

ORDINANCE NO. 3085-16

**AN ORDINANCE OF THE CITY OF SUNNYVALE
APPROVING AND ADOPTING A DEVELOPMENT
AGREEMENT BETWEEN MT II LLC AND THE CITY OF
SUNNYVALE RELATED TO THE DEVELOPMENT OF
PROPERTY COMMONLY KNOWN AS MOFFETT
TOWERS II**

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, Applicant proposes to construct a commercial development on property located within the Moffett Park Specific Plan area at 1111 Lockheed 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 Moffett Towers II Project ("the Project") is a large multiphase development and includes public service and facilities installations 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 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 Subsequent Environmental Impact Report (collectively, "SEIR") 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 a duly noticed public hearing on May 23, 2016 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 June 14, 2016, 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 Moffett Park Specific Plan as they will exist on the effective date of this ordinance, and hereby incorporates the findings regarding General Plan and Specific Plan conformity contained in the Planning Commission findings dated May 23, 2016. 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 Developer is providing a public benefit to the City by, among other things, contributing additional traffic improvement to the City and funding for three public safety officer positions for staffing at Fire Station 5. 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 Moffett Park Specific Plan, 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 Moffett Towers II Subsequent Environmental Impact Report (the "SEIR"), SCH #2001052121. The City Council reviewed the SEIR 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 SEIR 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, and adopted a Mitigation Monitoring and Reporting Program (Resolution No. 747-16). The City Council incorporates by this reference the findings and mitigations measures contained in the SEIR 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 June 14, 2016, and adopted as an ordinance of the City of Sunnyvale at a regular meeting of the City Council held on _____, 2016, by the following vote:

AYES:

NOES:

ABSTAIN:

ABSENT:

RECUSAL:

ATTEST:

APPROVED:

City Clerk
(SEAL)

Mayor

APPROVED AS TO FORM:

City Attorney

EXHIBIT A

RECORDING REQUESTED BY

CITY OF SUNNYVALE
City Attorney's Office
P.O. Box 3707
Sunnyvale, CA 94088

WHEN RECORDED MAIL TO

CITY OF SUNNYVALE
City Attorney's Office
P.O. Box 3707
Sunnyvale, CA 94088

Record at No Fee per Government Code § 6103

FINAL DRAFT

DEVELOPMENT AGREEMENT

by and between

MT II LLC and CITY OF SUNNYVALE

Project name: Moffett Towers II

THIS DEVELOPMENT AGREEMENT, dated for convenience _____, 2016, at Sunnyvale, California ("Agreement") is entered into by and between MT II LLC, a Delaware limited liability company ("Moffett Towers II Landowner" or "Landowner") and the CITY OF SUNNYVALE, a charter city, created and existing under the laws of the State of California ("the City"), pursuant to the authority of Sections 65864-65869.5 of the Government Code of the State of California, and City of Sunnyvale Resolution No. 371-81. The Agreement creates legal obligations pertaining to two parcels within the Moffett Towers II development.

RECITALS

A. State Authorization. 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 Section 65864 *et seq.* of the Government Code (the "Development Agreement Statute"), which authorizes the City to enter into a binding property development agreement with any person having a legal or equitable interest in real property for the development associated with such property in order to establish certain development rights in the property which is the subject of the development project application.

B. City Procedure and Requirements. The City has implemented the provisions of Government Code Section 65864 *et seq.* and adopted certain development agreement procedures

and requirements through the enactment of Resolution No. 371-81, adopted on December 15, 1981 (hereinafter referred to as the "Development Agreement Resolution").

C. Landowner. The Landowner is a limited liability company affiliated with Paul Holdings, Inc., dba Jay Paul Company and is organized under the laws of the State of Delaware.

D. Property. The subject of this Agreement is the development of that certain property commonly described as 1111 Lockheed Martin Way, Sunnyvale, California, consisting of approximately 47.4 acres located in the City of Sunnyvale, County of Santa Clara, as described in Exhibit A-1 and depicted in Exhibit A-2 (hereinafter referred to as "Moffett Towers II" or "the Property"), attached hereto and incorporated herein by reference. The Landowner either owns, or is the sole member of each of the entities that own, the Property in fee. Subject to the terms of Section 8.5 and Section 11.2 hereof, all persons holding legal or equitable interests in the Property shall be bound by this Agreement.

E. Moffett Park Specific Plan. The subject Property is located within the area subject to the Moffett Park Specific Plan (the "Specific Plan" or "MPSP"), adopted by the City Council on April 26, 2004.

F. Project. Landowner (or an affiliate thereof) proposes to develop a Class A office complex to replace 924,437 square feet of existing office space with five (5) new eight-story office buildings and a two-story amenities building for a total of 1,651,795 square feet of building space, along with three (3) four-story parking structures (the Moffett Towers II Project, collectively, the "Project"). Landowner is proposing a Project with a total FAR of 80%, which comprises a base zoning of 50%, a 20% incentive for green building features, and an additional 10% incentive for enhanced green/sustainability features. The Project would utilize 727,358 square feet of the Moffett Park Development Reserve.

G. Environmental Review. The City examined the environmental effects of this Agreement and the Development Approvals (as defined in Recital N. below) in a Subsequent Environmental Impact Report (the "SEIR") prepared pursuant to the California Environmental Quality Act (CEQA). On April 19, 2016, the City Council reviewed and certified as adequate and complete the SEIR by Resolution No. 747-16, and adopted written findings and approved a Mitigation Monitoring and Reporting Program.

