

**FIRST AMENDMENT TO PARK AGREEMENT BY AND BETWEEN  
THE CITY OF SUNNYVALE, CALIFORNIA  
AND  
1090 EAST DUANE AVENUE LLC**

This First Amendment (“*First Amendment*”) to the PARK AGREEMENT BY AND BETWEEN THE CITY OF SUNNYVALE, CALIFORNIA AND 1090 EAST DUANE AVENUE LLC, dated May 14, 2019 (“*Agreement*”) constitutes an agreement by and between the CITY OF SUNNYVALE, a charter city and municipal corporation (“*City*”), and 1090 EAST DUANE A VENUE LLC, a Delaware limited liability company (“*Developer*”) to amend the Agreement as described herein and pursuant to Section 8 of the Agreement. City and Developer may be referred to herein individually as a “*Party*” or collectively as the “*Parties*.”

RECITALS

A. On May 14, 2019, the Parties entered into the Agreement, which provides for Developer to construct certain Park Improvements for use as a “Community Park” on the 6.5-acre Parkland portion of the master-planned residential community Project Site, and to dedicate the Parkland, including the Park Improvements, to the City once the Park Improvements are completed.

B. The Agreement provides that the final budget for the costs of design and construction of the Park Improvements, including contingency, shall not exceed \$12 million, which is to consist of a \$4 million voluntary community benefit credit from Developer and an \$8 million contribution from City (in the form of a credit against fees in lieu of additional parkland dedication).

C. The Agreement requires Developer to complete construction of the Park Improvements no later than December 31, 2021, and, due to Force Majeure Events, the Parties now wish to extend that deadline to June 30, 2022.

D. The Parties acknowledge their current mutual understanding that the total cost of design and construction (including contingency) for the Park Improvements, as reflected in the Construction Documents approved by the City prior to the date of this First Amendment, will be approximately \$12 million and, upon City’s request, Developer has agreed to pay all additional costs, above \$12 million, to complete the Park Improvements as set forth in the City-approved Construction Documents subject to the provisions of the Agreement as amended by this First Amendment.

E. To avoid further project delay and cost, the Parties agree that Developer may utilize contractors already mobilized at the Project Site or otherwise available to Developer to complete the Park Improvements.

F. To allow public access to the Park Improvements promptly upon their completion, the Parties now wish to remove the “Six Month Developer Maintenance Period” provisions from

the Agreement and instead provide that the City will accept the dedication of the Parkland, including the Park Improvements, promptly upon completion of the Park Improvements. Developer's existing obligation under the Agreement to warranty the Park Improvements for one year following completion shall remain.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. RECITALS; DEFINITIONS. The foregoing recitals are true and correct, and incorporated into this First Amendment by this reference. Capitalized terms used in this First Amendment and not otherwise defined herein shall have the meaning assigned to them in the Agreement.

2. SECTION 2(c) OF THE AGREEMENT IS HEREBY AMENDED TO READ AS FOLLOWS:

(c) Park Improvements. The costs for design and construction of the Park Improvements, including contingency for change orders or otherwise (collectively "**Park Improvement Costs**"), are projected to be approximately \$12 million, the funding for which consists of the following: (i) a \$4 million voluntary community benefit credit from Developer; (ii) an \$8 million City credit against fees in lieu of additional parkland dedication; and (iii) any remaining balance of the Final Actual Costs, as defined in Section 5(a), to be paid by Developer.

3. SECTION 3(a) OF THE AGREEMENT IS HEREBY AMENDED TO READ AS FOLLOWS:

(a) Community Outreach; Preliminary Concept Plan; Schematic Design; Preliminary Budget. Developer and City shall cooperate, with the City leading the process and the Developer providing all design support, to schedule, provide notice, and conduct as soon as practicable following the Effective Date of this Agreement, at least two (2) to three (3) community outreach meetings in order to develop a preliminary concept plan for the Park Improvements (the "**Preliminary Concept Plan**") and, as soon as practicable following completion of such community outreach meetings, to present the Preliminary Concept Plan to the Sunnyvale Parks and Recreation Commission (the "**P&R Commission**") and for approval from the City Council. City shall complete its review and approval and issue its written approval of the Preliminary Concept Plan, and shall complete and provide to Developer final approved City standards and specifications for park design (the "**City's Park Standards**"). As soon as practicable following City Council approval of the Preliminary Concept Plan, Developer shall prepare and present to City for approval by City's Designated Representative a schematic design for the Park Improvements, based upon the approved Preliminary Concept Plan and the City Park Standards (the "**Schematic Design**"). City shall promptly complete its review and approval and issue its written approval of the Schematic Design. Promptly following City's approval of the Schematic Design, Developer shall

