

**AGREEMENT REGARDING
CONSTRUCTION OF TOT LOT AT SWEGLES PARK**

THIS AGREEMENT REGARDING CONSTRUCTION OF TOT LOT AT SWEGLES PARK ("**Agreement**") is made and entered as of _____, 2014 (the "**Effective Date**") by and between the CITY OF SUNNYVALE, a municipal corporation of the State of California ("**CITY**"), and 955-995 STEWART DRIVE LLC, a Delaware limited liability company ("**DEVELOPER**"). CITY and DEVELOPER are referred to herein individually as a "**Party**" or collectively as the "**Parties**."

RECITALS

- A. DEVELOPER is the owner of certain real property located at 955-995 Stewart Drive, Sunnyvale, California (the "**Apartment Property**"). DEVELOPER plans to develop an apartment community of two hundred and two apartment units on said property (the "**Apartment Project**").
- B. CITY is the owner of a public park located at 545 Santa Real Avenue within the City limits of CITY, which park is commonly known as Swegles Park (the "**Park Property**"). The Park Property is located next to the northwestern side of the Apartment Property. The locations of the Apartment Property and the Park Property are depicted on **Exhibit A** attached hereto.
- C. As a condition to development of the Apartment Project, the CITY's Planning Commission adopted its conditions of approval for Planning Application 2012-7381 on August 13, 2012 (the "**Development Conditions**"). Condition BP-11(b) of said Development Conditions requires DEVELOPER to pay park in-lieu fees of \$3,018,864.82 (the "**Park Fee**") prior to issuance of the building permit for the Apartment Project (the "**Park Fee Condition**"). DEVELOPER has previously paid CITY for \$2,618,864.82 of the Park Fee. The unpaid balance of the Park Fee as of the Effective Date is \$400,000.00 (the "**Park Fee Balance**").
- D. CITY has agreed that DEVELOPER may satisfy a portion of the Park Fee Balance by constructing a tot lot and related improvements within the Park Property (the "**Tot Lot Improvements**") to enhance the existing park facilities at Swegles Park.
- E. The Parties desire to enter into this Agreement to address their respective rights and obligations with respect to the design and construction of the Tot Lot Improvements and the amount of park in-lieu credit to be issued by CITY against the Park Fee Balance in consideration of DEVELOPER's construction of the Tot Lot Improvements.

NOW, THEREFORE, in consideration of the mutual promises contained in this Agreement, the Parties agree as follows:

AGREEMENT

ARTICLE 1. PURPOSE

1.01 Purpose; Incorporation of Recitals

A. Purpose. The purpose of this Agreement is to establish and describe DEVELOPER's obligation to construct the Tot Lot Improvements within the Park Property and the CITY's obligation to provide a park in-lieu credit for the construction costs excluding design and construction management. The Parties acknowledge and agree that nothing contained within this Agreement is intended to relieve or shall relieve DEVELOPER from timely performing any obligation established or contained within the Development Conditions.

B. Incorporation of Recitals. The PARTIES agree that the foregoing Recitals are true and correct and incorporated into this Agreement by this reference.

ARTICLE 2. RESPONSIBILITY FOR CONSTRUCTION OF TOT LOT

2.01 TOT LOT IMPROVEMENTS

DEVELOPER is responsible for ensuring the timely design, construction, and completion of the Tot Lot Improvements. DEVELOPER has previously completed, and CITY has approved, the conceptual design for the Tot Lot Improvements, as depicted on Exhibit B attached hereto. The Tot Lot Improvements include a swing set, shade, sand box, bench, trellis, and other elements.

2.02. DEVELOPER RESPONSIBILITIES

A. Final Design. DEVELOPER at its sole cost will prepare the final design of the Tot Lot Improvements consistent with the CITY's approved conceptual design. DEVELOPER shall provide CITY with a copy of the final design prior to commencement of construction. So long as the final design is consistent with the conceptual design, CITY shall approve the final design plans promptly after receipt thereof. Said approved final plans shall be referred to as the "**Approved Plans**." Any modifications to the Approved Plans will require written approval by the CITY. DEVELOPER acknowledges and agrees that it shall receive no park in-lieu fee credit against the Park Fee Balance for any costs incurred by DEVELOPER for the conceptual or final design plans.

