocation of sales and use taxes associated with Project construction, Land Owner shall include in the construction contract with its general contractor constructing the initial improvements consisting of the shell, the parking structures and related site improvements for the Landbank Project that is the subject of the City Approvals, the following provisions, in order to attempt to maximize the local sales and use taxes generated in connection with all eligible purchases of materials, fixtures, machinery, equipment and supplies for the work to be performed in connection with the Landbank Project are allocated directly to the City under applicable laws and regulations. It is expressly agreed, however, that this Section 3.10.5 shall not require the Land Owner or any contractor or subcontractor to purchase more expensive materials or pay additional taxes, or incur delays in obtaining materials, in order to comply with this Section 3.10.5.

1. Prior to the commencement of construction, and prior to the purchase of any materials, fixtures, machinery, equipment and supplies, Land Owner shall require its contractor or its subcontractor to apply for a jobsite sub-permit with the California State Board of Equalization ("**SBOE**") for the work to be performed hereunder (a "**Jobsite Sub-Permit**"). The contractor will be required to provide City with a copy of such Jobsite Sub-Permit(s), including the sub-permit number(s).
2. The contractor or its subcontractor must provide a written certification that the person(s) responsible for filing the tax return understands the process of

reporting the tax to City, and will do so in accordance with the City's reasonable conditions of project approval.

3. The contractor or its subcontractor shall, on its quarterly use tax return, identify the use tax applicable to the construction site and use the appropriate SBOE forms and schedules to ensure that the tax is allocated to the jobsite to the extent set forth above.

4. In determining the amount of use tax to be paid, the contractor or its subcontractor shall follow the guidelines in Section 1806 of Sales and Use Tax Regulations.

5. In the event it is later determined that certain eligible use tax amounts were not included on contractor's or its subcontractor's use tax return(s), contractor or subcontractor shall agree to amend those returns and file them with the SBOE in a manner that will ensure that City receives such additional use tax from the construction project.

6. The contractor will be required to provide the City, upon City's reasonable request, with:

(a) A list of any subcontractors providing services or materials in excess of \$5,000,000 in connection with the work to be performed in connection with the Landbank Project, which list shall include:

- (i) Name of subcontractor;
- (ii) Address and telephone number of headquarters or office;
- (iii) Name and telephone number of contact person;
- (iv) Estimated value of contract;
- (v) Estimated completion date;
- (vi) Scope of work; and
- (v) A copy of the subcontract;

(b) Such additional information as may be reasonably requested in writing by the City to ensure compliance with the foregoing provisions; and

(c) The same information related to the general contractor, and its construction contract, as to be provided for the subcontractor's set forth above.

The City shall be a third party beneficiary of the obligations of the contractor and subcontractors, as set forth in this Section 3.10.5, however, Land Owner shall not be responsible for any contractor's or subcontractor's failure to comply with the provisions set forth above.

3.10.6 Compliance with Agreement and Applicable Law. In addition to any other obligations of Land Owner set forth herein, in consideration of City entering into this Agreement, Land Owner has agreed that if Land Owner commences physical construction of the Landbank Project and proceeds to develop the Property, Land Owner shall pay when due any and all fees, Impact Fees of any type, and costs which are imposed on all or any portion of the Property, whether imposed by City or other agencies, as provided in this Article III.

3.10.7 Agreement Supersedes Vesting Statutes. As a material inducement to the parties to enter into this Agreement, the parties further agree that, as long as this Agreement is in effect, the provisions of this Agreement shall govern and control the City law to be applied to development of the Landbank Project over any contrary or inconsistent provisions of Section 66498.1 et seq. of the Government Code, or any other State law existing now or in the future regarding vested rights ("**Vesting Statutes**"). City and Land Owner waive the application of any Vesting Statute as it may be inconsistent or contrary to the provisions of this Agreement. Notwithstanding anything to the contrary in this Section, the Parties acknowledge and agree that this Agreement vests Land Owner's rights to develop the Landbank Project in accordance with the terms of this Agreement and the provisions of state and local law concerning Development Agreements.

3.11 City Obligations.

3.11.1 Diligent Processing of Land Owner Approvals. City staff shall diligently process in good faith the Land Owner Approvals and shall recommend approval or conditional approval to the approving authority if, as determined by the City in its reasonable discretion, the Land Owner Approvals comply with all general plan, zoning, subdivision, and other City development standards and regulations (as those may be modified by the City Approvals), CEQA, and all other relevant local, state, and federal laws and regulations.