prepare and submit to City, for its review and approval, an estimated preliminary budget for the Park Improvement Costs (the "**Preliminary Budget**"). City shall complete its review of the Preliminary Budget and issue its written approval as soon as practicable after Developer's submittal of the Preliminary Budget. The Parties mutually acknowledge and agree that all review and approval processes set forth above in this Section 3(a) have been completed as of the date of the Parties' execution of the First Amendment to this Agreement.

4. SECTIONS 3(c), 3(d), AND 3(e) OF THE AGREEMENT ARE HEREBY AMENDED TO READ AS FOLLOWS:

(c) Final Budget and Prevailing Wages. As soon as practicable following City's written approval of the Construction Documents pursuant to Section 3(b), and prior to starting construction, Developer shall prepare and submit to City a copy of Developer's projected final budget for the Park Improvement Costs based upon the approved Construction Documents and, to the greatest extent possible, consistent with the City-approved Preliminary Budget (the "**Final Budget**"). Should the Final Budget project Park Improvement Costs in excess of \$12 million, Developer shall indicate in the Final Budget that it will solely fund those excess Park Improvement Costs and, notwithstanding any provision herein to the contrary, and unless otherwise mutually agreed to in writing by the Parties in their respective sole and absolute discretion, any budgeted and/or expended Park Improvement Costs in excess of \$12 million shall be the sole responsibility of Developer. The City's fee credit to the costs of completing the Park Improvements shall not exceed the amount designated in Section 2(c) regardless of Final Budget or Final Actual Costs, as defined in Section 5(a), expended by Developer to complete the Park Improvements. Based on the guidance provided in Determination Letter of the Director of Industrial Relations Public Works Case 2017-025, dated April 18, 2019, the City accepts the Developer's determination that the Project is not a "public work," subject to prevailing wage requirements or other administrative requirements of the Public Works Law (Cal. Lab. Code § 1720 et seq.). However, Developer voluntarily agrees to require in its construction contracts for the Park Improvements that the applicable prevailing wages be paid for the Park Improvements. Developer is not agreeing to comply with, and City is not requiring compliance with, any other aspect of Public Works Law.

(d) Construction. Developer shall procure all grading and other permits necessary for construction of the Park Improvements. The identity and contact information for the City's representative who shall be the Developer's primary point of contact during the course of construction and inspection of the Park Improvements hereunder ("**City's Designated Representative**") is set forth in Section 6 below. The Park Improvements shall be constructed by Developer in compliance with the City-approved Construction Documents, subject to change orders approved in accordance with the provisions of Section 3(e), below. Prior to

the commencement of construction of the Park Improvements, City's Designated Representative, Developer and Developer's general contractor shall hold a pre-construction meeting to review construction-related matters, including a review of the City's inspection requirements and anticipated inspection process during construction. Developer shall schedule inspections of the Park Improvements to ensure conformity with the approved Construction Documents. Developer shall commence the construction of the Park Improvements in accordance with the timing requirement set forth in Section 3(f), below, and shall complete such construction in accordance with the timing requirements set forth in Section 3(g), below. Developer shall provide reasonable notice, a minimum of two weeks, to City prior to the start of construction of the Park Improvements. Developer shall provide City with copies of all of Developer's contracts for construction work related to construction of the Park Improvements within fifteen (15) business days after the later of (a) execution of those contracts or (b) the date of this First Amendment.