H. Purposes. The Landowner and City desire to enter into an agreement for the purpose of implementing the plan for development of the Moffett Towers II Project as set forth herein, and in the Specific Plan and Development Approvals, and for mitigating the environmental impacts of such development as identified in the SEIR. The City has an expressed interest in ensuring the adequacy of public facilities and infrastructure improvements to support well-planned growth, and entering into development agreements is a method whereby a level of assurance can be achieved to meet that interest. The City has determined that the development of the Project pursuant to the Specific Plan and the Development Approvals is a development for which a development agreement is appropriate. A development agreement will provide certain benefits to the City, as described in Article 2, will eliminate uncertainty in the City's land use planning, will provide orderly development of the Property in accordance with the policies and goals set forth in the City's General Plan, and will otherwise achieve the goals and purposes of

Resolution No. 371-81 which was enacted by the City. The Moffett Towers II Landowner has incurred and will incur substantial costs in order to comply with the conditions of approval and to assure development of the Property in accordance with this Agreement. In exchange for these benefits to the City and the public, the Moffett Towers II Landowner desires to receive assurance that the City shall grant permits and approvals required for the development of the Property in accordance with existing city laws, subject to the terms and conditions contained in this Agreement. In order to effectuate these purposes, the Parties desire to enter into this Agreement.

I. Relationship of City and Landowner. It is understood that this Agreement is a contract that has been negotiated and voluntarily entered into by City and Landowner and that the Landowner is an independent contractor and not an agent or partner of City. City and Landowner 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 Landowner joint ventures or partners.

J. Planning Commission Recommendations of Approval. The application for approval of this Agreement and the appropriate California Environmental Quality Act (Public Resource Code Section 21000 *et seq.* "CEQA") documentation required for approval of this Agreement, including the SEIR and all previous environmental documentation for the Moffett Towers II Project, were considered by the Planning Commission, on May 23, 2016. After conducting a duly noticed public hearing, the Commission recommended the adoption of this Agreement.

K. Adequacy of CEQA Environmental Documentation. The Sunnyvale City Council certified a program-level Moffett Park Specific Plan Environmental Impact Report (MPSP EIR). In May 2015, Landowner submitted an application to the City to redevelop a portion of the MPSP referred to as Moffett Towers II. The application included development of the site at a higher intensity than what is permitted under the MPSP, requiring an amendment to the MPSP and zoning, as well as revision to the previously-certified program level MPSP EIR. The City prepared a Subsequent Environmental Impact Report (SEIR) that discusses the significant environmental effects of the Project that were not previously addressed in the program-level MPSP (State Clearing House SCH# 2001052121).

L. Development Agreement Adoption. After conducting a duly noticed public hearing and making the requisite findings, the City Council, by the adoption of Ordinance No. 3085-16 on June 21, 2016 (the "Adoption Date"), approved this Agreement and authorized its execution.

M. Consistency with Sunnyvale General Plan and Specific Plan. Development of the Property in accordance with this Agreement will provide for orderly growth and development in accordance with the policies set forth in the City General Plan, the Specific Plan, and the Development Approvals. Having duly examined and considered this Agreement and having held properly noticed public hearings hereon, the City Council finds and declares that this Agreement is consistent with the General Plan of the City and with the Development Approvals.

N. Project Entitlements; Development Approvals. The following approvals, entitlements, and findings have been adopted by the City with respect to the Property, and constitute the Project Entitlements and Development Approvals:

- i. The City Council certified an Environmental Impact Report for the Moffett Towers II Project (SCH#2001052121) (comprised of the Draft Supplemental Environmental Impact Report and the Final Environmental Impact Reports, collectively the "SEIR"). As required by CEQA, the City adopted written findings and a Mitigation Monitoring and Reporting Program on April 19, 2016.
- ii. The City Council amended the Moffett Park Specific Plan Land Use Designation with respect to the Property by Resolution No. 748-16, on April 19, 2016.
- iii. The City Council rezoned the Property by Ordinance No. 3081-16 introduced on April 19, 2016, and adopted on May 3, 2016.
- iv. The City Council approved this Agreement as more fully set forth in Recital H above.
- v. The City Council approved Major Moffett Park Special Development Permit #_____, on June 14, 2016, to allow construction of the Moffett Towers II Project.

O. Development Agreement Resolution. City and Landowner have taken all actions mandated by and fulfilled all requirements set forth in the Development Agreement Resolution.

NOW THEREFORE, pursuant to the authority contained in Government Code Sections 65864-65869.5 and City of Sunnyvale Resolution No. 371-81, and in consideration of the mutual covenants and promises contained herein, the adequacy and sufficiency of which is hereby acknowledged, the Moffett Towers II Landowner and the City, each individually referred to as a Party and collectively referred to as the Parties ("Parties"), agree as follows.

ARTICLE 1

RECITALS, DEFINITIONS AND DATES

1.1 Incorporation of Recitals. The Preamble, the Recitals and all the defined terms set forth in both, are hereby incorporated into this Agreement as if set forth herein in full.

1.2 Definitions. In addition to the defined terms in the Preamble and the Recitals, each reference in this Agreement to any of the following terms shall have the meaning set forth below for each such term. Certain other terms shall have the meaning set forth for such term in this Agreement.

1.2.1 Applicable Laws. The laws and Constitution of the State of California, the laws and Constitution of the United States and any codes, statutes or executive mandates in any court decision, state or federal, thereunder.

1.2.2 City Laws. The ordinances, resolutions, codes, rules, regulations and official policies of the City, governing the permitted uses of land, density, design, improvements and construction standards and specifications applicable to the development of the Property. Specifically, but without limiting the generality of the foregoing, City Laws shall include the City's General Plan, the Moffett Park Specific Plan, the City's Zoning Ordinance and the City's Subdivision Ordinance.