B. Permits. DEVELOPER will obtain all necessary City of Sunnyvale and any other permits required for construction of the Tot Lot Improvements.

C. Bids; Award of Contract. DEVELOPER will obtain bids for the Tot Lot Improvements and provide City with a copy of the winning bid for the construction of the such improvements (the "**Winning Bid**"). The winning bidder is hereinafter referred to as the "**Contractor**."

D. Contract Requirements; Compliance with Law. In connection with the award of the Contract, DEVELOPER may use its own contract forms, but must require in the Contract that the Contractor comply with all laws, ordinances and regulations applicable to the work (including but not limited to, all applicable requirements of the California Labor Code and prevailing wage laws) in connection with construction of the Tot Lot Improvements. The Contract shall require the payment of prevailing wages for all work associated with the Tot Lot Improvements. DEVELOPER shall require the Contractor to construct the Tot Lot Improvements in accordance with the Approved Plans, and to carry insurance in amounts typically required by DEVELOPER for contracts of similar type and cost. CITY shall be included as an additional insured in the Contract, and shall also be named as an indemnified party in the indemnity provision in the Contract.

E. Construction Management. DEVELOPER shall be responsible to manage the construction of the Tot Lot Improvements. DEVELOPER acknowledges and agrees that it shall receive no park in-lieu fee credit against the Park Fee Balance for any costs incurred by DEVELOPER for construction management.

F. Construction Schedule. DEVELOPER shall cause the construction of the Tot Lot Improvements to be completed within nine months of the Effective Date (the "**Completion Date**"). If the Tot Lot Improvements are not completed by the Completion Date, then the Parties agree that (i) CITY will not obligated to issue any further building permits for the Apartment Project or certificates of occupancy for units within the Apartment Project until the Tot Lot Improvements are completed and accepted by CITY, and (ii) CITY will not grant any park in-lieu fee credit against the Park Fee Balance until the Tot Lot Improvements are completed and accepted by CITY.

G. Improvement Security.

(a) Performance Bond. DEVELOPER agrees to furnish and deliver to the CITY concurrently with execution of this Agreement, adequate and acceptable improvement security in the form of a performance bond in accordance with the requirements of Title 18 of the Sunnyvale Municipal Code, or as amended, in the amount of the Winning Bid, to secure the faithful performance of furnishing, constructing or installing all of the Tot Lot Improvements. DEVELOPER shall have an affirmative obligation to provide the City with evidence of said performance bond

no later than May 31 of each year until all of the Tot Lot Improvements have been constructed. In the event DEVELOPER fails to comply with the foregoing requirements, CITY agrees that no legal action will be taken by the CITY based on this provision without prior written notice to the DEVELOPER.

(b) Partial Release of Security. Upon completion of the work and CITY acceptance of the Tot Lot Improvements, CITY shall partially release the performance bond upon the partial performance of the work required by Section 2.01 above in accordance with the Sunnyvale Municipal Code.

(c) Retention Period. DEVELOPER agrees that a minimum of twenty-five percent (25%) of the faithful performance bond required by this Section 2.02.(G) shall be retained for a period of one (1) year ("**Warranty Period**") upon completion of the Tot Lot Improvements, against any defective work or labor done or defective materials as warranty security ("**Warranty Security**"). CITY shall release the Warranty Security upon expiration of the Warranty Period and settlement of any claims filed during the Warranty Period.

(d) Labor & Materials Bond. DEVELOPER agrees to furnish and deliver to the City concurrently with execution of this Agreement, adequate and acceptable improvement security in the form of a labor and materials bond as required by Title 18 of the Sunnyvale Municipal Code, or as amended, in the amount of the Winning Bid, as security for the payment to Contractor, his/her subcontractors and to all persons furnishing labor, materials, provisions, supplies or equipment to them and used in, upon, or about the Tot Lot Improvements, or for performing any work or labor of any kind in, about or upon said improvements, and for the payment of amounts due under the Unemployment Insurance Act with respect to such work or labor in connection with the furnishing, constructing, or installing said improvements. In case suit is brought by CITY in connection with DEVELOPER's failure to comply with these provisions, the losing party in such suit shall be responsible for payment of reasonable attorney's fees incurred by the prevailing party to be fixed by the court or arbitrator.