(e) Change Orders. The Parties agree that Developer may execute and implement change orders consistent with the City-approved Construction Documents, subject to the provisions of Section 2(c). In the event that a change order which is not consistent with the Construction Documents is required, due to unknown or unforeseen conditions or for any other reason, Developer seek approval from City's Representative in writing prior to executing the change order, and the City will provide its objection or consent within ten (10) business days.

5. SECTIONS 3(g) AND 3(h) OF THE AGREEMENT ARE HEREBY AMENDED TO READ AS FOLLOWS:

(g) Completion of Construction; Final Inspection; Acceptance of Completion. Developer shall complete the construction of the Park Improvements no later than June 30, 2022 provided that City provides Developer with its authorization to proceed with the Park Improvements by no later than December 31, 2021 (which authorization to proceed shall be represented by City's execution of this Amendment), unless otherwise mutually agreed upon by the Parties or due to City delays or a Force Majeure event as more fully set forth in Section 3(i), below. Developer understands that City intends to open the Parkland to public use upon acceptance of dedication of the Parkland, per Section 3(h), below, and shall, to the extent reasonably possible, schedule plantings and turf installations as early as possible in the course of the work to allow those plantings to become established prior to public use. When Developer completes construction of the Park Improvements, Developer shall provide written notice of completion to City ("**Notice of Completion**") and request a walk-through inspection. City shall conduct a final inspection of the Park Improvements (the "**Final Inspection**") as soon as practicable following the date of Developer's Notice of Completion. If, during the Final Inspection, City determines that the Park Improvements have not been completed in accordance with the approved Construction Documents, or do not

meet the Standards for Acceptance of Land for Park Purposes attached hereto as **Exhibit C** (the "**City Standards for Acceptance of Land**"; provided, however, Developer shall not be required to maintain the Parkland and Park Improvements for six months following acceptance by the City as otherwise required by Item 4 included in such "Other Requirements."), City shall prepare a punch list of all items to be completed by Developer and shall provide such punch list to Developer as soon as practicable following the Final Inspection. If City delivers such punch list to Developer, then Developer shall undertake to correct such punch list items in a diligent manner. Upon completion of the punch list work, Developer shall request another Final Inspection from City and City shall conduct another Final Inspection as soon as practicable following such written notice from Developer. If City determines that the punch list work is complete, City shall immediately deliver to Developer a notification of final completion and City acceptance of the Park Improvements as complete. If City determines that the punch list work is not complete, then City and Developer shall repeat the Final Inspection/punch list procedures specified herein until City accepts the Park Improvements as complete as set forth in this Section ("**City Acceptance of Completion**"). Thereupon City shall promptly provide Developer with written notice of City Acceptance of Completion of the Park Improvements and, subject to prior mutual agreement by the Parties, the Parties may cause such notice to be recorded. The Parties acknowledge and agree that the entry into this Agreement and the completion of the Park Improvements and City Acceptance of Completion of the Park Improvements by City as provided herein satisfies in full any and all of Developer's obligations to construct the Park Improvements under all applicable Parkland Requirements and Project Conditions and this Agreement.

(h) Acceptance of Dedication. The Parkland, including the Park Improvements thereon, shall be granted by Developer to City by separate instrument. City shall accept the offer of dedication of fee title to the Parkland by way of Grant Deed (the "**Parkland Deed**"). Promptly upon City Acceptance of Completion, Developer shall prepare and present to the City the Parkland Deed for City's execution and recording. At least twenty (20) business days prior to anticipated acceptance of the Park Improvements, Developer shall provide a draft of the Parkland Deed for City review and approval. City shall accept the offer of dedication of the Parkland no later than fifteen (15) business days after Developer presents to City the Parkland Deed for City's execution, and in any event prior to any use of the Parkland or Park Improvements by the general public. Developer may prohibit or otherwise restrict access by the general public to the Parkland and Park Improvements until City accepts the dedication of the Parkland. The Parties acknowledge and agree that the recording of the Parkland Deed satisfies in full the balance of Developer's Parkland dedication obligations under all applicable 14 City Standards for Acceptance of Land for Park Purposes, Parkland Requirements and Project Conditions, and this Agreement.