1.2.3 Conditions. All conditions, exactions, fees or payments, dedication or reservation requirements, obligations for on or off-site improvements, services or other conditions of approval called for in connection with the development of or construction on the Property under the Existing City Laws, whether such conditions of approval constitute public improvements, or mitigation measures in connection with environmental review of any aspect of the Project.

1.2.4 Director. The Director of the Community Development Department.

1.2.5 Enacting Ordinance. Ordinance No. 3085-16, introduced by the City Council on June 14, 2016, and adopted by the City Council on June 21, 2016 approving this Agreement.

1.2.6 Party. A signatory to this Agreement, or a successor or assign of a signatory to this Agreement.

1.2.7 Property. The Property is that property described and shown on Exhibits A-1, A-2.

1.2.8 Resolution No. 371-81. Resolution No. 371-81 entitled "Resolution of the City of Sunnyvale Establishing Procedures and Setting a Fee for Processing Development Agreements" adopted by the City Council of the City of Sunnyvale on December 15, 1981.

1.2.9 Substantially Consistent Modifications. Any changes to or modifications of any portion of the Project which Landowner makes or proposes to make to the Project, provided such changes or modifications are in substantial compliance with and/or substantially consistent with the approved plans and the Development Approvals, as determined by the City Manager. Without limiting the foregoing, minor modifications to the Project which do not affect permitted uses, density or intensity of use, heights or size of buildings, provisions for reservation or dedication of land, restrictions and requirements relating to subsequent discretionary actions, monetary obligations of Owner, conditions or covenants limiting or restricting the use of the Property or Project, or similar material changes, shall be considered to be Substantially Consistent Modifications.

1.3 Effective Date; Recordation. The Enacting Ordinance became effective on July 21, 2016, which shall be the Effective Date of this Agreement. The obligations of the Parties under this Agreement shall be effective as of the effective date of the Enacting Ordinance (the "Effective Date"), pursuant to Government Code Section 36937. Not later than ten (10) days after the Effective Date, the Parties shall cause this Agreement to be recorded in the Official Records of the County of Santa Clara, State of California, as provided for in Government Code Section 65868.5 and Resolution No. 371-81. However, failure to record this Agreement within ten (10) days shall not affect its validity or enforceability by and between the Parties.

1.4 Term. Except as provided herein, the term of this Agreement shall commence on the Effective Date and terminate fifteen (15) years thereafter ("Term"); provided, however, that if the parties have not completed their obligations pursuant to Section 4 hereto by the expiration of such term, the term of this Agreement may be extended upon written modification executed by both Parties, however, the extended term may not exceed 5 years and must be for good cause, supported by substantial evidence. Following the expiration of the term, this Agreement shall be deemed terminated and of no further force and effect; provided, however, said termination of the Agreement shall not affect any right or duty emanating from City entitlements on the Property approved concurrently with or subsequent to the approval of this Agreement.

1.5 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 2

BENEFITS TO THE CITY

2.1 Landowner shall provide the following benefits to the City, which are more particularly described in Section 4.2 below: 1) Additional Traffic Improvement Payment of Eleven Million Dollars (\$11,000,000); 2) Additional Traffic Improvement: Design, Construction and Maintenance of the "E" Street Segment; and 3) Contribution of Seven Million Dollars (\$7,000,000) for funding three public safety officer positions for staffing Fire Station 5 (the Public Safety Payment).

ARTICLE 3

GENERAL DEVELOPMENT

3. Project; Vested Entitlements.

3.1 The Landowner has certain vested entitlements, including the certified SEIR, the amended land use and zoning designation from MP-I to MP-TOD, the Major Moffett Park Special Development Permit, and the approval of this Agreement (collectively, "Vested Entitlements"). The Landowner shall have the vested right to develop the Project on the Property in accordance with the terms and conditions of this Agreement and the Development Approvals, and any Subsequent Approvals (as defined in Section 5.1 below) for the Project, as the same may be amended from time to time upon application by the Landowner. Except as otherwise specified herein, this Agreement, the Development Approvals and the City Laws shall control the overall

design, development, construction, use and occupancy of the Project, and all improvements and appurtenances in connection therewith, including without limitation, the permitted uses on the Property, density and intensity of uses, the maximum height and sizes of buildings, the allowable floor area ratios, the number of students, faculty and staff.

3.1.2 Except as provided herein, development of the Property shall be governed by this Agreement, the Development Approvals and Vested Entitlements, the Moffett Park Specific Plan, and the other City Laws. To the extent the provisions of this Agreement or the Development Approvals conflict with the applicable zoning provisions of the Moffett Park Specific Plan, the Moffett Park Specific Plan shall take precedence.

3.1.3 This Agreement does not impose affirmative obligations on the Moffett Towers II Landowner to commence development of the Project, or any phase thereof, in advance of its decision to do so.

3.1.4 The permitted uses of the Property, the density and intensity of use, including, but not limited to, minimum landscape areas, maximum lot coverage, maximum height, minimum and maximum number of parking spaces, and the allowable floor area ratios, and provisions for public improvements and all mitigation measures and conditions required or imposed in order to minimize or eliminate environmental impacts or any impacts of the Property applicable to development of the Property, are as set forth herein or in the Development Approvals and in ordinances, policies, and standards in effect as of the Effective Date. City agrees that it will accept, in good faith, for processing, review and action, all applications for use and development of the Property in accordance with the Development Approvals and Vested Entitlements, and shall act upon such applications in a diligent and timely manner.