3.11.2 Existing Public Easements. City shall cooperate with Land Owner in abandoning any existing utility and other public easements and related facilities and, if necessary, the relocation thereof at Land Owner expense or creation of new easements as reasonably required in connection with the development of the Landbank Project.

3.12 Mutual Obligations of the Parties.

City has agreed to provide Land Owner with the long term assurances, vested rights, and other City obligations described in this Agreement, including in particular those obligations described in this Article III, in consideration for the Land Owner obligations contained in this Agreement, including in particular those Land Owner obligations described in this Article III. Land Owner

has agreed to provide City with the Land Owner obligations contained in this Agreement, including in particular those Land Owner obligations described in this Article III, in consideration for the City obligations described in this Agreement, including in particular those obligations described in this Article III.

ARTICLE IV AMENDMENT OF AGREEMENT AND CITY APPROVALS

4.1 Amendment or Cancellation Procedure.

Either Party may propose an amendment to or cancellation of this Agreement in whole or in part. As required by the Sunnyvale Development Agreement Resolution, any amendment to or cancellation of this Agreement may be made only if the City follows the same procedures prescribed by Government Code 65864 et seq. for entering into a development agreement in the first instance, and those procedures prescribed in Development Agreement Resolution #371-81 for entering into a new development agreement, including but not limited to public hearings before the Sunnyvale Planning Commission and City Council and adoption of the amendment or cancellation by ordinance.

4.2 Requirement for a Writing.

No amendment to or cancellation of this Agreement or any provision hereof shall be effective for any purpose unless adopted pursuant to the procedures included in the Development Agreement Resolution and specifically set forth in a writing, which refers expressly to this Agreement and is executed in advance by duly authorized representatives of the Parties. The City Clerk shall record an appropriate notice of any amendment or cancellation with the Santa Clara County Recorder not later than ten (10) days after the effective date of the action effecting such amendment or cancellation, accompanied by a legal description of the Property.

4.3 Amendments to Development Agreement Legislation.

This Agreement has been entered into in reliance upon the provisions of California Government Code Section 65864 et seq. relating to development agreements, as those provisions existed at the date of execution of this Agreement. No amendment or addition to those provisions which would materially affect the performance, 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 unless the Parties mutually agree in writing, after following the procedures in Section 4.1, to amend this Agreement to permit such applicability.

4.4 Amendment of City Approvals.

To the extent permitted by local, state, and federal law, any City Approval may, from time to time, be amended or modified by submittal of an application from the Land Owner and thereafter following the procedures for such amendment or modification contained in the Development Agreement Resolution. Upon any approval of such an amendment or modification, the

amendment or modification shall automatically be deemed to be incorporated into the Applicable Law without any further procedure to amend this Agreement.

4.5 Effect of Termination on Land Owner's Obligations.

4.5.1 Notwithstanding any other provision to the contrary, termination or expiration of this Agreement shall not affect any requirement to comply with the City Approvals, the terms and conditions of any Land Owner Approval, nor any payments then due and owing to City, nor shall it affect the covenants of Land Owner specified in Section 4.5.2 below, to continue after the termination or expiration of this Agreement.

4.5.2 Notwithstanding anything in this Agreement to the contrary, the following provisions of this Agreement shall survive and remain in effect following termination or cancellation of this Agreement for so long as necessary to give them full force and effect with respect to claims or rights of City arising prior to termination or expiration:

- (a) Section 4.5.1 (Land Owner's obligations upon termination or cancellation);
- (b) Section 6.1 (Remedies; limitation on damages and exceptions thereto; accrued obligations);
- (c) Section 10.2 (Indemnification);
- (d) Section 12.3 (Indemnification and Defense);
- (e) Article VI (Breach, Remedies and Termination);
- (f) Article VIII (Transfer, Assignment): and
- (g) Article IX (Mortgagee Protection).

4.6 Except as expressly provided herein, none of the Parties' respective rights and obligations under this Agreement shall survive the Term hereof; provided that the termination of this Agreement shall not prevent Land Owner from exercising equitable remedies, including application for special writs, to obtain relief from City's wrongful termination of this Agreement.