H. Third Party Beneficiary. CITY shall be named as a third party beneficiary in the Contract as to the warranty, insurance and indemnity provisions thereof.

J. Payment of Net Park Fee Balance. Within ten (15) business days of CITY's determination of the Total Park Credits as provided in Section 2.03 (B) below, DEVELOPER shall pay CITY the difference between (i) the \$400,000 Park Fee Balance, and (ii) the Total Park Credits issued by CITY. Upon payment of such differential, DEVELOPER shall be deemed to have fully satisfied the Park Fee Condition of the Development Conditions.

2.03. CITY RESPONSIBILITIES

A. Acceptance of Tot Lot Improvements. CITY agrees that it shall, promptly after CITY's inspector confirms that the Tot Lot Improvements have been completed in accordance with the Approved Plans, accept such completed improvements.

B. Issuance of Park In-Lieu Credit. Upon City acceptance of the Tot Lot Improvements, CITY will issue DEVELOPER park in-lieu credits for (i) the costs of construction of the Tot Lot Improvements (which shall be based upon the cost reflected in the winning bid provided to CITY), (ii) plan check fees in connection with the design of the Tot Lot Improvements, (iii) permit fees related to the Tot Lot Improvements based upon CITY's approved fee schedule, and (iv) inspection fees incurred in connection with the construction of the Tot Lot Improvements. The sum of all such credits is referred to herein as the "**Total Park Credits.**" In no event shall the Total Park Credits exceed \$375,000. No additional credits beyond the Total Park Credits shall be provided to DEVELOPER.

ARTICLE 3. TERM OF AGREEMENT

3.01 TERM

The term of this Agreement shall commence upon the Effective Date and shall terminate upon DEVELOPER's payment of the net Park Fee Balance as provided in Section 2.02 (J) above. Following the termination hereof, this Agreement shall be deemed to be of no further force and effect, except as to those provisions expressly designated herein to survive expiration or termination of this Agreement.

ARTICLE 4. MISCELLANEOUS PROVISIONS

4.1 Parties' Representatives. The Vice President of Development of DEVELOPER (Jon Paynter) or his designee is hereby made the representative of DEVELOPER for all purposes under this Agreement. The Director of the Public Works for CITY (Kent Steffens) or the Director's designee is hereby made the representative of CITY for all purposes under this Agreement.

4.2 Indemnification. Each of the Parties hereto shall fully indemnify, defend and hold the other Party, its officers, employees and agents, harmless from any damage or liability imposed for injury (as defined in Government Code Section 810.8) occurring by reason of the negligent acts or omissions or willful misconduct of the indemnifying Party, its officers, employees or agents, under or in connection with any work, authority or jurisdiction delegated to such Party under this Agreement. Neither Party nor any officer, employee or agent thereof, shall be responsible for any damage or liability occurring by reason and to the extent of the negligent acts or omissions or willful misconduct of the other Party

jurisdiction. The arbitrator shall apply California substantive law in rendering his/her decision on the merits of any controversy or dispute. The institution and maintenance of an action for judicial relief or pursuit of a provisional or ancillary remedy shall not constitute a waiver of the right of either Party to submit the controversy or claim to arbitration if the other Party contests such action for relief.

4.6 Amendments. Amendments to this Agreement may be made by mutual written agreement of the Parties. Unless otherwise provided herein, any amendments to this Agreement must be approved by CITY's City Council.

4.7 Warranty of Authority to Execute Agreement. Each Party to this Agreement represents and warrants that each person whose signature appears hereon has been duly authorized and has the full authority to execute this Agreement on behalf of the entity that is a Party to this Agreement.

4.8 Severability. If any term, covenant, condition or provision of this Agreement, or the application thereof to any person or circumstance, shall to any extent be held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the terms, covenants, conditions and provisions of this Agreement, or the application thereof to any person or circumstance, shall remain in full force and effect and shall in no way be affected, impaired or invalidated thereby.

4.9 Effective Date. The effective date of this Agreement is the date marked "Effective Date" on the first page of this Agreement.

4.10 Successors and Assigns. This Agreement and the rights and obligations of the Parties contained herein shall inure to the benefit and be binding upon the successors and assigns of each of the Parties.