3.1.5 As set forth in Recitals G, J, and K above, the environmental effects of the Site Plan, the Specific Plan, Development Approvals (including, but not limited to, the land use and development standards, the design guidelines and the infrastructure and public utility requirements contained therein) and this Agreement (including, but not limited to, the development rights and obligations vested hereby) have been thoroughly and fully examined in the SEIR.

3.2 Project Phasing. Landowner and City acknowledge and agree that the Project is designed to be developed in phases. This Agreement and the Vested Entitlements and Development Approvals make explicit provision for such phased development. The Parties also acknowledge and agree that presently the Landowner cannot predict the timing of the Project phasing. Because the California Supreme Court held in *Pardee Construction Co. v. City of Camarillo* (1984) 37 Cal.3d 465, that failure of the Parties therein to provide for the timing of development resulted in a later-adopted initiative restricting the timing of development to prevail over the Parties' agreement, it is the Parties' intent to cure that deficiency by acknowledging and providing that the Landowner shall have the right to develop the building components of the Project in phases in accordance with the Site Plan, as amended by this Agreement, and the Development Approvals and at such times as the Landowner deems appropriate within the exercise of its subjective business judgment and the provisions of this Agreement.

3.3 Compliance with Requirements of Other Government Entities.

3.3.1 During the term of this Agreement, Landowner, at no cost to City, shall comply with lawful requirements of, and obtain all permits and approvals required by other local, regional, State and Federal agencies having jurisdiction over Landowner's activities in furtherance of this Agreement. Landowner shall pay all required fees when due to Federal, State, regional, or other local governmental agencies and acknowledges that City does not control the amount of any such fees.

3.3.2 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 State or Federal law prevent or preclude compliance with one or more provisions of this Agreement, this Agreement shall be modified or suspended 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 or suspended as may be necessary to comply with changes in the law and City and Landowner shall agree to such action as may be reasonably required. It is the intent of the Parties that any such modification or suspension 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. This Agreement shall remain in full force and effect to the extent it is not inconsistent with such laws or regulations. Nothing in this Agreement shall preclude the City or Landowner 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.

3.4 Reservations of Authority. Notwithstanding any other provision of this Agreement, at the time Subsequent Approvals are applied for, the following regulations and provisions shall apply to those Subsequent Approvals:

3.4.1 Processing fees and, subject to the terms of Section 3.6 of this Agreement, 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 Subsequent Approvals being applied for on an area-wide basis, which shall be paid at the rate then in effect.

3.4.2 All taxes, assessments, impact fees of any type, inclusionary housing in-lieu fees, other fees, or other monetary and non-monetary exactions imposed by the City which are in force and effect within the jurisdiction of the City for other similarly situated projects in the City on a City wide or area wide basis, discretionary or ministerial approvals, or taxpayers, as applicable, on which they are imposed, existing as of the Effective Date. 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 jurisdiction and applicable to the Project on the Effective Date (this does not include increases or adjustments to existing fees, taxes, etc.). After the 5 year period has run, the City may impose all taxes, assessments, impact fees of any type, inclusionary housing in-lieu 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.

3.4.3 If the City forms an assessment district including the Property and the assessment district is City-wide or area-wide, as defined below in Section 3.4.6, the Property may be legally assessed through such district based on the benefit to the Property, which assessment shall be consistent with the assessment of other property in the district similarly situated. In no event, however, shall the Landowner's obligation to pay such assessment result in a cessation or postponement of construction of the Project or affect in any way the development rights for the Project.

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

3.4.5 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, and all provisions 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 Subsequent Approvals being applied at the time the building permit in question is applied for.

3.4.6 For purposes of this Agreement, "area-wide" shall cover not only the Property, but also at least all parcels zoned and/or developed in a manner similar to the Property and located in the combined area of the Specific Plan. The Parties acknowledge that the provisions contained in this Section are intended to implement the intent of the Parties that the Landowner has the right to develop the Project pursuant to specified and known criteria and rules, and that the City receives the benefits which will be conferred as a result of such development without abridging the right of the City to act in accordance with its powers, duties and obligations.

3.5 Subsequently Enacted Rules and Regulations. The City may, during the term of this Agreement, apply such newer City Laws that are in force and effect within the jurisdiction of the City for the class of Subsequent Approvals being applied for and which are not inconsistent or in conflict with the intent or purposes or any terms, standards or conditions of this Agreement. To the extent any changed City Law is in conflict with the terms of this Agreement, the terms of this Agreement shall prevail

3.6 Moratorium, Quotas, Restrictions or Other Limitations. Without limiting the generality of any of the foregoing, no moratorium or other limitation (whether relating to the rate, timing, phasing or sequencing of development) affecting subdivision maps, building permits or other Approvals shall apply to the Property. Landowner agrees and understands that the City does not have authority or jurisdiction over another public agency's authority to grant a moratorium or impose any other limitation that may affect the Property.

3.7 Initiatives and Referenda. If any City Laws are enacted or imposed by a citizen-sponsored initiative or referendum, or by the City Council directly or indirectly in connection with any proposed initiative or referendum, which City Laws would conflict with this Agreement, such City Laws shall not apply to the Property. The Parties, however, acknowledge that the City's approval of this Agreement, the Moffett Park Specific Plan Amendment, and the Zoning Amendment are legislative actions subject to referendum.