ARTICLE V ANNUAL REVIEW

5.1 Time of Review.

To determine Land Owner's good faith compliance with this Agreement, in accordance with Government Code Section 65865.1, and in compliance with the Development Agreement Resolution, the Planning Commission shall review this Agreement and all actions taken with

respect to the development of the Property every twelve months from the Effective Date, commencing on the first anniversary of the Effective Date. The time for review may be modified either by written agreement between the Parties or, at the City's initiation, upon recommendation of the Planning Director and by the affirmative vote of the majority of the Planning Commission.

Consistent with Development Agreement Resolution #371-81, or its successor provision, the Planning Director or his or her designee shall give notice to the Land Owner that the City intends to undertake review of the Agreement at least thirty (30) days in advance of the time at which the matter will be considered by the Planning Commission and shall include the statement that review may result in an election to terminate this Agreement as provided herein.

5.2 Determination of Good Faith Compliance.

Such annual review shall be limited in scope to compliance with the terms of this Agreement pursuant to Government Code Section 65865.1. The Planning Commission shall conduct a public hearing. If the Planning Commission determines that, based upon substantial evidence in the record, Land Owner has complied in good faith with the terms and conditions of this Agreement during the period under review, the review for that period shall be concluded. A finding by the Planning Commission of good faith compliance by Land Owner with the terms of this Agreement shall be included in its recommendation to the City Council. If the Planning Commission determines, in good faith, that, based upon substantial evidence in the record, Land Owner has not complied in good faith with the terms and conditions of this Agreement during the period under review, the Planning Commission shall forward its report and recommendation to the City Council.

If the City Council determines that Land Owner has complied in good faith with the terms and conditions of this Agreement, the review for that period is concluded. A finding by the City Council of good faith compliance by Land Owner with the terms of this Agreement shall conclusively determine the issue up to and including the date of such review. If, however, the City Council determines, in good faith and based upon substantial evidence in the record, that Land Owner has not complied in good faith with the terms and conditions of this Agreement during the period under review, the City Council may issue a Notice of Breach (as defined in Section 6.2) and exercise the remedies set forth in Section 6.1.

5.3 No Waiver.

Failure of City to conduct an annual review shall not constitute a default by Land Owner under this Agreement or a waiver by City of its rights to otherwise enforce the provisions of this Agreement nor shall Land Owner have or assert any defense to such enforcement by reason of any failure to conduct an annual review. City does not waive any claim of defect or breach by Land Owner if, following periodic review pursuant to this Article V, City does not propose to modify or terminate this Agreement.

ARTICLE VI BREACH, REMEDIES, AND TERMINATION

6.1 Remedies for Breach.

City and Land Owner acknowledge that the purpose of this Agreement is to carry out the Parties' objectives as set forth in the recitals. City and Land Owner agree that to determine a sum of money which would adequately compensate either Party for choices they have made which would be foreclosed should the Property not be developed as contemplated by this Agreement due to a breach of this Agreement by the other Party is not possible and that damages would not be an adequate remedy. Therefore, City and Land Owner agree that in the event of a breach of this Agreement and a failure to cure following notice and an opportunity to cure as set forth in Section 6.2 (a "**Default**"), the remedies available to the non-breaching Party shall be: (1) actions for specific performance to remedy a specific breach, (2) actions for declaratory or injunctive relief, (3) actions for mandamus under Code of Civil Procedure Section 1085, or other special writs, (4) modification of this Agreement; and/or (5) termination of this Agreement. Monetary damages shall not be awarded to either Party, however, this exclusion on damages is limited to a breach of this Agreement and shall not preclude actions by a Party to enforce payments of monies due or the performance of obligations requiring the expenditures of money under the terms of this Agreement or Applicable Laws. All of these remedies shall be cumulative and not exclusive of one another, and the exercise of any one or more of these remedies shall not constitute a waiver or election with respect to any other available remedy.