4.11 Entire Agreement. This Agreement and **Exhibits A and B** attached hereto constitutes the entire Agreement between the Parties pertaining to the subject matter contained herein and supersedes all prior or contemporaneous agreements, representations and understandings of the Parties relative thereto.

[Signature Page Follows]

[Signature Page to Agreement]

WITNESS THE EXECUTION HEREOF as of the Effective Date set forth above.

"CITY"

City of Sunnyvale,
a municipal corporation

By: _____
Robert Walker
Interim City Manager

"DEVELOPER"

955-995 Stewart Drive LLC,
a Delaware limited liability company

By:  _____
Greg Jasso
Director, Project Management

By:  _____
Jon Paynter
Vice President, Development

Date: 3-3-14

APPROVED AS TO FORM:

By: _____
City Attorney

Date: _____

Exhibit A

Locations of Apartment Property and Park Property

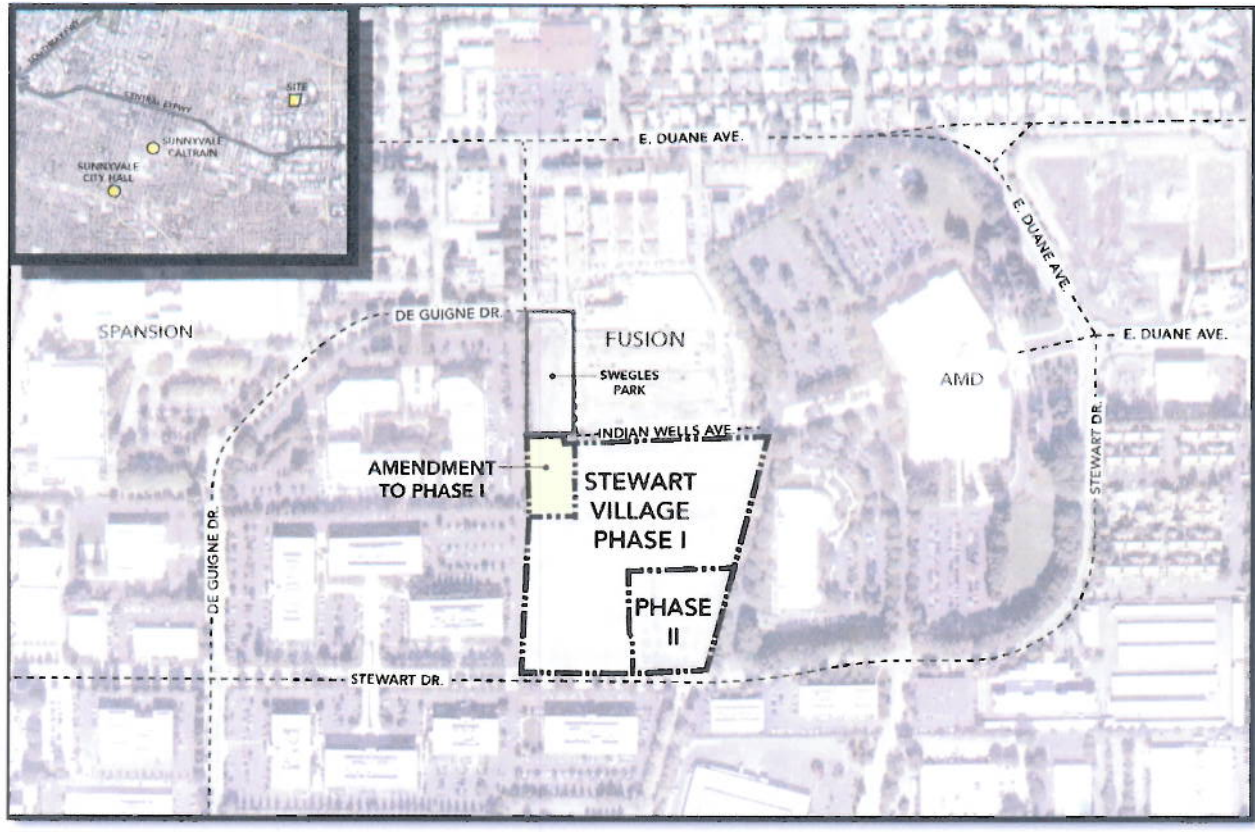


Exhibit B

Conceptual Design Plans for Tot Lot Improvements