3.8 Mutual Obligations of the Parties. City has agreed to provide Landowner with the long term assurances, vested rights, and other City obligations described in this Agreement in consideration for the Landowner obligations contained in this Agreement. Landowner has agreed to provide City with the Landowner obligations contained in this Agreement. To ensure that the understanding of the Parties and mutual consideration remain effective, should either Party bring any administrative, legal, or equitable action or other proceeding to set aside or otherwise make ineffective any of the City or Landowner obligations described in this Agreement, this Agreement may be terminated by the Party against whom the proceeding is brought at that Party's sole discretion.

ARTICLE 4

SPECIFIC CRITERIA OF THE PROJECT

4.1 Permitted Floor Area Ratio. Notwithstanding anything to the contrary herein or in the Development Approvals, the Landowner is hereby allowed a total development of no more than 1,651,795 square feet for Moffett Towers II, conditioned upon Moffett Towers II Landowner meeting the requirements of the MPSP and the provisions of this Agreement. The MPSP and City's Zoning Code allow development of up to 70% FAR (50% base zoning with additional 20% for certain green building features) and permits up to 80% FAR as an incentive for enhanced Green Building techniques. In consideration of the obligations of the Moffett Towers II Landowner and the benefits to the City for the development of the Property, the City agrees that Moffett Towers II Landowner or any affiliate, assignee or successor thereto is allowed up to 70% FAR (so long as the green building features are part of the Project) and up to 80% FAR if enhanced Green Building techniques are utilized, as allowed for under the MPSP and the City's Zoning Code.

4.2 Landowner 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, Landowner has offered and agreed to provide the public benefits to the City listed in this Section 4.2, and has further agreed to comply with all of its obligations under this Agreement, including in particular the obligations set forth in this Section 4.2.

4.2.1 Additional Traffic Improvement Payment for 101/237/Mathilda Interchange ("Interchange Improvement Payment"). Landowner shall pay to City a total of eleven million dollars (\$11,000,000) to be used for improvements to the 101/237/Mathilda interchange. Landowner intends this Interchange Improvement Payment to be in addition to any traffic impact fee, or any other fee which is 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 it is imposed. The Interchange Improvement Payment shall be made in full at the time or prior to issuance of the first building permit at the site.

4.2.2 Additional Traffic Improvement: Design and Construction of “E” Street Segment. In addition to the payment for traffic mitigations identified in the project SEIR, including the payment of traffic impact fees and the Interchange Improvement Payment, Landowner shall design, to City standards and specifications, construct, and dedicate for public access a segment of a new street, to be known as “E Street”, between 5th Avenue and 11th Avenue along the eastern boundary of the Project site (the “E” Street Segment). The estimated cost for the “E” Street Segment is \$4.5 million at the time of this Agreement approval; Landowner acknowledges and agrees it is responsible for all costs of construction of the “E” Street Segment, even if the cost exceeds the current estimated amount. The “E” Street Segment shall be constructed and approved by City prior to issuance of the first certificate of occupancy at the site. The parties acknowledge that the “E” Street Segment is located on private property subject to a public easement for vehicular traffic. Landowner shall maintain, at its sole cost, the “E” Street Segment.

4.2.3 Contribution of seven million dollars for funding three public safety officer positions for staffing Fire Station 5 (the Public Safety Payment). Landowner shall also pay to the City a lump sum total of seven million dollars (\$7,000,000) which shall be used by the City to fund three public safety officers for a seven year period of time to staff Fire Station No. 5. The Public Safety Payment shall be made in full at the time or prior to issuance of the first building permit at the site.

ARTICLE 5

SUBSEQUENT APPROVALS

5.1 Subsequent Approvals. The Project has been subject to Major Moffett Park Design Review and has been recommended for approval by the City of Sunnyvale Planning Commission at a public hearing on May 23, 2016, and approved by the City Council on June 14, 2016 (the “Development Approvals”). The development of the Project will require future discretionary and ministerial approvals from the City, potentially including, but not limited to, tentative maps, finals subdivision maps, private streets, easement vacations, encroachment permits, demolition permits, grading permits, building permits and certificates of occupancy, and sign permits (“Subsequent Approvals”).

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

5.1.2 With the Development Approvals, the City has made a final policy decision that the development of the Property consistent with the Development 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 Subsequent Approval that is consistent with the Development Approvals to change the policy decisions reflected by the Development 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 Subsequent Approval is consistent with City Law and this Agreement. City's review of the Subsequent Approvals shall be consistent with this Agreement, including without limitation Section 3.5 of this Agreement. To the extent that it is consistent with CEQA, as determined by the City in its reasonable discretion, City shall utilize the SEIR certified on April 19, 2016, to review the environmental effects of the Subsequent Approvals. Landowner shall defend, indemnify and hold the City harmless from or in connection with any litigation seeking to compel the City to perform additional environmental review of any Subsequent Approvals.

5.1.3 Any conditions, terms, restrictions, or requirements imposed by the City on Subsequent Approvals shall not prevent development of the Property for the uses and to the density of development, and at the rate, timing and sequencing, included in the Development Approvals, except as and to the extent required by state or federal law.