6.2 Notice of Breach.

Prior to the initiation of any action for relief specified in Section 6.1 above because of an alleged breach of this Agreement, the Party claiming breach shall deliver to the other Party a written notice of breach (the "**Notice of Breach**"). The Notice of Breach shall specify the reasons for the allegation of breach with reasonable particularity. The breaching Party shall have thirty (30) days following delivery of the Notice of Breach to either: (a) use good faith efforts to cure the breach or, if such cure is of the nature to take longer than 30 days, to take reasonable actions to commence curing the breach during the thirty (30) day period; or (b) if in the determination of the breaching Party, the event does not constitute a breach of this Agreement, the breaching Party, within thirty (30) days of receipt of the Notice of Breach, shall deliver to the Party claiming the breach a "**Notice of Non-Breach**" which sets forth with reasonable particularity the reasons that a breach has not occurred. Failure to respond within the thirty (30) days shall not be deemed an admission of the breach, but the Party alleging the breach may proceed to pursue its remedies under this Article VI.

6.3 Proceedings for Termination.

If, upon a good faith finding, based upon substantial evidence in the record, that there has been a Default by Land Owner under this Agreement, City desires to terminate this Agreement, then City shall give Land Owner at least thirty (30) days' prior written notice of its intention to terminate this Agreement and opportunity to cure. If performance of a non-monetary Default reasonably requires more than thirty (30) days to cure, Land Owner shall (a) have commenced to cure the Default within the 30-day period following receipt of Notice, and shall (b) provide City

written notice of its time estimate of completion of the cure. The thirty (30) days' notice from the City shall state the time and place of a public hearing and such other information as shall reasonably inform Land Owner of the nature of the proceeding. At such hearing, Land Owner shall be given an opportunity to be heard and submit evidence and the Land Owner shall have the burden of demonstrating compliance with this Agreement including cure of any monetary Default and compliance with clauses (a) and (b) above with respect to a non-monetary Default. If the City Council finds, based upon substantial evidence in the record that Land Owner has not cured or commenced to cure a Default as required under this Agreement, then it may elect to terminate this Agreement in accordance with the provisions of the Development Agreement Resolution.

6.4 Termination by Mutual Consent.

This Agreement may be voluntarily terminated in whole or in part by the mutual consent of the Parties or their successors in interest, in the sole and absolute discretion of each as to its consent, in accordance with the provisions of the Development Agreement Resolution.

ARTICLE VII ESTOPPEL CERTIFICATE

Either Party may, at any time, and from time to time, deliver written notice to the other Party requesting such Party to certify in writing that, to the knowledge of the certifying Party, (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, (c) the requesting Party is not in default in the performance of its obligations under this Agreement, or if in default, to describe the nature of any defaults, and (d) such other information regarding this Agreement and the Parties' performance as the requesting Party reasonably may request. The Party receiving a request under this Article VII shall execute and return the certificate within thirty (30) days following receipt of the request. The City Manager or designee shall be authorized to execute any certificate requested by Land Owner. Land Owner and City acknowledge that a certificate hereunder may be relied upon by Land Owner and current or prospective tenants, Assignees and/or Mortgagees.

ARTICLE VIII TRANSFERS, ASSIGNMENTS

8.1 Agreement Runs With the Land.

8.1.1 This Agreement and all of its provisions, agreements, rights, powers, standards, terms, covenants and obligations, shall be binding upon the Parties and their respective heirs, successors (by merger, consolidation, assignment, transfer or otherwise) and assigns, devisees, administrators, representatives and all other persons or entities acquiring fee title to the Property or any portion thereof, or any interest therein, whether by sale, operation of law, or in any manner whatsoever, and shall inure to the benefit of the Parties and their respective heirs, successors (by merger, consolidation or otherwise) and assigns.

8.1.2 All of the provisions of this Agreement shall be enforceable during the Term as equitable servitudes and constitute covenants running with the land pursuant to applicable law, including, but not limited to Section 1468 of the Civil Code of the State of California. Each covenant to do or refrain from doing some act on or with respect to the Property hereunder, (a) is for the benefit of the Property and is a burden upon the Property, (b) runs with the Property, and/or (c) is binding upon Land Owner and each successive owner during its ownership of the Property or any portion thereof, and each person or entity having any interest in the Property. Every person who now or hereafter owns or acquires any right, title or interest in or to any portion of the Property is and shall be conclusively deemed to have consented and agreed to every provision contained herein, whether or not any reference to this Agreement is contained in the instrument by which such person acquired an interest in the Property.