6. SECTION 4 OF THE AGREEMENT IS HEREBY AMENDED TO READ AS FOLLOWS:

**4. Maintenance and Repair of Parkland and Park Improvements.**

(a) Acceptance and Warranty Performance Bond. Subject to the provisions of Section 3(h), above, Developer shall remain responsible for the condition and maintenance of the Parkland and Park Improvements until City accepts the offer of dedication of the Parkland, including compliance with all applicable "Other Requirements" set forth in City Standards for Acceptance of Land; provided, however, Developer shall not be required to maintain the Parkland and Park Improvements for six months following acceptance by the City as otherwise required by Item 4 included in such "Other Requirements." Prior to City's acceptance of the offer of dedication of the Parkland and prior to any use of the Parkland or Park Improvements by the general public, and provided City has first released any Faithful Performance Bond with respect to the Park Improvements, Developer shall, at its sole cost and expense, provide a separate performance bond or other security acceptable to the City, in the amount of Three Million Dollars (\$3,000,000.00), warranting the Parkland and Park Improvements against any defective work or labor done, or defective materials furnished, for a period of one (1) year following City Acceptance of Completion of the Park Improvements (the "***Warranty Performance Bond***"). Except for any items warranted under the Warranty Performance Bond, City, at its sole cost and expense, shall maintain the Parkland and the Park Improvements following City acceptance of the offer of dedication of the Parkland.

(b) Watering Costs. Developer shall reimburse City for the watering costs to maintain landscaping at the Parkland for six (6) months after City's acceptance of the dedication of the Parkland. The Parties mutually estimate this cost to be approximately \$38,378.34. Upon City's acceptance of the Parkland dedication, Developer shall pay City \$25,000.00 to be applied to prospective water costs and, upon invoice from the City at the end of six (6) months, shall reimburse all additional water costs incurred by the City, up to an additional \$25,000.00. Any watering costs in excess of \$50,000.00 during the six (6) month period shall be not be reimbursed by Developer and shall be the responsibility of the City.

7. SECTION 5(a) OF THE AGREEMENT IS HEREBY AMENDED TO READ AS FOLLOWS:

(a) True-Up. As soon as reasonably practical following City Acceptance of Completion of the Park Improvements, Developer, upon City's request, shall submit to City a schedule and reasonable back-up evidence of all costs and expenses actually paid or incurred by Developer in connection with the design and construction of the Park

Improvements (collectively, the "***Final Actual Costs***"). This shall include an affidavit from Owner's general contractor confirming the payment of prevailing wages in connection with the construction of the Park Improvements. Should the Final Actual Costs be less than \$12 million, 2/3rds of such savings shall be paid in the form of a check to the City from Developer.

8. ENTIRE AMENDMENT. This First Amendment contains the entire agreement and understanding between the parties with respect to the subject matter of this First Amendment and supersedes any and all prior or contemporaneous oral and written representations, warranties, agreements, and understandings between the parties concerning the subject matter of this First Amendment.

9. FULL FORCE AND EFFECT. Other than as set forth in this First Amendment, the provisions of the Agreement shall remain unchanged and in full force and effect. In the event of any conflict between the Agreement and this First Amendment, the terms of this First Amendment shall control.

10. COUNTERPARTS. This First Amendment may be executed in counterparts, each of which shall be considered an original.

*[Remainder of Page Intentionally Blank; Signatures Follow]*

The Parties acknowledge and accept the terms and conditions of this First Amendment as evidenced by the following signatures of their duly authorized representatives. It is the intent of the Parties that this First Amendment shall become operative once the final signatory executes the First Amendment.

**CITY OF SUNNYVALE, CALIFORNIA**  
**a California municipal corporation**

APPROVED AS TO FORM

Dated: \_\_\_\_\_

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

\_\_\_\_\_  
Kent Steffens, City Manager

**"DEVELOPER"**  
**1090 EAST DUANE A VENUE LLC, a Delaware limited liability company**

Dated: \_\_\_\_\_

\_\_\_\_\_  
John Klabau, Vice President

\_\_\_\_\_  
Todd Keller, Senior Vice President