5.2 Subdivisions for Funding or Sale. If the Landowner desires to subdivide the site into smaller lots for financing purposes or disposition of a separate portion of the Property, a subdivision map shall be reviewed for approval by the City of Sunnyvale. Applications for subdivision maps shall conform to submittal requirements of the City of Sunnyvale, and shall be reviewed in accordance with the review procedures in place at the time such submittals are made. Such subdivision of the Property, or the filing of a parcel map or subdivision map that creates new legal lots, shall not require an amendment to this Agreement, provided the subdivision does not change any requirements set forth under the MPSP, as amended, the Development Approvals, or this Agreement. The City shall not impose any conditions regarding traffic improvements or requirements or off-site improvements, or impose any fees, taxes or assessments in connection with such subdivision other than those required for the Development Approvals; provided, however, that nothing herein shall excuse Landowner for the obligation to pay any processing fees then in effect and charged by the City for processing the approval of a subdivision map. Notwithstanding the above, as required by Government Code Section 65867.5, any tentative map prepared for a subdivision of the Property shall comply with the provisions of Government Code Section 66473.7

5.3 Life of Development Approvals and Subsequent Approvals. The terms of the Development Approvals and Subsequent Approvals shall automatically be extended for the duration of this Agreement (including any extension to this Agreement as permitted by Section 1.4) if the term otherwise applicable to such Approval is shorter than the duration of this Agreement (including any extension).

ARTICLE 6

AMENDMENT OF AGREEMENT AND DEVELOPMENT APPROVALS

6.1 Amendment or Cancellation. Either Party may propose an amendment to or cancellation of this Agreement in whole or in part, in the manner provided for in Government Code Section 65868 and Resolution No. 371-81. 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 Resolution No. 371-81 and specifically set forth in a writing, which refers expressly to this Agreement and is signed by duly authorized representatives of the Parties.

6.2 Recordation. Any amendment, termination or cancellation of this Agreement shall be recorded by the City Clerk not later than ten (10) days after the effective date of the action effecting such amendment, termination or cancellation; however, a failure to record shall not affect the validity of the amendment, termination or cancellation.

6.3 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 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 6.1, to amend this Agreement to permit such applicability

6.4 Amendment of Development Approvals. To the extent permitted by local, state, and federal law, any Development Approval may, from time to time, be amended or modified by submittal of an application from the Landowner and following the procedures for such amendment or modification contained in the Sunnyvale Municipal Code. Upon any approval of such an amendment or modification, the amendment or modification shall automatically be deemed to be incorporated into the Development Approvals without any further procedure to amend this Agreement.

ARTICLE 7

ANNUAL REVIEW

7.1 Time of Review. To determine Landowner'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 (12) months from the Effective Date, commencing on the first anniversary of the Effective Date. The date 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 Landowner 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.

7.2 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, Landowner has substantially 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 Landowner with the terms of this Agreement shall be included in its recommendation to the City Council. If the Planning Commission determines, in good faith and based upon substantial evidence in the record, Landowner 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 Landowner 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 Landowner 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 Landowner 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 8.2) and exercise the remedies set forth in Section 8.1.

7.3 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 8

DEFAULT, REMEDIES AND TERMINATION

8.1 Remedies for Breach. City and Landowner acknowledge that the purpose of this Agreement is to carry out the Parties' objectives as set forth in the recitals. City and Landowner 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 is not possible and that damages would not be an adequate remedy. Therefore, City and Landowner agree that in the event of a breach of this Agreement, the only remedies available to the non-breaching Party shall be: (1) suits for specific performance to remedy a specific breach, (2) suits for declaratory or injunctive relief, (3) suits for mandamus under Code of Civil Procedure Section 1085, or special writs, and (4) termination or cancellation of this Agreement or, at the option of City in the event of breach by Landowner, termination of the rights of Landowner under this Agreement. Except for attorney's fees and associated costs as set forth herein, monetary damages shall not be awarded to either Party. 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.

8.2 Notice of Breach. Prior to the initiation of any action for relief specified in Section 8.1 above because of an alleged breach of this Agreement, the Party claiming breach (the

“Complaining Party”) shall deliver to the other Party (the “Defaulting 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 Defaulting Party shall have thirty (30) days 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 Defaulting Party, the event does not constitute a breach of this Agreement, the Defaulting Party, within thirty (30) days of receipt of the Notice of Breach, shall deliver to the Complaining Party 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 Complaining Party may proceed to pursue its remedies under this Article 7.

8.2.1 Mutual Agreement for Cure of Certain Defaults. If the Defaulting Party believes that the breach cannot practically be cured within the thirty (30)-day period, the Defaulting Party shall not be deemed in breach provided that: (a) the cure shall be commenced during the thirty (30)-day period after receipt of the Notice of Breach; (b) within the thirty (30)-day period, the Defaulting Party provides a schedule to the Complaining Party for cure of the breach, subject to the reasonable approval of the Complaining Party; and (c) the cure is completed in accordance with the schedule agreed to by the Parties, or such additional time as may be agreed to by the Complaining Party. If the Parties cannot mutually agree on a schedule for cure of the breach, at the conclusion of the initial thirty (30)-day period, the Complaining Party may issue a Notice of Breach and proceed to pursue its remedies under this Article 8.

8.3 Failure to Assert; No Waiver. Any failures or delays by a Complaining Party in asserting any of its rights and remedies as to any breach shall not operate as a waiver of any breach or of any such rights or remedies. Delays by a Complaining Party in asserting any of its rights and remedies, irrespective of the length of the delay, shall not deprive the Complaining Party of its right to institute and maintain any actions or proceedings which it may deem necessary to protect, assert, or enforce any such rights or remedies, nor constitute a waiver of such party's right to demand strict compliance by such other Party in the future. No waiver by a Party of a breach shall be effective or binding upon such Party unless made in writing by such Party, and no such waiver shall be implied from any omission by a party to take any action with respect to such breach.

8.4 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 Resolution No. 371-81 and the Development Agreement Legislation.