8.2 Right to Assign.

8.2.1 Generally. Except as is described in Section 8.2.2 below, any Land Owner's rights and responsibilities under this Agreement may be assigned or transferred, by operation of law or otherwise, to any person or entity (“**Assignee**”) in conjunction with the conveyance by a Land Owner of its interest in all or a portion of the Property, at any time during the term of this Agreement, without the need for the consent or approval of (but with written notification to) the City, within ten (10) days after such conveyance, and provided further, any such Assignee shall have affirmatively assumed all of the relevant conveying Land Owner's obligations under this Agreement to the City arising from and after the date of such assignment with respect to the portion of the Property conveyed. The term “Land Owner” shall mean any Assignee following such assignment, transfer or conveyance.

8.2.2 Financing. Mortgages, deeds of trust, sales and leasebacks, or other forms of conveyance or encumbrance of title to the Property or a portion thereof required for any reasonable method of financing requiring a security arrangement with respect to the Property are permitted without the consent of the City. Neither the Mortgagee, nor any purchaser at a public or private foreclosure or trustee’s sale or deed-in-lieu of foreclosure in connection with a financing, nor the first transferee subsequent to any such public or private foreclosure or trustee’s sale or deed-in-lieu of foreclosure in connection with a financing, shall be obligated to assume the obligations of Land Owner under this Agreement. The delays caused by such events shall not extend the term of this Agreement or affect City’s remedies hereunder.

8.2.3 Release Upon Transfer. Upon the assignment or conveyance of the Land Owner's rights and interests under this Agreement, the Land Owner shall be released from its obligations pursuant to this Agreement with respect to the Property or any portion thereof so conveyed which arise subsequent to the effective date of the assignment, conveyance or transfer. When such successor assumes all of the obligations of Land Owner existing prior to the effective date of the assignment, the assigning Land Owner shall be released from such obligations or liabilities under this Agreement.

**ARTICLE IX
MORTGAGEE PROTECTION**

9.1 Mortgage Protection.

This Agreement shall be superior and senior to any lien placed upon the Property or any portion of the Property after the date of recording of this Agreement, including the lien of any deed of trust or mortgage ("**Mortgage**"). Notwithstanding the foregoing, no breach of this Agreement shall defeat, render invalid, diminish, or impair the lien of any Mortgage made in good faith and for value, but all of the terms and conditions contained in this Agreement (including but not limited) to City's remedies to terminate the rights of Land Owner (and its successors and assigns) under this Agreement, to terminate this Agreement, and to seek other relief as provided in this Agreement) shall be binding upon and effective against any person or entity, including any deed of trust beneficiary or mortgagee ("**Mortgagee**") who acquires fee title to the Property, or any portion thereof, by foreclosure, trustee's sale, deed in lieu of foreclosure, or otherwise.

9.2 Mortgagee Not Obligated.

Notwithstanding the provisions of Section 9.1 above, no Mortgagee shall have any obligation or duty under this Agreement to construct or complete the construction of improvements on the Property, or to guarantee such construction or completion; provided, however, that a Mortgagee shall not be entitled to devote the Property to any uses or to construct any improvements on the Property other than those uses or improvements provided for or authorized by this Agreement, or otherwise under Applicable Law.

9.3 Notice of Default to Mortgagee.

If City receives a written notice from a Mortgagee, Land Owner, or any Assignee requesting a copy of any notice of default given Land Owner or any Assignee and specifying the address for service, then City shall deliver to the Mortgagee and/or Assignee at Mortgagee's and/or Assignee's cost (or Land Owner's cost), concurrently with service to Land Owner, any notice of City's determination of noncompliance or breach or Default given to Land Owner with respect to any claim by City that the Land Owner has breached or is in Default under this Agreement, and if City makes a determination of Default, City shall if so requested by the Mortgagee and/or Assignee likewise serve at Mortgagee's and/or Assignee's cost (or Land Owner's cost) notice of noncompliance on the Mortgagee and/or Assignee concurrently with service on Land Owner. Each Mortgagee and/or Assignee shall have the right during the same period available to Land Owner, together with whatever additional time period is reasonably necessary to cure such breach or Default, if the Land Owner shall fail to do so, including the time period required to foreclose its lien on the Property, in which to cure or remedy, or to commence to cure or remedy, the breach or event of Default claimed or the areas of noncompliance set forth in City's notice. Such events shall not extend the term of this Agreement or affect City's remedies herein.

**ARTICLE X
INDEMNIFICATION**

10.1 No Duty of City; Hold Harmless.

It is specifically understood and agreed by the Parties that the development contemplated by this Agreement on the Property is a private development, that City has no interest in or responsibility for or duty to third persons concerning any of said improvements, and that Land Owner shall have full power over and exclusive control of the Property subject only to the limitations and obligations of Land Owner under this Agreement.

10.2 Indemnification.

Land Owner hereby agrees to and shall hold City and its elected and appointed representatives, officers, agents, and employees harmless from any liability for damage or claims for damage for personal injury, including death, as well as from claims for property damage which may arise from the negligence or willful misconduct of Land Owner in connection with the performance of its obligations under this Agreement, excepting suits and actions brought by Land Owner for breach of the Agreement by City or to the extent arising from the intentional acts, negligence, or willful misconduct of City, its elected and appointed representatives, officers, agents, employees, contractors or subcontractors, or of a third party.

This indemnification and hold harmless agreement applies to all damages and claims for damages suffered or alleged to have been suffered by reason of the Land Owner's performance of its obligations under this Agreement, regardless of whether or not City prepared, supplied, or approved plans or specifications for the Property, but does not apply to damages and claims for damages caused by City with respect to public improvements and facilities after City has accepted responsibility for them.

**ARTICLE XI
NOTICES**

11.1 Notices.

Formal written notices, demands, correspondence and communications between City and Land Owner shall be sufficiently given if: (a) personally delivered; or (b) dispatched by next day delivery by a reputable carrier such as Federal Express or DHL to the offices of City and Land Owner indicated below, provided that a receipt for delivery is provided; or (c) if dispatched within the San Francisco Bay Area by certified mail, postage prepaid, to the offices of City and Land Owner indicated below. Such written notices, demands, correspondence, and communications may be sent in the same manner to such persons and addresses as either Party may from time-to-time designate by notice as provided in this Section. Notice delivered by personal delivery or by a reputable overnight carrier such as Federal Express or DHL shall be deemed given when delivered. Notice delivered by certified mail, postage prepaid, shall be deemed to have been given three business days after deposit with the US Postal Service.

City: City Manager
City of Sunnyvale
P.O. Box 3707
Sunnyvale, CA 94088-3707

With copies to: City Attorney
City of Sunnyvale
P.O. Box 3707
Sunnyvale, CA 94088-3707

Land Owner: c/o Landbank Investments, LLC
1164 Chestnut Street
Menlo Park, CA 94025
Attn: Scott C. Jacobs, CEO

With a copy to: Farella Braun + Martel LLP
235 Montgomery Street
San Francisco, CA 94104
Attn: Richard M. Shapiro

ARTICLE XII MISCELLANEOUS

12.1 Agreement Not for Benefit of Third Parties.

This Agreement is made and entered into for the sole protection and benefit of Land Owner and the City and their respective successors and assigns. No other person or entity shall have any right of action based upon any provision of this Agreement.

12.2 Third Party Challenges.

If, as the result of any legal action, claim, or proceeding instituted by a third party or other governmental entity or official challenging the validity of any provision of this Agreement, the City Approvals, or the Land Owner Approvals ("**Third Party Challenge**"), the responsibilities of the Parties shall be as follows.

12.3 Indemnification and Defense

(a) Consistent with the Conditions of Approval of the Special Development Permit, the Land Owner shall defend, indemnify, and hold harmless the City or its agents, officers, and employees from any Third Party Challenge against the City or its agents, officers, and employees to attack, set aside, void, or annul this Agreement, the City Approvals, or the Land Owner Approvals and shall indemnify and hold harmless City against any and all third-party attorneys' fees, court costs and other liabilities determined by a court to be arising out of such Third Party Challenge. Land Owner shall not defend, indemnify or hold harmless any of the foregoing if the Third Party Legal Challenge arises out of or in connection with a claim that any person or entity otherwise entitled to such defense, indemnification and hold harmless engaged in willful misconduct, intentional misrepresentation, fraud or gross negligence.

(b) The City shall promptly notify the Land Owner of a Third Party Challenge and shall cooperate fully in the defense of the Third Party Challenge, including but not limited to decisions about selection of counsel, settlement, preparation of the administrative record (if any) and litigation strategies.