8.5 Effect of Termination on Landowner's Obligations.

8.5.1 Notwithstanding any other provision to the contrary, termination or cancellation of this Agreement or termination of the rights of Landowner as to the entire Property, or any part the Property, shall not affect any requirement to comply with the Development Approvals, the terms and conditions of any other Subsequent Approval, nor any payments then due and owing to City, nor shall it affect the covenants of Landowner specified in Section 8.5.2 below, to continue after the termination or cancellation of this Agreement.

Landowner understands and agrees that the City Approvals may be substantially modified in light of the circumstances resulting from the termination or cancellation of this Agreement or Landowner's rights under this Agreement, and Landowner shall have no rights to challenge such a modification by reason of this Agreement other than the rights, if any, Landowner would have in the absence of this Agreement.

8.5.2 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 cancellation:

- (a) Section 8.5.1 (Land Owner's obligations upon termination or cancellation);
- (b) Section 8.1 (Remedies; limitation on damages and exceptions thereto; accrued obligations);
- (c) Section 12.2 (Indemnification); and
- (d) Section 14.1 (Third Party Challenges; Indemnification).

ARTICLE 9

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, and (iii) 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. The Party receiving a request under this Article 9 shall execute and return the certificate within thirty (30) days following receipt of the request. The City Manager shall be authorized to execute any certificate requested by Landowner. Landowner and City acknowledge that a certificate hereunder may be relied upon by transferees and Mortgagees.

ARTICLE 10

TRANSFERS, ASSIGNMENTS

10.1 Agreement Runs With the Land.

10.1.2 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, or otherwise) and assigns, devisees, administrators, representatives, lessees, and all other persons or entities acquiring 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.

10.1.3 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 the Property hereunder, (a) is for the benefit of the Property and is a burden upon the Property, (b) runs with the Property, and (c) is binding upon Landowner and each successive owner during its ownership of the Property or any portion thereof (subject to the terms of Section 11.2 below), 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.

10.2 Right to Assign. Landowner shall have the right to assign (by sale, transfer, or otherwise) its rights and obligations under this Agreement as to any portion of the Moffett Towers II Project to any person, business entity, association, organization, or other similar entity ("Assignee"). Landowner's right to assign shall not be subject to City's approval.

10.3 Release Upon Assignment. Upon the express written assumption by the Assignee of Landowner's rights and interests under this Agreement (the "Assignment Agreement"), Landowner shall be free from any and all liabilities accruing on or after the date of assignment with respect to those obligations assumed by the Assignee pursuant to the Assignment Agreement.

ARTICLE 11

MORTGAGEE PROTECTION

11.1 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 Landowner (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 title to the Property, or any portion thereof, by foreclosure, trustee's sale, deed in lieu of foreclosure, or otherwise.

11.2 Mortgagee Not Obligated. Notwithstanding the provisions of Section 11.1 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.

11.3 Notice of Default to Mortgagee. If City receives a written notice from a Mortgagee, Landowner or any approved assignee requesting a copy of any notice of default given Landowner or any approved or permitted assignee and specifying the address for service,

then City shall deliver to the Mortgagee at Mortgagee's cost (or Landowner's cost), concurrently with service to Landowner, any notice given to Landowner with respect to any claim by City the Landowner is in default under this Agreement, and if City makes a determination of default, City shall if so requested by the Mortgagee likewise serve at Mortgagee's cost (or Landowner's cost) notice of noncompliance on the Mortgagee concurrently with service on Landowner. Each Mortgagee shall have the right during the same period available to Landowner to cure or remedy, or to commence to cure or remedy, the event of default claimed or the areas of noncompliance set forth in City's notice.

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

ARTICLE 12 **INDEMNIFICATION**

12.1 No Duty of City; Hold Harmless. It is specifically understood and agreed by the Parties that the development contemplated by this Agreement 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 Landowner shall have full power over and exclusive control of the Property subject only to the limitations and obligations of Landowner under this Agreement.

12.2 Indemnification and Duty to Defend.

(a) To the fullest extent permitted by law, Landowner hereby agrees to and shall immediately defend, indemnify, and 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 Landowner's operations under this Agreement, excepting suits and actions brought by Landowner for default of the Agreement or to the extent arising from the intentional acts, sole negligence, or willful misconduct of City, its elected and appointed representatives, officers, agents, employees, contractors or subcontractors, or of a third party.

(b) This indemnification and hold harmless agreement applies to all damages and claims for damages suffered or alleged to have been suffered by reason of Landowner'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.

(c) The duty to defend is a separate and distinct obligation from Landowner's duty to indemnify. Subject to the limitations or requirements stated in this Agreement, Landowner shall be obligated to defend, in all legal, equitable, administrative, or special proceedings, with counsel reasonably approved by the Indemnified Party immediately upon tender to Landowner, which shall be made to Landowner promptly upon it becoming known to

the Indemnified Party. An allegation or determination of the sole negligence or willful misconduct by the Indemnified Party shall not relieve Landowner from its separate and distinct obligation to defend the Indemnified Party. The obligation to defend extends through final judgment, including exhaustion of any appeals. The defense obligation includes the obligation to provide independent defense counsel if Landowner asserts that liability is caused in whole or in part by the sole negligence or willful misconduct of the Indemnified Party. If it is finally adjudicated that liability was caused by the sole negligence or willful misconduct of the Indemnified Party, Landowner may submit a claim to City for reimbursement of its reasonable attorneys' fees and defense costs.

ARTICLE 13

NOTICES

13.1 Notices. Any notice to either Party shall be in writing and given by delivering the notice in person or by sending the notice by registered or certified mail, or Express Mail, return receipt requested, with postage prepaid, to the Party's mailing address.