(c) Under no circumstances shall subsections (a) – (b) above require Land Owner to pay or perform any settlement arising out of a Third Party Challenge unless the settlement is expressly approved by Land Owner.

12.4 Invalidity

If any part of this Agreement is held by a court of competent jurisdiction to be invalid or unlawful as the result of a Third Party Challenge, the Parties shall use their best efforts to cure any inadequacies or deficiencies identified by the court in a manner consistent with the express and implied intent of this Agreement, and then to adopt or amend such part of this Agreement as necessary or desirable to permit implementation of this Agreement.

12.5 Applicable Law/Venue/Attorneys' Fees and Costs.

This Agreement shall be construed and enforced in accordance with the laws of the State of California. Any legal actions under this Agreement shall be brought only in the Superior Court of the County of Santa Clara, State of California. Should any legal action be brought by either Party because of breach of this Agreement or to enforce any provision of this Agreement, the prevailing Party shall be entitled to reasonable attorney's fees and such other costs as may be awarded by the court.

12.6 Severability.

Except as otherwise provided in Section 3.12, if any provision(s) of this Agreement is (are) held invalid, the remainder of this Agreement shall not be affected except as necessarily required by the determination of invalidity by such court, and shall remain in full force and effect unless amended or modified by mutual consent of the Parties.

12.7 Nondiscrimination.

Land Owner covenants by and for itself and any successors in interest that there shall be no discrimination against or segregation of any person or group of persons on account of race, color, creed, religion, sex, marital status, ancestry, or national origin in the development of the Property in furtherance of this Agreement. The foregoing covenant shall run with the land.

12.8 Land Owner Right to Rebuild.

City agrees that Land Owner may repair, renovate or rebuild any improvement or part thereof located on the Property within the Term of this Agreement should it become necessary due to vandalism, casualty, natural disaster or similar event. Any such repair, renovation or rebuilding shall comply with the Applicable Law and this Agreement.

12.9 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.

12.10 Agreement is Entire Understanding.

This Agreement is executed in one original, which constitutes the entire understanding and agreement of the Parties.

12.11 Interpretation.

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.

12.12 Recordation of Termination.

Promptly following the first to occur of Land Owner's request after it has obtained all discretionary City approvals required for the initial development of the Landbank Project or the expiration or earlier termination of this Agreement, City and Land Owner shall execute, acknowledge and deliver a written statement acknowledging the termination of the Agreement and City shall cause such statement to be recorded in the Official Records of Santa Clara County, California.

12.13 Approvals.

Unless otherwise provided in this Agreement, whenever approval, consent or satisfaction (herein collectively referred to as "**approval**") is required of a party pursuant to this Agreement, such approval shall not unreasonably be withheld. If a Party shall disapprove, the reasons therefor shall be stated in reasonable detail in writing. Approval by a Party to or of any act or request by the other Party shall not be deemed to waive or render unnecessary approval to or of any similar acts or subsequent acts or requests.

12.14 Other Necessary Acts.

Each Party shall take all actions and do all things, including executing, with acknowledgement, if required, and delivering all instruments, documents and writings as may reasonably be necessary or proper to achieve the purposes and objectives of this Agreement and to secure for the other Party the full and complete enjoyment of its rights and privileges under this Agreement.

12.15 Time.

Time is of the essence of this Agreement and of each and every term and condition hereof. In particular, City shall act in a timely fashion in reasonably accepting, processing, checking and, if appropriate, approving all maps, drawings, applications and any other actions requiring City's review or approval in connection with the Landbank Project.

[signatures appear on following page(s)]

IN WITNESS HEREOF, the Parties have executed this Agreement as of the Effective Date.

CITY OF SUNNYVALE,
a municipal corporation

By: _____
City Manager

Dated: _____

APPROVED AS TO FORM:

City Attorney for the City of Sunnyvale

[signatures continue on following pages]

LAND OWNER

For APN #205-33-002

BORREGAS PARTNERS, LLC, a California
limited liability company

By: _____
Justin M. Jacobs, Jr.