13.2 Mailing Addresses. The respective mailing addresses of the Parties are, until changed as hereinafter provided, the following:

City:	Director of Community Development City of Sunnyvale 456 W. Olive Avenue P.O. Box 3707 Sunnyvale, CA 94088
With a copy to:	City Attorney City of Sunnyvale 456 W. Olive Avenue P.O. Box 3707 Sunnyvale, CA 94088
Moffett Towers II Landowner:	Moffett Towers II Landowner c/o Jay Paul Company Four Embarcadero Center, Suite 3620 San Francisco, CA 94111 Attn: Ms. Janette D'Elia
With a copy to:	Sheppard Mullin Richter & Hampton LLP Four Embarcadero Center 17 th Floor San Francisco, CA 94111 Attn: Doug Van Gessel

Either Party may change its mailing address at any time by giving ten (10) days' notice of such change in the manner provided for in this section. All notices under this Agreement shall be

deemed given, received, made or communicated on the date personal delivery is effectuated or, if mailed, on the delivery date or attempted delivery date shown on the return receipt. Nothing in this provision shall be construed to prohibit communication by facsimile transmission or email, so long as an original is sent by first class mail, commercial carrier or is hand-delivered.

ARTICLE 14

MISCELLANEOUS

14.1 Third-Party Legal Challenge. In the event 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 Entitlements or the Approvals ("Third Party Challenge"), the responsibilities of the Parties shall be as follows.

14.1.1 Indemnification

(a) The Landowner 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 or the Project Entitlements 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

(b) The City shall promptly notify the Land Owner of the 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 Landowner to pay or perform any settlement arising out of a Third Party Challenge unless the settlement is expressly approved by Landowner.

14.1.2 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 or otherwise, 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 re-enact such part of this Agreement as necessary or desirable to permit implementation of this Agreement.

14.2 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 or arbitration 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 reasonably attorney's fees and such other costs as may be found by the court.

14.3 Severability. Invalidation of any of the provisions contained in this Agreement, or of the application thereof to any person, by judgment or court order, shall in no way affect any of the other provisions hereof or the application thereof to any other person or circumstance and the same shall remain in full force and effect, unless enforcement of this Agreement as so invalidated would be unreasonable or grossly inequitable under all the circumstances or would frustrate the purposes of this Agreement.

14.4 Nondiscrimination Clause. Landowner 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 shall run with the land.

14.5 Construction of Agreement. The provisions of this Agreement and the Exhibits shall be construed as a whole according to their common meaning and not strictly for or against any Party in order to achieve the objectives and purpose of the Parties. The captions preceding the text of each Article, Section, Subsection and the Table of Contents are included only for convenience of reference and shall be disregarded in the construction and interpretation of this Agreement. Wherever required by the context, the singular shall include the plural and vice versa, and the masculine gender shall include the feminine or neuter genders, or vice versa. All references to "person" shall include, without limitation, any and all corporations, partnerships or other legal entities.

14.6 Other Necessary Acts. Each Party covenants, on behalf of itself and its successors, heirs and assigns, to take all actions and do all things, and to execute, with acknowledgment or affidavit if required, any and all further instruments, documents and writings as may be reasonably necessary or proper to achieve the purposes and objectives of this Agreement and to secure the other party the full and complete enjoyment of its rights and privileges hereunder.

14.7 Applicable Law. This Agreement, and the rights and obligations of the Parties, shall be construed by and enforced in accordance with the laws of the State of California.

14.8 Equal Authorship. This Agreement has been reviewed by legal counsel for both the Landowner and City, and no presumption or rule that ambiguities shall be construed against the drafting Party shall apply to the interpretation or enforcement of this Agreement.

14.9 Time. Time is of the essence of this Agreement and of each and every term and condition hereof. In particular, the City agrees to act in a timely fashion in accepting, processing, checking and approving all maps, documents, plans, permit applications and any other matters requiring the City's review or approval relating to the Project or Property. Subject to extensions of time by mutual consent in writing, unreasonable delay by either party to perform any term or provision of this Agreement shall constitute a default.

14.10 Subsequent Projects. After the effective date of this Agreement, the City may approve other projects that place a burden on the City's infrastructure; however, it is the intent and agreement of the Parties that the Moffett Towers II Landowner's right to build and

occupy the Project, as described in this Agreement, shall not be diminished despite the increased burden of future approved development on public facilities.

14.11 Entire Agreement. This written Agreement and the Exhibits contain all the representations and the entire agreement between the Parties with respect to the subject matter hereof. Except as otherwise specified in this Agreement, any prior correspondence, memoranda, agreements, warranties or representations are superseded in total by this Agreement and Exhibits.

14.12 Form of Agreement; Exhibits. This Agreement is executed in three duplicate originals, each of which is deemed to be an original. This Agreement consists of XX pages and exhibits which constitute the entire understanding and agreement of the parties. Said exhibits are identified as follows:

Exhibit A-1 and A-2: Property Description and Site Map

14.13 Authority. The Parties hereby represent that the person hereby signing this Agreement on behalf of each respective Party has the authority to bind the Party to the Agreement.

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

"City"

CITY OF SUNNYVALE,
A Charter City

By: _____
Deanna J. Santana
City Manager

Date: _____

Attest:

City Clerk

Approved as to Form:

City Attorney

"Landowner"

MT II, LLC,
a Delaware limited liability company

By: _____
Name:
Title:

Date: _____

Approved as to Form:

ACKNOWLEDGMENT

State of California

County of _____)

On _____ before me, _____, a 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.

Signature _____ (Seal)

ACKNOWLEDGMENT

State of California

County of _____)

On _____ before me, _____, a 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.

Signature _____ (Seal)