Its: Manager

Dated: _____

For APN #205-33-005

WOLFE ROAD NO II, a joint venture

By: _____
Justin Jacobs, Jr., Trustee of the
2013 Justin Jacobs, Jr. Trust
U/D/T June 7, 2013

Its: Joint Venture Partner

Dated: _____

By: _____
Justin M. Jacobs, Jr., Trustee of the
Jacobs Marital Trust (aka the Hanford
Trust), created under the Jacobs Family
Trust dated 12/9/1982

Its: Joint Venture Partner

Dated: _____

For APN #205-33-010

WOLFE ROAD NO III, a joint venture

By: _____
Justin Jacobs, Jr., Trustee of the
2013 Justin Jacobs, Jr. Trust
U/D/T June 7, 2013

Its: Joint Venture Partner

Dated: _____

[signatures continue on following pages]

By: _____
Justin M. Jacobs, Jr., Trustee of
the Spousal Trust (aka the Wallace
Trust), created under the Jacobs Family
Trust UTA dated 12/9/1982, as
amended
Its: Joint Venture Partner

Dated: _____

For APN #205-33-009
SANTA ANA COURT PARTNERS, LLC, a
California limited liability company

By: _____
Justin M. Jacobs, Jr.
Its: Manager

Dated: _____

For APN #205-33-014
SANTA ANA COURT INVESTMENTS II, a
joint venture

By: _____
Justin Jacobs, Jr., Trustee of the
2013 Justin Jacobs, Jr. Trust
U/D/T June 7, 2013
Its: Joint Venture Partner

Dated: _____

By: _____
Justin M. Jacobs, Jr., Trustee of
the Spousal Trust (aka the Wallace
Trust), created under the Jacobs Family
Trust UTA dated 12/9/1982, as
amended
Its: Joint Venture Partner

Dated: _____

[signatures continue on following pages]

By: _____
Justin M. Jacobs, Jr., Trustee of the
Jacobs Marital Trust (aka the Hanford
Trust), created under the Jacobs Family
Trust dated 12/9/1982
Its: Joint Venture Partner

Dated: _____

For APN #205-33-013
SANTA ANA INVESTMENTS NO III, a joint
venture

By: _____
Justin Jacobs, Jr., Trustee of the
2013 Justin Jacobs, Jr. Trust
U/D/T June 7, 2013
Its: Joint Venture Partner

Dated: _____

By: Borregas Partners, LLC,
a California limited liability company
Its: Joint Venture Partner

By: _____
Justin M. Jacobs, Jr.
Its: Manager

Dated: _____

For APN #205-33-012
SANTA ANA COURT PARTNERS NO. 4,
LLC, a California limited liability company

By: _____
Justin M. Jacobs, Jr.
Its: Manager

Dated: _____

[signatures continue on following page]

For APN #205-33-011

SANTA ANA INVESTMENTS NO V, a joint venture

By: _____
Justin Jacobs, Jr., Trustee of the
2013 Justin Jacobs, Jr. Trust
U/D/T June 7, 2013

Its: Joint Venture Partner

Dated: _____

By: _____
Justin M. Jacobs, Jr., Trustee of
the Spousal Trust (aka the Wallace
Trust), created under the Jacobs Family
Trust UTA dated 12/9/1982, as
amended

Its: Joint Venture Partner

Dated: _____

For APN #205-33-007

JUSTIN M. JACOBS, JR., an individual

By: _____
Justin M. Jacobs, Jr.

Dated: _____

APPROVED AS TO FORM:

Farella Braun + Martel LLP

By: _____
Richard M. Shapiro, Esq.
Counsel for Land Owner

STATE OF CALIFORNIA)
)
COUNTY OF _____)

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

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

WITNESS my hand and official seal.

Notary Public

STATE OF CALIFORNIA)
)
COUNTY OF SANTA CLARA)

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

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

WITNESS my hand and official seal.

Notary Public

EXHIBIT A

LEGAL DESCRIPTION OF THE PROPERTY

RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:

City of Sunnyvale
City Clerk's Office
456 West Olive Avenue
Sunnyvale, CA 94088-3707

Exempt from Recording Fee
Pursuant to Government
Code Section 27383

Space above this line for Recorder's Use Only

DEVELOPMENT AGREEMENT

By and Between

THE CITY OF SUNNYVALE

And

Affiliates of LANDBANK INVESTMENTS, LLC

City of Sunnyvale, California

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